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Affirmative Action

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25.1 Introduction

Affirmative action refers to a range of governmental policies designed to foster greater opportunities for racial and ethnic groups that have traditionally been victims of discrimination. These policies are also frequently extended to women and to individuals who have suffered from socio-economic disadvantage. Affirmative action has generally been less controversial when based on class or gender instead of race. Affirmative action policies have taken the form of quotas for members of previously disadvantaged groups, preferential weighting of applicants for employment and university admissions and governmental pressure to increase recruitment of members of groups that have long suffered from discrimination. In some nations—the United States and the Republic of South Africa are examples—affirmative action takes place against a background of previous histories of formal, legally mandated discrimination against non-white groups. In other nations—Brazil is an example—affirmative action occurs in the absence of a history of formal legal discrimination. In such nations there are often nonetheless very real histories of racial discrimination and stigmatization of and often very strong patterns of racially linked class disadvantage (Cottrol). Affirmative action policies are found in a diverse set of nations in the modern world including such nations as Brazil, Colombia, India, Israel, Malaysia, Nigeria, South Africa and the United States (Sowell, 2–22).

Affirmative action frequently creates constitutional and judicial dilemmas in the nations that have or contemplate such policies. By the end of the twentieth century, and especially after the fall of South Africa's apartheid regime in 1993, the principle of the equality of all citizens before the law had become a virtually universal constitutional norm. But how would affirmative action policies that did confer preferences and benefits on traditionally disfavored groups be reconciled with the equality principle? A strict reading of the equality principle that is found in most modern constitutions would argue that applications for employment or university admissions be judged without regard to race, ethnicity, gender, or a nation's previous history of discrimination. Yet such a strict adherence to the equality principle would allow entrenched patterns of social, economic and, in some cases, political inequalities to continue, not taking into account either historic disadvantage, or the very real persistence of

discrimination against traditionally disfavored groups. Various international conventions proscribing discrimination, in particular the UN Convention on the Elimination of All Forms of Discrimination, and treaty bodies have weighed in on this issue, indicating that measures designed to benefit historically excluded groups do not violate the equality principle because substantive equality acknowledges that there are situations where concrete circumstances may necessitate unequal treatment for unequal matters.[1] It is accepted in international law that the principle of equality

> [do]es not require absolute equality or identity of treatment but recognizes relative equality ie, different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifiable is on those who make them (McKean).

As Judge Tanaka famously held in the South West Africa Case (Second Phase):

> The principle of equality before the law does not mean absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal … To treat unequal matters differently according to their inequality is not only permitted but required.[2]

The extent to which this viewpoint has become accepted law in different nations has, of course, depended on the actions of national courts and legislatures, the reception of international human rights law and the era in which constitutional drafting occurred.

This Chapter examines the treatment of affirmative action in the constitutional law of four nations, selected to highlight differences and similarities in connection with the common law or civil law background, and differences and similarities in connection with the historical origins of the conditions that have led policy-makers to develop affirmative action policies.

25.2 United States

Affirmative action in the United States developed out of the civil rights movement and the struggle of black Americans against systematic patterns of segregation and discrimination, frequently mandated by law. In 1865, more than two centuries of slavery on the North American continent would come to an end: the results of Northern victory in the American Civil War. In the wake of that conflict, the US Constitution was amended with three new provisions, specifically designed to provide equal rights for the newly emancipated black population. These provisions included the Thirteenth Amendment, which prohibited slavery, and the Fifteenth Amendment, which eliminated racial restrictions on voting. The new provision that would become the subject of much constitutional litigation was the Fourteenth

1 *International Convention on the Elimination on All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). See also Human Rights Committee, General Comment No 18: Non-Discrimination (10 November 1989); See also, Judge Tanaka in South West Africa Case, (second phase) ICJ Report 18 July 1966.
2 Judge Tanaka in South West Africa Case, (second phase) ICJ Report 18 July 1966.

Amendment, which contained an equal protection clause designed to bring the principle of equal treatment of people of different races into the American constitutional order.

If the period after the American Civil War would see the enactment of constitutional measures designed to equalize the status and treatment of Americans of different races, by the beginning of the twentieth century, the principle of equal treatment under the law was being largely ignored in many parts of the nation. By the beginning of the twentieth century, a system of racial segregation, popularly known as 'Jim Crow,' was developing in the southern states of the America, home to a majority of the nation's black population. The Jim Crow system, which at its height would mandate separate railroad coaches, separate seating on buses, separate park benches and water fountains, separate schools and segregation in almost every visible facet of public life, was approved by the US Supreme Court in the 1896 case *Plessy v Ferguson*.[3] In that case, the Court declared that the equal protection principle was not violated by separate facilities for people of different races as long as the facilities were equal. In the Southern states, and a good part of the rest of the nation, separate facilities were common but equal facilities rare.

The fight against the Jim Crow system would gain increasing momentum after World War II. One important early victory was *Brown v Board of Education*, the case that declared school segregation unconstitutional and implicitly reversed the separate but equal doctrine of *Plessy*.[4] The efforts of the Civil Rights movement would ultimately lead to comprehensive national legislation, the Civil Rights Act of 1964 which outlawed many of the then existing patterns of racial discrimination in public accommodations. It also prohibited discrimination on the basis of race and sex in employment.

By the late 1960s, many proponents of civil rights had come to believe that the simple elimination of previously existing restrictions would not be sufficient to overcome the disadvantages that had been suffered by blacks and other minorities during generations of discrimination. Civil rights activists urged the adoption of affirmative action measures in employment and university admissions designed to compensate for previous, and indeed still existing, patterns of racial exclusion. A number of these programs would be brought before the Supreme Court with constitutional challenges claiming that reverse discrimination and thus violations of the Fourteenth Amendment's equal protection clause.

The Court would make its first examination of affirmative action in the field of higher education in the 1978 case of *Regents of the University of California v Bakke*.[5] *Bakke* examined an admissions program at the University of California at Davis School of Medicine in which a certain number of spaces were reserved for minority students. In what would become the operating rationale of the case, Justice Lewis Powell wrote an opinion stating that quotas, such as the one administered by the University of California, were unconstitutional and violations of the Fourteenth Amendment's equal protection clause. Powell's opinion went on to state that public universities could consider race in admissions in order to add to the diversity of the student body. The Supreme Court would re-affirm the operating principle in *Bakke* that some degree of considering race in university admissions was constitutionally permissible, but that rigid numerical formulae using race were constitutionally forbidden in its 2003 examination of two affirmative action programs at the University of Michigan.[6]

3 165 US 537 (1896).
4 347 US 483 (1954).
5 438 US 265 (1978).
6 *Gratz v Bollinger*, 539 US 244 (2003); *Grutter v Bollinger* 539 US 306 (2003).

The Supreme Court has been willing to give a limited constitutional sanction to affirmative action in American public universities, in part on the rationale offered by Justice Powell, that racial diversity contributes to a university's educational mission by fostering contact between students of different backgrounds. The Court has generally taken a somewhat stricter view of affirmative action in public employment. Although the Court ruled that an affirmative action program by a private employer did not violate Title VII of the 1964 Civil Rights Act in the 1979 case *United Steel Workers of America v Weber*,[7] it has taken a more narrow view of what is permissible for public agencies. The Court's view of the equal protection principle has been that affirmative action involving preferences for minority job candidates or contractors requires 'strict scrutiny' of the highest level in American constitutional jurisprudence. In effect, this means that governmental entities intending to adopt affirmative action measures have to demonstrate that these measures are remedial measures designed to remedy a specific history of discrimination in the agency proposing the affirmative action measure. The Court has rejected the view that affirmative action can be justified as a broad measure to remedy societal discrimination in general.[8]

25.3 Brazil

Affirmative action developed in the United States as an outgrowth of the African American struggle against formal legal barriers to racial equality. The push for affirmative action in Brazil would take place against a somewhat different historical background. Brazil has a long history of often profound racial inequality, but this inequality existed in the absence of formal, legally mandated racial discrimination. Although slavery in Brazil lasted for a generation longer than it did in the United States, ending in 1888, the South American nation did not have, after emancipation, the system of legally mandated segregation that existed in the United States. Indeed, throughout much of the twentieth century, the South American nation was hailed as a 'racial democracy' lacking the kind of rigid, legally mandated racial segregation or apartheid found in much of the United States and later in the Republic of South Africa. This image, frequently promoted by the Brazilian government, served to mask the very real and persisting racial inequalities in Brazilian society, including widespread discrimination in employment and significant differences in educational levels between Afro-Brazilians and whites. Although Brazil adopted seemingly far-reaching national civil rights legislation in 1951, prohibiting racial discrimination in all facets of public life, discrimination in employment, public accommodations, and the provision of public services would be a continued fact of life for many Afro-Brazilians throughout the twentieth century and indeed into the twenty-first century (Cottrol). Throughout the post-war period, social science investigators, including some sponsored by the UN Educational, Scientific and Cultural Organization (UNESCO), documented the pervasive nature of discrimination and inequality in Brazilian life (Chor Maio, 153; Fernandes, 134–44).

In the 1970s and 1980s, Afro-Brazilian activists were becoming increasingly assertive in their criticism of racial barriers in Brazilian life. Their efforts were encouraged by the anti-apartheid and anti-colonial struggles in Africa and the success of the civil rights movement in the United States, including the relative success that African Americans had in

7 443 US 103 (197).
8 See e.g. *City of Richmond v JA Croson*, 488 US 469 (1986).

breaking down traditional racial barriers. The increasingly visible presence of blacks in the US media, the professions, the senior ranks of the armed forces, and the diplomatic corps—and the absence of Afro-Brazilians in similar positions—made the traditional assertions that Brazil was a racial democracy seem increasingly hollow. The Afro-Brazilian push for greater racial inclusion and the elimination of racial barriers was inhibited in the 1970s and 1980s by the nation's military government, which was suspicious of all independent political movements. With the return of democratic rule in 1985, the movement for greater racial equality gained increased momentum. The adoption of a new democratic constitution in 1988, which Afro-Brazilian political activists had played a significant role in drafting, further spurred efforts to place the problem of racial inequality on the national agenda.

The new constitution had strong provisions prohibiting racial discrimination. Title I of the 1988 Constitution, the document's statement of 'Fundamental Principles,' declares the nation's obligation to promote 'the well-being of all people, without prejudice on the basis of origin, race, sex, color, age or any other form of discrimination.' Title II proclaims the equality of all persons under the law and declares racism to be a crime.[9] The 1988 Constitution also had provisions recognizing the cultural contributions of Afro-Brazilians and the nation's indigenous population. It is silent on the question of race-based affirmative action. Measures were adopted in the 1990s guaranteeing a minimum level of political representation for women, with relatively little controversy. Throughout the 1990s, opponents and proponents of race-based affirmative action would debate the desirability and constitutionality of possible affirmative action measures. Proponents would point to the strong disparities in income and education between Afro-Brazilians and Brazilians of European descent. Opponents of affirmative action would respond that such measures would violate the new constitution's strong equality principle and that race-based affirmative action was inappropriate in a nation that lacked a history of legally mandated racial discrimination. Many opponents of affirmative action argued that the disparities between whites and Afro-Brazilians were the results of class inequality and not racial discrimination, and that affirmative action measures based on race would be inappropriate. Other opponents of affirmative action also argued that in a society like Brazil, with its large degree of racial mixture and lack of agreed-upon definitions as to who was white and who was Afro-Brazilian, it would be difficult—if not impossible—to make the kind of racial determinations that affirmative action required.

Affirmative action programs would begin with the nation's public universities. The South American nation had long had a system of first-class public universities available to students free of charge. Entrance to these universities was controlled by a rigorous exam known as the vestibular. Overwhelmingly, the students who did well on these exams were those who had had strong secondary school preparations, usually in private schools. Disproportionately, students from wealthy families were the ones who scored high on the exams and were able to attend the good public universities, which were frequently the key to professional success in Brazil. In 2001 the state of Rio de Janeiro became the first state to announce a program of affirmative action for its public universities, requiring them to set quotas for Afro-Brazilians and the graduates of public secondary schools. In the years that followed, other state and federal universities also adopted affirmative action programs with quotas for Afro-Brazilians, indigenous people, and in many cases, graduates of public schools regardless of race.

The new policies, which were also accompanied by new affirmative action programs for Afro-Brazilians in a number of governmental ministries, were met with an extensive body of

9 Constitution Title I, Art 4 § VIII, Title II, Art 5§ I, No. XLII (Brazil, 1988).

academic and polemical commentary pros and cons throughout the Lusophonic nation. To date, the programs have not been the subject of any decisions on the part of O Supremo Tribunal Federal, the South American nation's Supreme Court. In March 2010, the high court agreed to hear a case involving an affirmative action program at the Federal University of Rio Grande do Sul. The Court invited a wide segment of interested parties—those supporting, opposing, or merely commenting on affirmative action—to testify before the Court. More than 40 presentations were heard.

Two of the presentations presented the views of the administration of President Luiz Inácio da Silva ('Lula'), supporting the constitutionality of affirmative action. Deborah Duprat, then Vice Procuradora of the Republic, argued that the 1988 Constitution should be viewed as a break with the nation's past, a past in which the legal and constitutional order worked to protect the privileged while excluding the underprivileged. She argued that the 1988 Constitution should be viewed as an effort to bring about the inclusion of those who had traditionally been excluded and that, hence, the affirmative action measures were consistent with the equality principle in the new constitution.[10] Duprat's colleague Edson Santos de Souza, Minister of the Special Secretariat for Public Policy for the Promotion of Racial Equality, documented the strong patterns of racial discrimination and inequality in Brazilian life, and argued that these justified the new affirmative action measures.[11]

On 26 April 2012, Brazil's Supremo Tribunal Federal declared university affirmative action programs constitutional in a case involving another university, the University of Brasilia, a federal university. In a unanimous 10–0 vote, the Brazilian High Court supported a decision authored by STF Minister Ricardo Lewandowski. The Lewandowski opinion held that the university's affirmative policies were justified on three grounds: first, that the university had an interest in having a diverse student body and in combating racial inequality; second, that the university's program used proportional means to achieve its goals; and third, that the university's program was temporary and required periodic review. The Court concluded that the university's affirmative action program was within the principles of equality and human dignity set forth in the 1988 Constitution.[12] On August 29th 2012 Brazilian President Dilma Rouseff signed legislation requiring public universities to reserve half their admissions slots for graduates of public secondary schools. This action is expected to siginificantly increase the number of Afro-Brazilians attending public universities.[13]

25.4 India

Affirmative action in India is aimed at addressing the historical inequality of the caste system and the continuing impact that this deeply embedded discrimination and social subordination continues to have upon those at the bottom of the caste system. It has been described as a 'feudal system of hierarchical inequality embodied in the caste system that had been nurtured by an intermeshing of religion, culture and socio-legal practice' (Jackson, 223). It was envisaged that the post-independence Constitution would be transformative for those at the

10 *Audiência Publica: Arguição de Descumprimento de Preceito Fundamental 186, Recurso Extraordinário 597.285*, 'Palestra de Senhora Deborah Duprat (Vice-Procuradora Geral da República)' (Brasilia, 2010) (website Supremo Tribunal Federal).

11 *Ibid*, 'Palestra de Edson Santos de Sousa.'

12 'STF julga constitucional política de cotas na UnB,' *Noticias STF* (Quinta-feira, 26 de abril de 2012) http://www.stf.jus.br/portal/geral/verImpressao.asp

13 'Brazil Enacts Affirmative Action Law for Universities' *New York Times*, August 30, 2012 (online addition).

bottom rung of the system and they are identified in the Constitution as Scheduled Castes, Scheduled Tribes, and social and educationally backward classes of citizen. The Indian Constitution was intended to provide the legal architecture to address the entrenched inequality that is a feature of the caste system through affirmative action. Yet, identifying who within those groups—in particular, other backward classes—should benefit has proved complicated and controversial since the Mandal Commission's attempt at designation.

Indeed, the Preamble to the Indian Constitution emphasizes equality of status and of opportunity, which reflects this commitment and imbues the text of the Constitution with this aim. Even so, the courts have struggled with the tension between equality before the law as a principle and the need to address the contemporary manifestations of caste and rigid social hierarchy. There exists a duality to this struggle in the Supreme Court whereby one approach is to view affirmative action as an exception to equality and the other approach is to read affirmative action as a composite feature of equality. The tension between equality and non-discrimination is particularly magnified in the context of access to employment in the public sector, and access to educational institutions, which has attracted significant domestic controversy.

Articles 14 and 15 of the Constitution enshrine equality before the law and non-discrimination, and are aimed at addressing the inequality of the caste system:

> 14. Equality before law.
>
> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
>
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
>
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
> (4) [(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]
> (5) [(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes.

In general, the courts have held that under article 15, equality before the law means the right to equal treatment in similar circumstances and, to date, the judiciary's approach to interpreting article 14 has been to recognize the limitations on the implementation of such a right. Bakshi locates the origins of article 14 in 'the American and Irish Constitutions' and connects the constitutional commitment to equality of status and opportunity with the freedom movement in India (Bakshi, 17). According to Bakshi, the relationship between arts 14 and 15 is, in a general sense, that article 15 lays down the detail of article 14; 'discrimination,' on the

other hand, has been found to mean 'making an adverse distinction with regard to' or 'distinguishing unfavorably from others,'[14] and 'only' in article 15(1) has been interpreted as meaning that if the discrimination is based on a ground not connected to religion, race, caste, sex, or place of birth, then the discrimination would be valid (Bakshi, 27).

An area where the tension between equality and affirmative action has been amplified is reservations or quotas in educational institutions. In a decision on 12 August 2005, the Indian Supreme Court delivered a judgment that found that the state cannot impose its reservation policy on minority and non-minority unaided private colleges and professional colleges.[15] Moving swiftly, the state adopted an amendment to the Constitution to article 15 that any special provision for the advancement of 'any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes includes private educational institutions, whether aided or unaided by the State' (Article 15(5)).[16] This proposal was a commitment to, and aimed at, achieving the goal of equality by providing the lower castes have access to educational opportunities and facilities.

The constitutionality of this amendment was challenged in the Supreme Court decision *Thakur v India* in 2006. The grounds included that the amendment violated the basic structure of the Constitution because it transgressed the principle of secularism by favoring one minority group over another; that the determination of who is classified as 'other backward classes' is inconsistent with the principle of equality in the Constitution and, in particular, the 'creamy layers' should be excluded from the benefit of these reservations and stricter scrutiny should be given to the classification of other backward classes.

Here, it is important to note that the challenge to the central government's proposal was twofold: that it discriminated against meritorious students who did not have a disadvantaged background; and that such reservations are monopolized by the elite or so-called 'creamy layer' of the other backward classes.[17] The 'creamy layer' is a term given to the wealthier and more affluent members of the other backward classes. The concern is that members of the 'creamy layer' have the benefit of these reservations solely by virtue of their membership of a caste without regard to other rational factors that may differentiate them from other members of the caste, including their income, assets, and level of education. Indeed, in *Jagdish Negi v State of Uttar Pradesh*, a case pertaining to public-sector employment, the Supreme Court held that backwardness is not static; that no one is entitled to remain a member of the other backward classes in perpetuity; and that there should be some review of how citizens are classified. Once members of the other backward classes advance and achieve success economically and socially, that 'creamy layer' should not be entitled to the reservation because the aim of preferential treatment is to advance the situation of those in the caste who are: that is to say, these measures should be temporary, not permanent, and cease to provide a benefit once the aim is achieved. Although related to s 16 (4) and dealing with public-sector employment, the Supreme Court in *Indra Sawhney v Union of India* found that if the connecting link is social backwardness and some of the members become too socially and economically advanced, then the connecting thread between them and the class snaps.

14 *Kathi Raning Rawat v State of Saurashtra* (1952) SCR 435, 442.

15 *PA Inamdar & Ords v State of Maharashtra & Ors.*

16 Constitution (Ninety-Third Amendment) Act 2005.

17 Note: Justice Krishna Iyer, in *State of Kerela v NM Thomas*: 'benefits of the reservation shall be snatched away by the top creamy layer of the backward class, thus leaving the weakest among the weak and leaving the fortunate layers to consume the whole cake.'

In *Thakur*, the Supreme Court found that the Constitution (Ninety-Third Amendment) Act 2005 was not unconstitutional because it did not violate the basic structure of the Constitution.[18] While they left open-ended the question of whether the amendment was valid in relation to private education institutions, they did find that such reservations should exclude the 'creamy layer' of the other backward classes. The Court found implied in the Act that the failure to exclude the 'creamy layer' from monopolizing the benefits of reservation would render the reservation for other backward classes under the Act unconstitutional.

The debate in India is ongoing over the role of affirmative action in achieving a classless society and whether it is contrary to the principle of equality. Constitutionally valid affirmative action measures that mandate preferential treatment of some groups over others, particularly in the context of education and public-service jobs, continue to fuel ongoing tensions and debate about whether these measures entrench class divisions and perpetuate caste rather than foster a more egalitarian society.

25.5 South Africa

Like India, the South African Constitution is intended to be a transformative instrument aimed at addressing the historical exclusion of black South Africans during the apartheid regime. The language of the Preamble to the Constitution lays bare this intent: '*Recognise the injustices of our past*'; '*Honour those who suffered for justice and freedom in our land*'; '*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*'; '*Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law*'. The challenge South Africa has faced in regard to affirmative action has been that the historically oppressed group is now the majority.

Equality is protected in ss 7 to 39 of the Constitution in the South African Bill of Rights. The commitment to equality is enshrined in s 1 (a) of the Constitution and can only be amended by a 75 percent majority of the National Assembly supported by six of the nine provinces. Section 9 of the South African Constitution provides:

> Section 9 Equality
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

18 Writ Petition (civil) 265 of 2006; see also Writ Petition (civil) No. 265 of 2006 decided on 10 April 2008.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 includes equality before the law, non-discrimination, and affirmative action, and is comprehensive including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The limitations to equality are expressed in s 36 (1). The equality jurisprudence in the Constitutional Court is mostly based on s 8 of the interim Constitution, which came into force on 27 April 1994. Although it was not the product of a democratically elected assembly, the 1996 Constitution was drafted and adopted by a democratically elected assembly. Section 9 is the successor of s 8 in the interim constitution and, according to Currie and De Waal, s 8 of the interim constitution applies to the 1996 Constitution (Currie & De Waal, 234).

In regard to Affirmative Action, s 9 (2) is the relevant provision. According to Currie and De Waal, the constitutional drafters were adamant that South Africa would avoid the controversies of affirmative action that has beleaguered the United States, and instead emphasized that affirmative action is an integral aspect of equality and s 9 (2) must be read only in the context of South Africa's unique history (Currie & De Waal, 264). There has also been a readiness on the part of the Court to provide group redress for discrimination (ibid).

In a 1995 decision, the Court had to grapple with the legacy of the apartheid regime classification system. In post-apartheid South Africa, 'black South Africans' were classified by the African National Congress as including black Africans, coloreds, and Indians, displaying a unity among those who were discriminated against during apartheid. In *Motala v University of Natal* an Indian student argued that he was unfairly discriminated against when he was refused admission to the University of Natal medical school despite the fact that he had obtained five distinctions in senior.[19] In this case, the medical school had limited its intake of Indian students to 40, the rationale being that, given the history of limited or no access to quality education for African students, a merit-based entrance system would unfairly discriminate against them. The Court held that the admission policy had a reasonable justification because it was a special measure designed to achieve the advancement of a group that was more disadvantaged under apartheid than South Africans of Indian descent. According to Currie and De Waal, this decision was 'clearly correct' because the measures were in proportion to the degree of disadvantage suffered; however, 'when the effect of a programme is to disadvantage, on the basis of race, people who had also been victims of discrimination in the past, the court ought to focus on the second requirement of the affirmative action clause and satisfy itself that the programme is rational and carefully constructed so as to achieve equality' (Currie & De Waal, 267).

In 2004, the Constitutional Court set down a substantive approach to s 9 (2) affirmative action in *Minister of Finance v Van Heerden*.[20] This case involved an appeal against the High Court declaration that Rule 4.2.1 of the Political Office-Bearers Pension Fund was constitutionally invalid because it was discriminatory. Van Heerden was a former parliamentarian who served with the National Party from 1997 to 2004, and served until 1999 as a member of the National Assembly. This meant he was covered by both the Pension Fund and the Closed Pension Fund. Van Heerden challenged the Pension Fund because Rule 4.2.1 prescribed categories of members and, as such, employer contributions differentiated between members and discriminated against him. Prior to the leave to appeal to the Constitutional

19 *Motala v University of Natal* 1995 (3) BCLR 374 (D).
20 *Van Heerden v Minister of Finance* 2004 (6) SA 121 (CC).

Court, the High Court had found that the Pension Fund and the Minister had violated the constitutional right of equality because they had not discharged their onus to establish that the affirmative action measures promoted the achievement of equality.

The Constitutional Court found that such remedial measures do not violate the principle of equality. The Court held that measures are 'not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality' (para 32). Moseneke J laid down three grounds on which s 9 (2) can be achieved: the majority of the group targeted by the measures must be designated as disadvantaged by unfair discrimination; the measure must be designed to protect or advance the disadvantaged group; and the measure must promote the achievement of equality (para 37). On each of these grounds the majority found that Rule 4.2.1 of the Pension Fund did satisfy these grounds because the means to achieving equality were targeted at the achievement of equality in a restitutionary sense.

Debates are ongoing in South Africa about the effectiveness of affirmative action policies and division caused by a rigid adherence to affirmative action measures. Again, as in other jurisdictions, the community must grapple with the balance between whether affirmative action measures are having an impact in terms of addressing historical disadvantage or whether such measures serve to entrench and perpetuate divisions along racial lines.

25.6 Conclusion

The affirmative action debate occurs worldwide and represents an ongoing struggle to strike a balance between the equality principle found in contemporary constitutions and the very real problem of entrenched structural inequality in modern societies. Different nations have found the balance between the competing considerations difficult to achieve. Some nations, such as France and the other nations of the European Union, have largely rejected the idea of ethnically or racial-based affirmative action because of their underlying conceptions of citizenship and the state, although there are significant European advocates for such programs. In other nations, affirmative action policy is a matter of constant debate and revision. The Ecuadoran Constitution of 2008 had adopted provisions permitting affirmative action for the South American nation's indigenous and Afro-Ecuadoran populations.[21] On 21 February 2012, the United States agreed to hear a challenge to an affirmative action program at the University of Texas, potentially calling into question race-based affirmative action programs in American public universities.[22] The battle over affirmative action, both as a matter of policy and as a matter of constitutional law, will remain an ongoing area of controversy in the twenty-first century.

References

Bakshi, PM (2000). *The Constitution of India with Comments and Subject Index* (Universal Law Publishing).
Chor Maio, M (1999). 'O projeto UNESCO e a agenda das Ciências Sociais no Brasil dos Anos 40 e 50,' *Revista Brasileira de Ciências Sociais* 14, no. 41 (Outubro): 141–58.
Cottrol, RJ (2004). '*Brown* and the Contemporary Brazilian Struggle Against Racial Inequality: Some Preliminary Comparative Thoughts, 66 *U Pitts L R* (Fall): 113–29.

21 Republica del Ecuador, Constituciones de 2008, Art II, Sec II.
22 *Fisher v University of Texas at Austin* 2012 WL 538328 (cert granted).

Currie, I & De Waal, J (2005). *The Bill of Rights Handbook* (Juta, 5th edn).
Fernandes, F (1971). *The Negro in Brazilian Society* (New York: Atheneum Books for Young Readers).
Jackson, VC (2010). *Constitutional Engagement in a Transnational Era* (Oxford University Press).
McKean, W (1983). *Equality and Discrimination under International Law* (University of Michigan, Clarendon Press).
Sowell, T (2009). *Affirmative Action Around the World* (New Haven, Yale University Press).

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Minorities and group rights

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26.1 Liberalism, neutrality and the constitution

For many decades, it was assumed that liberal constitutions had to be neutral in relation to different ways of life and conceptions of the good, so as to be equally respectful of them all. Philosophers referred to this idea of neutrality as 'the priority of the right over the good' (Rawls 1971, 1988). John Rawls, for example, maintained this view of neutrality, which he extended to the constitution. For him, the constitution had to limit itself to the establishment of a fair procedure through which rival parties would seek approval from the people. It had to set up 'a form of fair rivalry for political office and authority' (Rawls 1971, 227). So organized, the constitution was seen as an expression of *imperfect procedural justice*.[1]

Constitutional neutrality was the way in which liberalism responded to a world characterized by 'the fact of pluralism' (Rawls 1991).[2] The US Constitution represents a good illustration of what this response could imply, namely, a system of checks and balances (aimed at ensuring that the exercise of power remained under control), and a bill of rights (which came to set limits to the state, and thus to protect individual rights). The US Constitution's endorsement of the principle of neutrality appears particularly clear in its First Amendment, and the idea that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press ...' The Amendment was a moral compromise reached at a time of extreme religious confrontations,

1 We have *perfect procedural justice* when we have both an independent criterion for deciding what is a fair outcome and a procedure that guarantees that we get that outcome. In the case of the constitution, we do have an independent criterion for defining what is fair, but lack a procedure that could guarantee us such a result.

2 As the moral philosopher Michael Sandel has put it, liberals assumed that '[since] people disagree about the best way to live, government should not affirm in law any particular vision of the good life. Instead, it should provide a framework of rights that respects individuals as free and independent beings, capable of choosing their own values and ends' (Sandel 1996, 4; Taylor 1989, 172, 178). By so doing, liberals asserted 'the priority of fair procedures over particular ends' (ibid).