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## **Affirmative action in education and Black Economic Empowerment in the workplace in South Africa since 1994: policies, strengths and limitations**

Harold D. Herman

### **Abstract**

This paper explains the concepts of Affirmative Action (AA) and Black Economic Empowerment (BEE) and the policies developed in post-Apartheid South Africa. It compares it to similar policies adopted in different contexts in Malaysia, India and the U.S.A. It explains and critiques the South African policies on AA and BEE, its history since 1994 and how class has replaced race as the determinant of who succeeds in education and the workplace. It analyses why these policies were essential to address the massive racial divide in education and the workplace at the arrival of democracy in 1994, but also why it has been controversial and racially divisive. The strengths and limitations of these policies are juxtaposed, the way it has benefitted the black and white elites, bolstered the black middle-class but has had little success in addressing the education and job futures of poor, working class black citizens in South Africa. The views of a number of key social analysts in the field are stated to explain the moral, racial, divisive aspects of AA in relation to the international experience and how South Africa is grappling with limited success to bridge the divide between the rich and poor.

### **Introduction**

Positive discrimination, affirmative action and measures of redress have been applied in favour of minorities in a number of countries throughout history. These policies and practices have variously been called reverse discrimination, preferential treatment, or affirmative action. Most analysts agree that the modern concept of affirmative action was formulated during the Civil Rights Campaign in the United States during the 1950s and 1960s. The U.S. President John F. Kennedy is credited with coining the term “affirmative action” in 1961 (Potts, 2000) in an Executive Order following the creation of the Committee on Equal Employment Opportunity. Affirmative Action (AA) has been developed in the 1960s as a tool to help achieve a semblance of equity within an increasingly diverse U.S. population. It began as an effort to incorporate race and economic disadvantage in the process of decision-making in the workplace and in the admissions to public universities and colleges (Douglas, 1999).

In an earlier paper entitled “A comparative analysis of Affirmative Action in South Africa, India, Malaysia and the U.S.A.” at the XIIIth World Congress of Comparative Education Societies in Sarajevo, Bosnia in 2007, the author discusses how these policies were

applied in the four countries. This paper analyses the progress and challenges of AA and Black Empowerment policies as they have been applied since South Africa became a democracy in 1994.

### **AA in South Africa since the dawn of democracy in 1994**

In 1992 Mandela said that what has often been interpreted as positive discrimination in favour of Whites has actually been confirmed to be blatant White racism (Potts, 2000). Many feel that affirmative action requires a group who has been negatively and unfairly discriminated against due to personal characteristics such as race/ethnicity that is granted positive measures to erode the legacy of this discrimination. In her book "Beyond Affirmative Action", Adèle Thomas (1996) says that in a broad context, affirmative action has been seen in South Africa as a means of correcting historical injustices and as an attempt to work from there to eventually create level playing fields where everyone can compete, based upon equal access to education, training and other opportunities formerly restricted to the White minority population. The motivation for instituting programmes of affirmative action generally lies in moral, legal or social responsibility issues. However, some scholars feel that affirmative action should have a time-span in countries like South Africa where you are affirming majorities, and should end if it is indeed successful, within one generation (20 years) or more since the country became a democracy in 1994. In South Africa affirmative action claims are being made across a spectrum of fields, restitution being sought with regard to land, housing, education and health, in addition to employment. Clive Thompson seeks a different banner for the concept affirmative action in the South African workplace, viz. employment equity. He finds the term employment equity preferable, given the historical and foreign baggage of the term affirmative action, there being close antecedence in domestic labour relations vocabulary, employment equity being positive in its import, the unfair labour practice concept having been presented in the developing jurisprudence as being coterminous with the notion of equity, and denoting the particular subject under scrutiny-employment and labour relations (in Adams, 1993, p. 27).

After a long liberation struggle, South Africa became a democracy in 1994 with the first democratic elections which led to Nelson Mandela becoming the first black President of the country. The AA policies before 1994 are now history, the question was how to address the huge backlogs of the majority black population in an equitable, just post-Apartheid era in line with one of the most democratic and progressive constitutions which South Africa adopted in 1996. The Constitution (1996) was operational since February 1997 supported by a new Bill of Rights. It became the supreme law in the country and its preamble states that it aims "to establish a society based on democratic values, social justice and fundamental rights" in terms of which "every citizen is equally protected by the law". In addition Section 1 of the Constitution lists the "achievement of equality" as one of South Africa's fundamental values and within the Bill of Rights equality is stated as the first substantive right. Section 9.2 of the Constitution states that "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". So, unlike the constitution of liberal democracies like that of the U.S.A., the South African constitution speaks directly to mechanisms to address inequalities in the society.

In 1998 a law was passed which became the central pillar of the AA policies, the Employment Equity Act, No. 55 of 1998 (EEA). The purpose of the Act is to achieve equity in the workplace. The Chapter on the prohibition of unfair discrimination states that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. It also says that it is not unfair discrimination to promote affirmative action consistent with the Act or to prefer or exclude any person on the basis of an inherent job requirement. When unfair discrimination is alleged, the onus of proving that the discrimination is fair is on the employer.

The AA measures of the Employment Equity Act are intended to ensure that suitably qualified employees from designated groups (Africans, Coloureds and Indians/Asians), promote diversity, reasonable accommodation for people of designated groups and their development and training. There needs to be numerical goals and preferential treatment for these designated groups, but the allocation of quotas is excluded.

To monitor the progress of EE, the Act requires all employers to prepare and implement an Employment Equity Plan stating its objective for each year, its AA measures, numerical goals for equitable representation, a time table for each year, internal monitoring and evaluation procedures and the identification of persons such as senior managers to implement the plan. The Department of Labour and if necessary, the Labour Courts, will monitor the annual progress of business in the implementation of their AA Plans.

The urgency of racial transformation within business has led to the concept of Black Economic Empowerment (BEE). There has been increasing transfer of shares in companies and positions on boards of directors of companies to blacks, not the least ANC luminaries who have become multi-millionaires as BEE took off. This has led to intense debate about the pros and cons of BEE, whether it is indeed addressing the inequalities of the society or whether it is window-dressing by the White-dominated economy. The concept has been expanded to be called Broad-based Black Economic Empowerment (BBEE) as it became clear that as a corrective measure, it was privileging the black elite and not reaching out to the poor of the country. In fact, it is now a common perception that BEE is only benefitting the elite and politically well-connected individuals and that the gap between the rich and the poor in South Africa is now even larger. The burgeoning black middle-class is now referred to as “Black Diamonds” and the debate on the need for the upliftment of the poor has intensified.

Before 2008 serious measures were developed to improve Black Economic Empowerment (BEE) and address some of the weaknesses mentioned above. These include business sectoral charters for BEE negotiated between business, labour and government. Also the institution of BEE Generic Scorecards to verify the BEE credentials of businesses. These scorecards contain various elements such as ownership, management control, employment equity, skills development, enterprise development, socio-economic development and sector specific contributions. BBEE ratings were developed on the basis of these elements to verify the appropriate BEE credentials.

In 2007, the Department of Trade and Industry (D.T.I.) gazette the Black Economic Empowerment (BEE) Codes of Good Practice to try and remedy the limitations listed above. In terms of these Codes a number of Transformation Sector Charters were introduced, vetted and analyzed for compliance as per the stipulations of Section 9 and 12 of the Broad-based Black Economic Empowerment (BBBEE) Act, No 53 of 2003. The responsibility of the D.T.I. is to ensure that the various Sector Charters submitted for gazetting are sufficiently aligned to the BBBEE Act and Codes of Good Practice and advance the objectives of sustainable BBBEE (Dept. of Trade and Industry, 2016).

These Sector Charters were effective from dates varying from 2009 to 2016. Each one had set targets relating to black empowerment. The coming years will show to what extent these targets are met to achieve Broad-Based Black Economic Empowerment.

This paper, however, focuses primarily on AA as it is applied in the Education Sector. In a paper presented just before the first democratic elections in 1994, Claassen (1993) discusses the possibilities of AA aimed at firstly equality of educational opportunity and secondly, at achieving equality of results. He posits that to achieve equality of opportunity there has to be parity of educational expenditure within the education departments, compulsory education for all racial groups, a unified education system, academic support programmes in areas such as medium of instruction (additional tuition for non-English speakers if the medium of instruction is English), financial support for students from disadvantaged backgrounds for tuition fees, accommodation, transport, books and school feeding schemes, curriculum restructuring and in-service training programmes for under-qualified teachers. He distinguishes AA programmes aimed at achieving equality of results as reserved for managerial, administrative, teaching positions for persons from disadvantaged groups, enrolment quotas for preferred students, enforced school integration and enforced multicultural school staff composition.

Most of these policies have been adopted and implemented in some form in South Africa over the past decades. The National Department of Education (DOE) has created a legislative framework since 1994 to make the drive for educational equality possible. This includes the South African Schools Act (1996), the Employment of Educators Act (1998) and the various Acts affecting labour and employment equity. So, for example, the Western Cape Education Department (WCED), one of the nine provinces in control of primary and secondary education, has an Employment Equity Plan (EEP) in line with the provincial and national government's Employment Equity Framework to which all role players such as School Governing Bodies (SGBs) and line managers have to adhere. All line managers have to consciously and committedly endeavour to narrow the race, gender and disability gaps on all levels, as well as all occupational categories (WCED, 2006).

The DOE has also tried to address the socio-economic disparities between state schools of the rich and the poor. The poorest schools now have a no-fee policy and the various state schools have been classified into one of five quintiles. Based on factors such as the quality and quantity of physical plant, socio-economic status of the area where the school is situated, class sizes, etc. the schools are placed in the hierarchy of quintiles to determine

the level of funding, the poorest schools receiving much higher levels of funding than those who have better facilities or serve higher income groups.

Racial integration at schools is progressively taking place, but class has replaced race as the determining factor of the quality of schooling pupils get. The former White, privileged schools now draw large numbers of pupils from the black middle-class whereas the former black, disadvantaged schools enroll mostly the children of the black working class who attend schools where the culture of teaching and learning has been seriously eroded. Private schools for the children of the economic elite, black and white, have been established in increasing numbers, showing again that class has replaced race as the determinant of who gets a good basic education.

One of the key areas in which AA has been applied worldwide, is selection for higher education. In India, Malaysia, the U.S.A. and South Africa the AA policies have been applied in respect of admissions requirements for university and college entrants based on race/ethnicity, caste and class factors. These policies have always been contested and they have often led to Supreme/High Court litigation questioning the constitutionality of the AA policies. The classical examples of the U.S.A. have been the 1977 Bakke case (Time, July 10, 1978), Hopwood et al vs State of Texas (Orfield & Miller, 2000) and the 2003 Univ. of Michigan Law School Case (Wise, 2005).

In South Africa, where blacks were denied equal access to leading universities in the Apartheid era, the preferential or differentiated admissions policies based on race, ethnicity or class which were adopted even before the arrival of democracy in 1994, were accepted with much less outcry from conservative constituencies than in the U.S.A. So for example the University of the Western Cape adopted an admissions policy in the 1980s based on reducing race/ethnicity, gender and rural imbalances, as well as the socio-economic status of parents (Herman, 1995). Because of the historical inequities in higher education admissions of black students, universities were increasingly required to equalize opportunity for disadvantaged black students, in an attempt to level the playing field. Meritocracy only or colour-blind admissions could, in the context of redress after Apartheid, be seen as a way to perpetuate racial inequalities. So AA in the areas identified by Claassen above has been applied widely in South Africa, in line with Section 1 and 9.2 of the Constitution and the Bill of Rights. The Employment Equity Act of 1998 requires all universities to have an Employment Equity Plan, the progress of which has to be reported on annually, inter alia, to reflect on progress in diversifying student populations and academic appointments of black staff at all levels of the academy. With only a few exceptions, the twenty two universities in South Africa had a majority black student enrolment in 2015.

Unlike the U.S.A. where the affirmation of minorities (Blacks, Hispanics and indigenous Indians) has been controversial and often struck down by courts as reverse discrimination, AA is part and parcel of the transformation of education in South Africa. The main issues at stake in South Africa are the pace and internal dynamics of educational transformation towards racial and gender equity. The key question is to what extent these AA policies are successful as mechanisms for redress.

## **Recent trends in AA**

The deracialisation of primary and secondary schooling has proceeded apace over the past two decades. Before 1994 there were prestigious White state schools (called Model C schools post 1994) and private schools where the pupils were virtually exclusively white. Through the new South Africa policies of AA and redress, these schools are now to a large extent multi-racial, some with black enrollments of more than 70%. In terms of deracialisation, the AA enrolment policies have worked, but because of the increasing fees of these schools, they are unaffordable for the poorer parents whose children attend the black state schools which constitute nearly 90% of the schools in the country. This confirms the view that class has replaced race as the determinant of who gets a good primary and secondary education. The difference in quality of education in Model C/private schools and state urban/ghetto and rural black schools is still massive. Although South Africa spends 22 – 23% of its annual budget on education, the quality of education of the nearly 90% of schools in the country situated in urban working class and slum areas as well as rural areas, is extremely low by international standards. South Africa is consistently rated in the bottom tier of the annual TIMMS tests in Science and Mathematics held in about sixty countries. The ethos and quality of state schools has increasingly deteriorated since the late 1970s after schools were used as sites of political struggle for liberation. The situation has worsened since democracy as the culture of learning and teaching has been seriously eroded to the point where more than 50% of the state schools are now (2016) educationally dysfunctional. Although AA has worked well in deracialising the former White schools since the arrival of democracy 23 years ago, it has to a large extent benefitted only the children of the rich and middle-class black parents. The neo-liberal economic and educational policies have exacerbated the class divide to make South Africa the country which now has the widest gap between the rich and the poor in the world as measured by the gini coefficient.

## **Criticism of AA**

In 1993, a black analyst (Vincent Maphai, 1989) contended that the entrenchment of AA in the constitution provides a legal base for discriminatory legislation, and continues to perpetuate one of the cornerstones of Apartheid – namely, that it is acceptable to use state resources to advance certain groups over others. He stated that AA involved dubious criteria for reward – race and gender – which have always been regarded as obnoxious features of Apartheid, thus sanctifying racial preference rather than equality as a constitutional principle (Maphai, 1991, p. 7).

Another criticism is that AA focused on race and facilitates the acquisition of wealth by an already privileged enclave because it does not seek to eliminate or even reduce class distinction. This is countered by the argument of creating useful role models and the pride they generate among potential emulators. However, this seems to be overshadowed by the destructive racialization of society as the price that has to be paid for the success of a few. Even the successful few may feel degraded and inferiorised if their success is attributed to supportive policies rather than own achievement (Adam, 1997, p. 247).

The late Dr. Neville Alexander, a renowned social analyst and former political detainee in the Robben Island jail of the Apartheid state, expresses his grave reservations about AA policies in a published lecture he gave in 2006 at the University of Fort Hare titled

“Affirmative Action and the perpetuation of racial identities in post-apartheid South Africa” (Alexander, 2007). He debated what he sees as the troubling relationships between the policy of AA and the perpetuation of racial identities. He saw it as one of the unintended consequences of the policy for which we should give the architects of it the benefit of the doubt (Alexander, 2007, p. 92). He critiques the policy and as an avowed socialist, he suggests a socialist alternative but was vague on how it is to be implemented (Alexander, 2007, p. 105).

### **Conclusion**

This analysis has tried to capture the success and limitations of Affirmative Action and Black Economic Empowerment in post-Apartheid South Africa. Like the cross-national comparative equivalents in Malaysia, India and the U.S.A. these are highly contented policies in South Africa. After centuries of Apartheid they were inevitable and have to a limited extent shown progress towards equality in education and the workplace for black South Africans. However, these policies remain controversial because in principle and in practice, they enhance social engineering and economic advancement based on race/ethnicity, gender and disability. The divide between rich and poor continues in South Africa despite these attempts to develop a more egalitarian, non-racial society. The struggle continues! Aluta continua!

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