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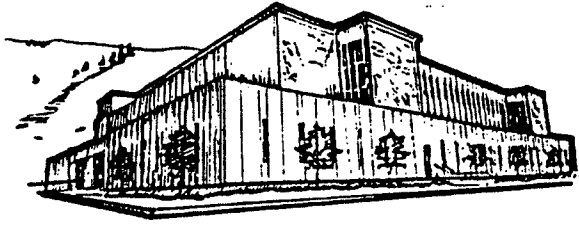
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**ASSESSING THE NEED FOR LEGISLATION TO PROMOTE
EQUAL EMPLOYMENT OPPORTUNITY IN SOUTH AFRICA**

by

Aaron Mthembu

BA. Honors, University of Zululand, South Africa, 1994

Presented in partial fulfillment of the requirements

for the degree of

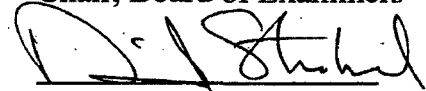
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EXECUTIVE SUMMARY

Purpose

The purpose of this research project was to assess how equal employment opportunity has been pursued in the United States and Malaysia and, from these cases, to identify appropriate legislative strategies for achieving equal employment opportunity in South Africa. The research questions include: 1) What type of legislative strategies can be used to promote equal opportunity in South Africa? 2) What is the rationale for government intervention in combating discrimination to create substantive equality? 3) How can equal employment opportunity be implemented without undue complexity, reduced managerial autonomy, and internally inconsistent policies and practices?

Methodology

This study examined the experiences of two countries that have pursued equal employment opportunity policies. It relied upon library research to identify relevant sources of data. A review of the relevant literature provided data for the purposes of this study. In the United States the study focused on literature covering the progress of women and minorities in education, types of occupation, earnings, and federal employment. In Malaysia the focus was on educational, business, and civil service policies that were implemented to increase opportunities for the indigenous groups.

Findings

A review of the data indicates that the constitution alone is not a sufficient mechanism to create substantive equality. It provides a passive approach to equal employment opportunity which only prohibits further acts of discrimination. This is evidenced by the lack of progress in the United States and Malaysia before the enactment of legislation. This study identified three basic approaches to achieving equality: 1) a nondiscrimination approach which prohibits discrimination and allows individuals to pursue judicial remedies through the courts, 2) an affirmative action strategy that requires employers to pursue hiring goals to achieve representative workforces, and 3) a multi-factor approach that provides for preferential treatment to the disadvantaged people. The study concludes that legislation is needed to create substantive equality.

Recommendations

The primary recommendations are as follows:

- 1) Parliament should enact *legislation* to strengthen equal opportunity and affirmative action policies.
- 2) A *commission* should be established to enforce this legislation and be empowered to investigate and sue employers who engage in discriminatory practices.
- 3) Legislation should empower the courts to impose judicial penalties on those employers who continue engaging in acts of discrimination.

CHAPTER 1

INTRODUCTION

Since the collapse of “apartheid,” and the subsequent installation of a new democratically elected government, the ideal of creating a more equitable society has become a rallying point in South Africa, particularly among the black majority. Apartheid led to the marginalization of the black people by the white minority government. Racial discrimination and inequality were entrenched in the Constitution and laws of the country to promote the white minority at the expense of the majority. The new government, which inherited a severely divided society, recognizes the need to create equal opportunities for all South Africans. It is generally accepted that special attention should be paid to the development and advancement of people who have been socially, economically, and educationally disadvantaged by past discriminatory laws and practices, but nobody believes this will be easily accomplished.

According to Masondo (1992, 4), “a society which has always treated its members on the basis of equality would have no need for equal opportunity programs.” The call for equal opportunity, therefore, is an admission that some members of that society have been socially disadvantaged for a long time. It is an admission that there is a need to socially correct imbalances. This is the situation in South Africa today, as a result of more than three hundred and forty years of white privilege and more than three hundred and forty years of black disadvantage. In both the public and private sectors, the effects of discrimination can be easily observed.

Statement of the Problem

Although the Interim Constitution guarantees and protects voluntary programs to promote equal employment opportunity and affirmative action, so far the government has not taken any formal action to require such programs. Various groups, especially the labor unions, are currently pressing for such legislation. Private organizations, presently abuzz with the need for equal employment opportunity and affirmative action, are driven by the fear that unless they themselves formulate plans or policies to advance members of disadvantaged groups, the government will do it for them. The key question facing the government is whether to encourage companies and other private organizations to take voluntary action to redress inequalities or to impose external pressure by means of legislation. There is every reason to believe that without formal action by the government, businesses and other private organizations will not genuinely address the effects of past discrimination. The government is successfully implementing equal employment opportunity policies in the public sector, but does not seem to know what to do with the private sector.

Today some form of legislation to promote equal opportunity is in existence in most, if not all, of the major industrial countries except, of course, South Africa. Masondo (1992) argues that discrimination against black people in South Africa has been Law. Law, therefore should be passed to provide for the abolition of all discrimination. Equal employment opportunity is the law in the United States, United Kingdom and Malaysia, for example, but in South Africa it is not.

The purpose of this study is to determine what type of legislative strategies are

needed to promote equal opportunity in South Africa. The experiences of two countries in implementing equal opportunity policies will be examined: the United States and Malaysia. The United States, in particular, has been a pioneer in equal opportunity and affirmative action (Masondo 1992). Therefore, it is important to enquire into the debate in the United States in order to deduce lessons for South Africa. The Malaysian model is of particular interest to South Africa. Many parallels exist in terms of a majority benefiting from equal opportunity and affirmative action programs. Moreover, the beneficiaries of affirmative action programs, the Malays, also hold the major part of political power and have ensured that legislation is amended accordingly, thereby increasingly transferring wealth to a Malaysian elite while neglecting the poor and disadvantaged (Thompson 1993). A review of these countries' experiences with programs to promote equal opportunity will demonstrate the impact of legislative measures in redressing imbalances and creating equal opportunity for all. For the purpose of this study it is assumed that equal employment opportunity cannot be achieved without formal government intervention to combat discrimination and promote equal opportunity in South Africa. At a more practical level, the question to be addressed is how to promote equal employment opportunities without undue complexity, without reducing managerial autonomy, and without adopting policies and practices that are internally inconsistent.

Research Questions

The following questions will be addressed in this study:

1. What type of legislative strategies can be used to promote equal employment

opportunity in South Africa? What is the rationale for government intervention in combating discrimination and creating an equitable society?

2. How can equal employment opportunity policies be implemented without undue complexity, reduced managerial autonomy, and internally inconsistent policies and practices?

Methodology

The main aim of this study is to identify appropriate legislative strategies for achieving equal employment opportunity in South Africa. To answer the first question, the study will examine two countries that have successfully implemented programs to promote equal employment opportunity, i.e. the United States and Malaysia. The United States is chosen because it is a pioneer in legislating programs to promote EEO. Malaysia is chosen because it has close resemblance to South Africa in terms of a majority benefiting from equal employment opportunity and affirmative action programs. A review of the relevant literature will provide data for the purposes of this study. In the United States, the progress and advancement of women and minorities prior to and after the passing of legislation will be analyzed. In Malaysia, the progress of the indigenous Malay in education, employment, and business will be analyzed since the adoption of the constitution which safeguards the special position of the indigenous groups. Statistical evidence of the increase in employment, education, and business opportunities for the formerly disadvantaged groups will be presented to illustrate the present position in these countries. The second question will be addressed by analyzing formal procedures that are

followed in implementing EEO programs.

It is acknowledged that the vastly differing demographics between South Africa and the other two countries goes far in explaining the differences. Despite this, however, the experience of these countries can be useful to South Africa as it passes through the period of transition.

Significance of the Study

It is extremely important that the South African government learn from the experiences of other countries. There is not an abundance of research done on this particular subject and this study may serve as the basis of future studies. With equal employment opportunity and affirmative action under scrutiny and constantly under attack in some countries, this study should give insight into the importance of legislation to protect EEO. This study will also enhance our understanding of the various problems associated with the role of government in creating an equitable society. This information will be invaluable to the government in determining which approach to follow in developing policies to address problems of racial inequality.

Organization of the study

The remaining sections of the study are as follows: chapter 2 discusses the legal environment in South Africa and its implications for equal employment opportunity; chapter 3 examines equal employment opportunity in the United States; chapter 4 provides a review of positive discrimination in Malaysia; chapter 5 discusses the

relevance of a legislated model for South Africa; and chapter 6 offers a conclusion which summarizes the various arguments in favor of legislated EEO as well as recommendations about how it might best be accomplished.

Definitions

For purposes of this study, the terms equal employment opportunity, affirmative action, and black people are defined as follows:

Equal Employment Opportunity (EEO): The general elimination of discrimination or unequal treatment, and the guarantee that only individual merit and efficiency is taken into account when deciding on the appointment or promotion of persons to specific positions. It is mainly identified with the values of fairness and individual merit.

Affirmative Action: A policy or program designed to increase opportunities for the disadvantaged. It includes all efforts to redress the effects of present and past discrimination, to achieve a greater measure of substantive equality.

Black People: The term black is used to refer to members of the African, Indian and Coloured communities. The term African will be used to distinguish the indigenous from the nonindigenous people of Africa.

CHAPTER 2

The Legal Environment in South Africa and its Implications for EEO.

At present, the South African Government of National Unity (GNU) has not actually enacted legislation designed to ensure the active implementation of EEO. Only the Interim Constitution which came into effect in April 1994 has a provision for programs to address inequalities in the entire society. This chapter discusses the constitutional provisions guaranteeing and protecting equal opportunity as well as the role of courts in interpreting these provisions to redress the effects of past discrimination.

Historical Background

Racial discrimination and unequal treatment was codified in the laws of the former South African governments. It was the fundamental objective of the white minority to keep the other population groups out of the powerful positions, particularly in government and business. The white minority enjoyed all the privileges as free citizens while the black majority had no freedom at all. According to Clive Thompson (1993, 22), "racial discrimination has been one of the defining features of the apartheid order in South Africa, and has been entrenched in a range of statutory provisions for many decades. In the area of employment the most telling legislative measures designed to afford racial privilege were those laying the basis for the policy of job reservation." Legislation such as the Industrial Conciliation Act, Mines and Works Act, Population

Registration Act, and many more served to deny the black people equal rights and equal treatment. Such laws were more than the badge of race, they carried with them lifelong rewards for being white and penalties for not being white. They operated to prevent black people and particularly Africans from doing certain jobs (Hepple 1966).

Thompson (1993) notes that the consequences of discrimination in the South African economy are self-evident. White males are heavily over-represented in the key decision-making posts and in fact all the more skilled occupational categories of both the public and private sectors. Because of this situation, there is a very broad consensus that all forms of race discrimination in the society must be combated. There is also a considerable amount of support for the notion that policies of affirmative action must be developed in order to redress the past wrongs and to achieve equality.

Constitutional Provisions

In 1994 a new government was elected by all people of South Africa under an interim constitution which came into operation on 27 April 1994. The Government of National Unity (GNU), elected for the transitional period, is supposed to draw a new constitution which will come into effect after the next election in 1999. The Interim Constitution includes a Bill of Rights and other necessary provisions for the transitional period. In order to understand the legal environment in South Africa, the following discussion will focus on the bill of rights and the role of the courts as provided by the Interim Constitution.

Bill of Rights

Two divergent views concerning a bill of rights emerged during the negotiations for a new constitution, one view represented by the former government and the other by the African National Congress (ANC) (Ncholo 1992). The white government saw in a bill of rights a mechanism whereby political and economic interests of the privileged white minority may be protected. The former government's approach overemphasized the protection of group rights whereas the black liberation groups sought to protect the interests of the black majority. The desire to redress past discrimination and injustice on the basis of race is a strong element in this approach. Looking at the final provisions of the Interim Constitution it is apparent that the approach of the black groups, led by the ANC, prevailed. The Constitution protects individual rights but also guarantees programs to increase opportunities for the disadvantaged, mainly blacks. Despite these guarantees, it is important to point out that the Bill of Rights is viewed with great suspicion by many people who were involved in the liberation struggle. Most believe it was an attempt by the former white government to protect existing and unjustly acquired rights of the racist minority rather than to advance the legitimate claims of the disadvantaged majority (Ncholo 1992).

Section 8 of the Interim Constitution includes the following provisions:

- 1) Every person shall have the right to equality before the law and to equal protection by the law.
- 2) No person shall be unfairly discriminated against, directly or indirectly, ... on one of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination

The constitution guarantees both equal protection of all individuals by the law (the first subsection), as well as programs to address inequalities resulting from unfair discrimination (the third subsection). Looking at these stipulations one wonders if there is not an inherent conflict between the equal protection clause in the first subsection and protection of affirmative action programs guaranteed in the third subsection. Vague as these provisions may be, it is not surprising that today the pace for change remains very slow. This lack of progress can be blamed on the private employers' insincerity about change. Recently, the South African minister of labor called for the passage of legislation to strengthen affirmative action, because there is no evidence of any change, particularly in the private sector. The constitution cannot make people change their attitudes or behaviors, particularly those private employers who are against reforms. Thus, a need for a proactive approach arises, as an inducement for businesses to deal with the effects of discrimination and disadvantage. The Constitution does not provide a mechanism to increase opportunities for the disadvantaged. Unless the government enacts specific legislation that requires businesses and other private organizations to make every effort to address the effects of discrimination, nothing will change.

The author believes that businesses and private organizations will not take voluntary action to remove discrimination and inequality. Knowing the history and culture of the corporate world in South Africa, it cannot be expected that they could change their attitudes and behaviors on their own. The society cannot rely on the good faith of white males who are used to being privileged. Legislation is the only way to enforce equal employment opportunity policies. Affirmative action without law is useless. As the custodian of the people the government has an obligation to not only prohibit discrimination but to ensure that the disadvantaged masses are brought to the same level of opportunity as others, if not a higher level. Masondo (1992, 13) argues that "the whole issue of equal opportunity in South Africa should be moved away from academics and taken straight to the government. Most solutions recommended by the white authorities on the elimination of discrimination at work failed dismally."

As will be explained in the following sections, critics of equal opportunity policies in other countries, particularly affirmative action, often use the constitution to attack these policies. One argument is that giving preferences to groups is unconstitutional because it violates individual rights (see chapter 3). Critics often raise the issue that the constitution protects individual rights and does not guarantee any rights to groups. The same argument may be raised in South Africa. Unlike in Malaysia, the Interim Constitution does not mention any special group rights. It only protects programs directed at assisting the disadvantaged persons or groups. Whether this will be enough to redress the effects of discrimination against groups remains to be seen. On what basis, for example can black people claim compensation as a group? The provisions of the

constitution mentioned above are not enough to guarantee compensatory programs for blacks as a group. Thompson (1993) argues that in the United States the legal framework is open to constitutional attack because of conflict between individual and group rights. Therefore, a more specific measure is imperative to strengthen the implementation of equal opportunity programs and achievement of desired goals for blacks as a group. As it happens in other countries that have implemented similar policies, it will be interesting to see how the courts interpret the Constitution to serve and protect public interests.

The Courts

In the past, the government and the courts shared the same agenda, that is, promoting white supremacy through the oppression of the black majority. As a result, the whole judicial system lacked confidence by the majority of the people in South Africa. The courts did little to apply the law that promotes justice for all. Instead, the courts helped the apartheid government to sustain its position of separate development. Ncholo (1992) notes that, previously, the courts in South Africa lacked the judicial testing power reserved for the judiciary in most countries. Parliament was supreme over and above the other two branches of government, and was able to erode individual liberties without fear of judicial intervention. Courts could not or did not challenge any legislation passed by the parliament. It is hoped that the courts under the new constitution will be more assertive in protecting fundamental rights.

Section 98 (2) of the Interim Constitution provides for a "Constitutional Court as the court of final instance over all matters relating to the interpretation, protection and

enforcement of the provisions of the Constitution” This authority includes any alleged violation or threatened violation of any fundamental right entrenched in the Constitution, such as equal protection before the law. The Constitution also provides for a Supreme Court, with jurisdiction on matters other than those reserved for the Constitutional Court. This introduced a new dimension in the South African government whereby legislative actions are counterbalanced by the judiciary. It removed legislative supremacy established by previous constitutions. The new judicial system provides a mechanism to protect citizens against abuse of power by parliament. It will be interesting to see what role the courts, particularly the higher level courts, will play in creating a balance between protecting individual rights and redressing inequalities.

The GNU has reorganized the whole judicial system but it is still too early to judge if there are any positive results. A serious problem has been the shortage of qualified law professionals to assume the new positions, particularly from the black people. As in most democratic societies, courts need to be empowered to be independent and impartial referees in settling disputes and conflicts in the society. However, the courts also need to be proactive and considerate to ensure law and justice prevail. This is one area of controversy because what is justice for the group may be unjust for the individual. What is justice for all may be interpreted as injustice by the privileged. Thus the role of the courts needs to be clarified from the beginning so that they do not impede the achievement of the goals of the government. According to Ncholo (1992, 430), “the role of the courts should be minimized so that they are not obliged to review the substance of legislation authorizing programmes such as affirmative action, but simply to ensure that

appropriate procedures have been followed.” How this will be achieved is not clear. What is clear is that for the government to successfully address inequalities, the Constitution alone does not provide the answer.

Other Legal Issues

Various other laws and policies will definitely affect the promotion of equal opportunities in the South African society. In education new policies have been introduced to remove segregation and increase opportunities for the disadvantaged. Reorganization of the educational system has been undertaken. In the private sector, the National Labour Relations Act of 1995 will have a great impact on the implementation of equal opportunity programs. Labor unions have always played a leading role in the political struggle in South Africa, and they will be in the forefront in determining the kind of programs desirable to redress imbalances. The National Labour Relations Act gives labor unions representing the majority of employees the right to negotiate the terms and conditions of employment for its members within a particular organization. For example, principles such as seniority which governs promotion in many unionized companies may impede the efforts to move black people into senior positions. Finally, the Public Service Act of 1994 has had a great impact on the transformation of the public service. One goal of the Constitution, strengthened by this Act, is to create a more representative bureaucracy. The Act provides for the recruitment, training, and promotion of black people until a full representation is achieved at all levels in the public service. Affirmative action has been identified as one of the methods to achieve this goal. It is

important to note that there has been a tremendous improvement in the public service after the passage of this legislation. Black people have been appointed or promoted to senior positions in the public bureaucracy.

Conclusion

In South Africa, the Constitution is the supreme law of the country. It binds all legislative, executive and judicial organs of state at all levels of government. Programs to promote equal opportunity are protected by the Constitution's Bill of Rights. The judicial system was reorganized in line with the goals of the Government of National Unity. An independent Constitutional Court was established as a final recourse over all matters relating to interpretation, protection, and enforcement of the provisions of the Constitution. The Supreme Court was strengthened to have a testing power against the legislative and executive authority.

Under the Interim Constitution, voluntary programs to increase opportunities for the disadvantaged are constitutional. This creates ground for conflict in the practical implementation of such programs, because the rights of some individuals may be harmed by attempts to assist the disadvantaged. Although the Constitution provides a limited tool for advancing the interests of the disadvantaged majority, how this will be achieved is unclear. Thus, there is a need for a more proactive approach through the passage of legislation that requires businesses and other organizations to enforce these policies.

CHAPTER 3

EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES

The United States has a long history of association with strategies to increase opportunities for the disadvantaged, women, and minorities. Beginning with constitutional amendments and statutory enactments to abolish discrimination and guarantee equal protection to individuals, the country introduced active measures to redress the injustices of past discrimination. This chapter examines the legal remedies to eliminate discrimination in the United States, the trends in efforts to increase equal opportunity, as well as philosophical arguments regarding the equal opportunity principle.

What is Equal Employment Opportunity (EEO)?

David Lane (1980, 3) once said "It is in employment, far more than in any other field of our national life, that the battle for an equal opportunity society will be won or lost." According to Tompkins (1995), "equal employment opportunity (EEO) refers to the right of every individual to compete for employment opportunities on an equal footing with all other members of society without being restrained by arbitrary or irrelevant barriers." Tompkins further notes that:

Work is important to members of society because it provides income needed to support self and family, gives purpose and discipline to life, integrates individuals into a network of social relationships, and enhances individual self-esteem. It is because work is so central to personal identity and collective well-being that we as a nation have come to recognize the importance of pursuing equal employment opportunity as a matter of government policy (Tompkins 1995, 131).

Support for the ideal of equal employment opportunity can be found in the Supreme Court's equal protection opinions, civil rights legislation, and executive orders (Rosenfeld 1991). The United States Constitution, as well as Title VII of the Civil Rights Act of 1964 as amended, impose an obligation to provide equal opportunity to all individuals. In the words of Owen Fiss (1991), the equal protection clause of the Fourteenth Amendment gives constitutional status to the ideal of equality. Thus, individuals have a right to be treated on the basis of their individual qualities. The principle of equal opportunity holds that so long as individuals enjoy the equal protection of the laws, open competition should be the rule, with individuals winning on the basis of whatever personal qualities turn out to count for most in the struggle (Van Dyke 1985). But as will be seen below, governments in the United States have adopted two different approaches to achieving equal employment opportunity.

Two Approaches to Achieving EEO

For centuries, women and minorities were denied privileges enjoyed by other citizens in the United States. It took many years before the government could intervene to end discriminatory practices and policies that prevented blacks, other minorities, and women from obtaining the benefits of society on an equal footing with all other citizens. The civil rights movement of the 1950s and 1960s played a definite role in pushing the government to become actively involved in creating equal opportunities for all citizens. Prior to that, measures had been introduced to remove discrimination and guarantee equal opportunity. Various legislation and constitutional amendments were passed that brought

African-Americans and other minorities into the political process. The Thirteenth Amendment to the U.S. Constitution (1865) prohibited slavery and involuntary servitude in the United States but did not specify which civil rights the freed slaves were to enjoy. The Civil Rights Act of 1866 made former slaves and all other persons born or naturalized in the United States citizens of the United States with the same legal rights as "white persons." The Fourteenth Amendment of 1868 guarantees equal protection under the law to everyone (Cooper 1991; Schwartz 1970; Tompkins 1995). Other statutes and executive orders were also enacted that further improved the position of women and minorities.

Beginning in the post Civil war period, the federal government in the United States identified equal opportunity as a goal to be achieved in the society after centuries of discrimination. It first attempted to use the constitution to end discrimination and guarantee equal opportunity for all citizens through the equal protection clause of the Fourteenth Amendment. When this failed to eliminate discrimination, the government resorted to a more proactive approach through statutory enactment and executive orders. These form the two strategies adopted to increase equal opportunities in the United States: the nondiscrimination approach and affirmative action approach to equal opportunity. These two approaches are discussed in more detail below.

The Nondiscrimination Approach to EEO

According to Tompkins (1995, 131),

The nondiscrimination approach involves identifying specific categories of

individuals who are judged to be in need of legal protection and prohibiting employers from discriminating against them on the basis of such factors as race, gender, national origin, and religion. Victims of discrimination are authorized under specific pieces of legislation to pursue individual remedies through the judicial system. In addition, government agencies are often authorized to impose administrative remedies by canceling government contracts or withholding government funds. The nondiscrimination approach thus sanctions government regulation while attempting to preserve, as much as possible, the principles of merit, individual liberty, and employer autonomy.

The nondiscrimination approach corresponds to the idea of distributive justice which is concerned with the “equal distribution of rights, benefits, and burdens among the members of a society (Aristotle 1925, 180).” It is based on the principle of equal treatment and relies on the judicial system to correct wrongs done to the victims of discrimination. The primary goal of the nondiscrimination approach is to enable individuals to compete for opportunities on an equal footing and to be judged on the basis of personal qualities.

Schwartz (1970) notes that the purpose of these measures is to eliminate discrimination through the utilization of formal and informal remedial procedures.

Whereas the Constitution offers a passive approach to equal opportunity, the Civil Rights Act of 1964 created the machinery by which EEO can be realized. The Act as amended in 1972, established the Federal Equal Employment Opportunity Commission with the primary responsibility for preventing and eliminating unlawful employment practices. The Equal Employment Opportunity Act of 1972 also extended the law to include acts of discrimination by state and local governments and in federal employment.

The nondiscrimination approach prohibits further acts of discrimination and allows persons discriminated against to sue employers, but it does not take any steps to

redress the past or present effects of discrimination. Simply prohibiting discrimination did not fix the injustices that Congress continuously identified as the real problem that needed fixing: the exclusion of women and minorities from the upper reaches of the socioeconomic ladder. It soon became clear that achieving substantive equality requires more than just abolishing discriminatory policies and practices. Women and minorities still suffered the effects of historical discrimination. They could not compete with people who, for centuries, enjoyed most of the society's privileges. As President Lyndon B. Johnson once said, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, you are free to compete with all others (Edmonds 1994)." Prohibiting discrimination was not enough to help the disadvantaged to be able to compete on the same level with others. Thus a more active approach became necessary.

The Affirmative Action Approach to EEO

The failure of the nondiscrimination approach to actively redress the effects of historical discrimination led to the adoption of a different strategy. Even after the discriminatory practices have been made unlawful, Tompkins (1995, 162-163) notes that:

educational disadvantages, for example, continue to affect racial and ethnic minorities as they pursue employment opportunities. ... Low socioeconomic status, ... has made it difficult for many blacks to take full advantage of available educational opportunities. Social stereotypes represent another significant barrier to equal employment opportunity. Economic and educational disadvantages, and the persistence of gender, racial and ethnic stereotypes, continue to contribute to the underrepresentation of women and minorities in the workplace, especially at higher organizational levels. During the 1960s affirmative action emerged as a strategy for addressing workforce imbalances.

According to Tompkins (1995), the affirmative action approach relies on positive, results-oriented practices to ensure that women and minorities are equitably represented in the organization's workforce. Where the nondiscrimination approach calls on employers to be gender neutral and color-blind, the affirmative action approach requires them to deliberately take race, sex, and national origin into account in their employment practices. Affirmative action is a concept based on the idea that for women and minorities who are disadvantaged by past discrimination, a commitment to not discriminate in the future may not be enough to remedy past discrimination. Title VII of the landmark 1964 Civil Rights Act specifically prohibits discriminatory practices that would deprive any individual of employment opportunities because of race, color, gender, religion or national origin. Subsequent affirmative action measures went a step further by specifically encouraging active efforts to recruit workers from targeted minority groups. To put muscle into Title VII of the Act, President Johnson issued Executive Order 11246 in 1965 which required government contractors to take affirmative action to rectify the under-representation of women and minorities (Tompkins 1995, Israel and David 1994). With this order, the term affirmative action was firmly rooted into American society. The fear of costly administrative sanctions by the federal government against employers began to slowly open employment opportunities for women and minorities. In 1969 President Nixon issued Executive Order 11478 requiring formal affirmative action programs in each federal agency (Tompkins 1995).

Among arguments for affirmative action is the social utility argument which says a policy may be justified because it promotes the aggregate well-being of society. The

goal is to increase opportunities for traditionally victimized groups (Israel and Ankey 1994). Advocates argued that affirmative action would increase the well-being of many people since it would move many women and minorities upward on the economic scale; provide additional role models for young blacks by placing blacks in greater than token numbers in more visible and desirable positions; result in better services being provided to the black community; and would break the civil stereotypes and move the country closer towards being a racially integrated society (Fullinwider 1989).

Nondiscrimination as a Method

The nondiscrimination approach is represented by a number of acts, constitutional amendments, and executive orders all of which attempt to promote equal employment opportunity. Title VII of the Civil Rights Act of 1964 addresses discrimination in employment, and gives authority to the Equal Employment Opportunity Commission (EEOC) to sue employers on behalf of individuals whose Title VII rights it believes had been violated. Complaints against discrimination may be filed with the EEOC or a state civil rights commission. When a complaint is filed with the EEOC, Title VII requires that it first “attempt to resolve the problem by informal methods of conference, conciliation, and persuasion, which when successful, result in a conciliation agreement (Tompkins 1995, 135).” Through this agreement an employer may agree to eliminate discriminatory practices and offer some form of remedy to the victims. The employer may also agree to establish affirmative action timetables and hiring goals to increase representation of women and minorities.

If conciliation efforts fail in private sector cases, the EEOC may sue the employer on behalf of the complainant seeking court-imposed penalties. In public sector cases, the EEOC has no such authority. It may ask the Justice Department to sue the employer seeking court-imposed penalties. The EEOC may also give the complainant the right to sue on his or her own. If the complaint is handled under state law, the state civil rights commission can investigate, hold a hearing, and often impose penalties on the employer if the latter is found guilty. The U.S. Attorney General's Office may on its own authority file suits against state and local governments who violate Title VII, apart from filing suits on behalf of individual employees or job applicants (Tompkins 1995).

Affirmative Action as a Method

Despite the controversy surrounding the concept of affirmative action, some of its methods can be implemented without violating the equal treatment principle. Tompkins (1995, 164) identified five key methods which form the spectrum of affirmative action.

These may be summarized as follows:

Special recruitment programs, whereby employers aggressively increase the number of women and minorities in the applicant pool. Such programs increase access to qualified applicants for upper-level as well as entry-level positions, but they do not require that subsequent decisions be made on the basis of gender, race, or national origin.

Special training programs, to increase promotion opportunities for women and minorities who often lack the work experience and skills needed to advance within the organization. This provides a means for improving their representation at higher organizational levels, but does not exclude others from participating.

Adverse impact analysis, which involves scrutinizing job qualifications, employment examinations, and other selection devices for evidence of adverse impact. The purpose is to ensure that qualifications are demonstrably related to job requirements and

examinations are valid predictors of subsequent job performance.

Workforce analysis, which involves tracking the number of women and minorities in each occupational category relative to their numbers in the external labor force, determining whether the agency is “underutilized” in particular occupational categories, and establishing numerical hiring goals to achieve an appropriate balance. Hiring authorities are expected to keep affirmative action goals in mind but do not give special preference to women and minorities. Rather, women and minorities are selected on a “tie-breaker” basis when they are substantially equally qualified with other top-rated candidates.

Mandated quotas, involves hiring or promoting a mandated number of women and minorities until underutilization problems are corrected. This method requires preferring candidates on the basis of gender, race, or national origin without strict reference to their relative qualifications. It is lawful only when ordered by a court or when it results from a negotiated settlement.

These methods can be viewed as lying along a continuum. “The farther one moves to the right, the greater the violation of the equal treatment principle (Tompkins 165).” He further notes that preferential affirmative action programs fall under three types.

Court-ordered Affirmative Action Programs result from a court order to remedy the effects of intentional acts of discrimination by an employer. A court may order an employer to establish an affirmative action plan with hiring goals or quotas to obtain a workforce that is representative of the number of women or minorities in the local labor force. These plans are imposed after a finding of unlawful discrimination and are not restricted to the actual victims of discrimination.

Affirmative Action Programs Established Under Executive Order 11246. These programs are required of all federal contracts and subcontracts. The Office of Federal Contract Compliance Programs (OFCCP) monitors the Order and has authority to investigate complaints of discrimination and take appropriate action. Executive 11246

programs differ from voluntary plans because they must conform to requirements carefully spelled out in government regulations, such as, the utilization analysis to identified areas where minority groups and women are underutilized and establish plans to correct those deficiencies. They differ from court-ordered programs because they are required of government contractors regardless of whether they have violated nondiscrimination laws. They also rely on nonbinding hiring goals rather than on mandatory ratios or quotas.

Voluntary Affirmative Action Programs are encouraged by the EEOC and U.S. Commission on Civil Rights to correct imbalances in employment. Government agencies can establish their own voluntary affirmative action programs to eliminate underutilization of women and minorities. They are free to choose their own methods for achieving affirmative action goals as long as they remain within boundaries set by the courts. Like all affirmative action programs, voluntary programs may be challenged in court on the grounds that they violate the Constitution as well as Title VII. Voluntary programs have been found to be constitutional if they are narrowly tailored to correct problems of underrepresentation, temporary, and flexible in nature (Tompkins 1995).

The nondiscrimination and affirmative action methods have not only increased opportunities for women and minorities, they have also contributed to the growth and complexity of the field of human resource management in the United States. The nondiscrimination approach is less controversial because it does not require the use of race, gender, or national origin in making employment decisions. The affirmative action method draws a lot of criticism because some of its methods require the use of these

factors. These two approaches to EEO sometimes move in contradictory directions, creating special problems for those responsible for their implementation, such as managers and personnel officers.

Have the Nondiscrimination and Affirmative Action policies been effective?

Having reviewed the strategies that are used to increase opportunities for women and minorities, this section evaluates the statistical evidence regarding the effectiveness of EEO policies. It addresses the question: have these policies made a difference in terms of substantive equality? Four variables provide the focus of this analysis: educational attainment, occupation, earnings or income levels, and federal employment. In some areas comparison is made only between whites and blacks due to lack of data for the other groups.

Education

Education is one indicator of the opening of opportunities to women and minorities. Data in Table 1 indicates the trends in educational attainment by race and sex, between 1950 and 1994. Beginning in the 1950s women and minorities have increased their share in educational attainment. Large increases occurred between the 1960s and 1980s. The percentage of white women with four or more years of college grew from nearly five percent to more than 20 percent. The percentage of black women increased from less than three percent to 13 percent in the same period. Black men who completed four or more years of college increased from nearly two percent in 1950 to nearly 13

percent in 1994. Other minorities have also increased their share in education. The evidence suggests that women and minorities have taken advantage of the opportunities being opened to them after a long history of discrimination. This is indicated by the increases in their level of educational attainment.

TABLE 1

Educational Attainment by Race and Sex, 1950 -1994
(In percent. For persons 25 years old and over)

YEAR	WHITE		BLACK		OTHER	
	Male	Female	Male	Female	Male	Female
Completed High School						
1950	33.0	35.6	11.3	14.5	NA	NA
1960	41.6	44.7	18.2	21.8	NA	NA
1970	54.0	55.0	30.1	32.5	37.9	34.2
1980	69.6	64.1	50.8	51.5	67.3	65.8
1990	79.1	79.0	65.8	66.5	50.3	51.3
1994	82.1	81.9	71.1	73.8	53.4	53.2
Completed 4 years of College						
1950	7.6	4.8	1.7	2.5	NA	NA
1960	10.3	6.0	2.8	3.3	NA	NA
1970	14.4	8.4	4.2	4.6	7.8	4.3
1980	21.3	13.3	8.4	8.3	9.4	6.0
1990	25.3	19.0	11.9	10.8	9.8	8.7
1994	26.1	20.0	12.8	13.0	9.6	8.6

NA- not available.

Source: Data from Statistical Abstracts of the United States, U.S. Bureau of the Census, 1993, 1995.

Occupation

Another indicator of progress by minorities and women is their entrance into the two top organizational job categories: officials and managers, and professionals. These positions, which traditionally have reflected low participation rates for women and minorities, are important for several reasons. First, they are the better paying jobs and provide increased advancement opportunities. Secondly, officials and managers are in positions of significant influence because they set and execute employer policies, including those which affect employment opportunities for all women and minorities (EEOC Report 1995, 14).

Table 2 presents participation rates for whites, women, and minorities in private sector managerial and professional jobs, in selected years. The table indicates increases in the share of the managerial and professional jobs held by women and minorities in the private sector. During the 1970s, women made notable progress in entering a number of professions that were formerly predominantly male. Their share of managerial jobs increased from nine percent in 1966 to over 30 percent in 1992, and their share of professional jobs increased from 20.5 percent to nearly 50 percent.

Minorities have increased their participation substantially in managerial and professional jobs, but not as dramatically as women. For example, blacks increased their share of managerial jobs from less than one percent in 1966 to just over five percent in 1992. Similarly, their share of professional jobs increased from less than two percent in 1966 to 5.5 percent in 1992. In 1966 blacks comprised about 6 percent of the United States population and in 1992 they comprised about 12 percent. In short, their share of

these jobs still does not correspond to their numbers in the larger population.

TABLE 2

Private Sector Employment Participation Rates of Whites, Minorities
and Women in Managerial and Professional Jobs, Selected Years.

Job Category	Year	Whites	Minorities		Women
			Blacks	Other	
Officials and Managers	1966	98.2	0.9	0.9	9.3
	1978	93.1	3.7	3.2	17.3
	1988	90.3	4.9	4.7	27.7
	1990	89.6	5.2	5.2	29.3
	1992	89.4	5.3	5.5	30.5
Professionals	1966	96.1	1.7	2.2	20.5
	1978	90.8	4.0	5.2	33.9
	1988	87.9	4.9	7.2	45.8
	1990	87.0	5.2	7.9	47.6
	1992	87.0	5.5	8.4	49.4

Source: Data from Indicators of Equal Employment Opportunity, U.S. Equal Employment Opportunity Commission, Government Printing Office, 1990, 1991, 1993.

Earnings/Income

Earnings are another important indicator of equal opportunity in the job market. In addition to the impact of a specific occupational category, earnings are due to many other factors, including education, work experience, and length of service. As such, earnings summarize the impact of these factors in determining the ability of individuals in any population group to find and hold higher paying jobs and to generally advance their

careers beyond entry-level jobs. Although the earnings gap between gender and racial groups still exists there has been an improvement in earnings for women and minorities. Changes in the earnings gap between whites and minorities is indicated by the data in Table 3. Earnings for whites increased about 43 percent between 1970 and 1993, and about 50 percent for blacks.

TABLE 3

Per Capita Money Income in 1993 Constant Dollars, by Race, 1970 - 1993

YEAR	WHITE	BLACK	OTHER
1970	11,735	6,539	(NA)
1975	13,041	7,642	7,320
1980	14,455	8,435	8,542
1985	15,673	9,186	8,881
1990	16,877	9,969	9,313
1993	16,800	9,863	8,830

Source: Data from Statistical Abstracts of the United States, U. S. Bureau of the Census, 1995.

Table 4 presents data for median household income according to race. White households still earn higher incomes than minority households. White household income increased by nearly four percent between 1970 and 1993, whereas black household income increased by nearly one percent during the same period. Overall, wages for both white and minority groups have remained stagnant. The slow progress in closing the income gap may be due to economic factors which affect efforts to reduce inequality.

TABLE 4

Median Household Income in 1993 Constant Dollars, by Race,
1970-1993.

YEAR	WHITE	BLACK	OTHER
1970	31,828	19,373	(NA)
1975	31,728	19,047	22,793
1980	32,805	18,899	23,968
1985	33,450	19,901	23,454
1990	34,529	20,648	33,599
1993	32,960	19,533	30,617

Source: Data from Statistical Abstracts of the United States, U.S.
Bureau of the Census, 1995.

Federal Employment

The last indicator of equal employment opportunity discussed is the number of women and minorities in the federal employment. Table 5 provides participation rates in federal employment, by population group. The participation rates of women are indicated within each population group. Among minorities, blacks had the highest participation rate between 1982 and 1991. Although the proportion of black males in federal employment declined from 7.2 percent in 1982 to 6.5 percent in 1991, it is still higher than that of other minorities. Black women increased their participation rate from 8.5 percent in 1982 to 10 percent in 1991. White women increased their share from 26.9 percent to 28.3 percent during the same period. The data indicates that federal employment is not representative of the population at large.

TABLE 5

Federal Government Employment Participation Rates by Population Group,
1982, 1988, 1990, and 1991.

Gender	Year	Whites	Minorities	
			Blacks	Other
Men	1982	49.3	7.2	5.3
Women		26.9	8.5	2.8
Men	1988	46.2	6.8	5.9
Women		27.7	9.6	3.8
Men	1990	45.4	6.6	6.1
Women		27.9	9.9	4.0
Men	1991	44.7	6.5	6.0
Women		28.3	10.0	4.3

Source: Data from Indicators of Equal Employment Opportunity-Status and Trends, Equal Employment Opportunity Commission, 1990, 1993.

Table 6 indicates the changes in participation rates of whites, women, and minorities according to job categories, between 1982 and 1991. Minorities have slightly increased their proportion at managerial and professional levels. For example, blacks increased their share from nearly 11 percent in 1982 to nearly 13 percent of all administrative positions in 1991, and from nearly 6 percent to nearly 8 percent of all professional jobs in the same period. This represents a roughly 2 percent increase in both categories. Women dramatically increased their proportion of administrative jobs from 31 percent in 1982 to nearly 40 percent in 1991, and from nearly 26 percent to nearly 34 percent of professional

jobs in the same period. This represents nearly nine percent increase in administrative positions and 10 percent increase in professional jobs.

TABLE 6

Federal Government Employment Participation Rates of Whites, Minorities and Women in Administrative and Professional Jobs, 1982, 1988, 1990, and 1991.

Job Category	Year	Whites	Minorities		Women
			Blacks	Other	
Administrators	1982	83.4	10.7	5.9	31.0
	1988	80.3	12.5	7.2	37.9
	1990	79.4	12.8	7.8	39.0
	1991	79.2	12.8	8.0	39.5
Professionals	1982	87.3	5.9	6.8	23.5
	1988	84.0	6.7	9.3	28.3
	1990	82.6	7.5	9.9	31.7
	1991	82.5	7.6	9.8	33.7

Source: Data from Indicators of Equal Employment Opportunity-Status and Trends, Equal Employment Opportunity Commission, 1990, 1993.

In 1991 blacks constituted about 12 percent of the United States population and held 12.8 percent of federal administrative positions, and 9.8 percent of professional jobs. One explanation of the slow progress of minorities during this period may be due to political conditions, particularly in the executive branch. For example, since 1978, the government was led for 12 years by Republican administrations that were not champions of affirmative action. This influenced the operations of the EEOC which enforces equal employment opportunity programs.

The evidence suggests that efforts to increase opportunities for women and minorities have produced positive results. Contrary to what critics say, opening opportunities to women and minorities did not come at the expense of white males. White males still hold distinct advantages with respect to the four indicators reviewed above. These policies, particularly affirmative action, have made a tremendous difference in the opportunities for women and minorities. Although there are limitations in certain areas, evidence suggests that women and minorities' employment opportunities have improved since the establishment of these policies.

The Philosophical Arguments Regarding the Equal Opportunity Principle

Efforts to increase equal employment opportunities through affirmative action have not been challenged only on the basis of legality and constitutionality, but also on philosophical and moral grounds. There are two arguments regarding the justification of affirmative action practices: distributive justice and compensatory justice. These revolve around the question whether it is groups or individuals that possess rights.

Distributive Justice

According to Aristotle (1925), the distributive justice argument is concerned with the distribution of rights, benefits, and burdens among the members of a society. Advocates of this position argue that the government has a positive duty, even at considerable social cost, to channel resources, including jobs, so as to increase the

opportunities and improve the condition of those who are at the bottom of the socioeconomic structure, and who unlikely to rise as things are presently arranged (Fullinwider 1980). They often argue that affirmative action is a means for promoting the redistribution of income (wealth) and other important benefits to the disadvantaged. Two of the most persuasive arguments in support of affirmative action have been made by Wasserstrom (1980) and Dworkin (1985). Wasserstrom justifies affirmative action as an instrumentality, that is, a means for altering the social realities. He argues that redistribution alone is enough to justify affirmative action since the present distribution is unjust. He extends the argument by holding that the redistribution alters the perception that positions of power and authority are held exclusively by white males to a perception that historically underrepresented groups can appropriately hold those positions (Wasserstrom 1980, 55-56).

Dworkin holds that the immediate goal of affirmative action is to increase the number of members of certain races in the professions, but that the long-term goal is to reduce the degree to which the society is a racially conscious society (Dworkin 1985, 294). He points out that as long as whites continue to hold the positions of power and prestige to the exclusion of other groups, racial divisions will continue to exist. Increasing the number of blacks and others in such positions will reduce the sense of frustration, injustice, and race-consciousness of blacks, who will begin to think of themselves as individuals who can succeed as well as whites on their talents.

Compensatory Justice

Compensatory justice is concerned with rectifying or compensating for particular wrongs or injustices against individuals by other individuals or their government (Aristotle 1925). The argument is that legal policies involving temporary preferences to help women and minorities will serve to restore equality of opportunity in a situation where it has long been absent (Fullinwider 1980, 115). The premise is that unless positive action is taken to overcome the effects of systematic discrimination, a benign neutrality in employment practices will tend to perpetuate the status quo indefinitely. Positive action is necessary to overcome systematic institutional discrimination. Activity is emphasized, as opposed to passivity, in accomplishing the desired neutrality in employment practices.

Advocates of affirmative action also use compensatory arguments when justifying the policy. Their rationale is that, indeed, Title VII is compensatory to the effect that it allows the government to require employers to take necessary action where there is evidence of past discrimination. On the other side critics argue that Title VII was intended to compensate those blacks and other minorities who have actually been victims of discrimination (Goldman 1979, Chapter 3). This leads us to the next area of controversy, that is, whether compensation is owed to the individual or group.

Group or Individual Compensation?

The equal opportunity principle requires a nondiscriminatory interpretation of the legal policies regarding individuals. Every person is guaranteed equal protection by the Constitution. The distributive approach is not highly controversial since it only asks for

the opening of opportunities to all individuals so that they can compete on an equal footing. Generally, this means protecting their individual rights in court. However, the extreme form of distributive justice which calls for taking from the rich and giving to the poor does create considerable controversy.

The principle of compensatory justice is more controversial because affirmative action involves compensating blacks or women as group for past acts of discrimination by whites or men as a group. To benefit, a particular individual need not be a victim of discrimination. Critics believe that recognizing group rights violates individual rights. They say if ever there is any compensation to be paid it should be to the identifiable individuals who are the real victims of discrimination. According to Dworkin (1985), there are three possible violations of rights that can result from group compensation: it can violate a person's right to be judged on merit; it can violate a person's right to be judged as an individual instead of as a member of a group; and it can violate a person's right not to be excluded from an opportunity simply because of race or gender. Dworkin argues in response that there is no acceptable definition of merit upon which to base a right. Additionally, there is no educational institution or employer who judges individuals solely on the basis of merit. With regard to a person's right to be judged as an individual, Dworkin argues that it is impossible for administrators or managers to judge each person solely on individual characteristics. Instead, some statistical generalizations are made in order to eliminate some members from the applicant pool. With regard to an individual's right not to be excluded from benefits on the basis of race, he notes that this right only exists when the exclusion is not based on race, but when an individual's race is the object

of prejudice or contempt. Thus, it is not a violation of an individual right to be denied a benefit on the basis of race as long as the denial is not because of racial prejudice or a belief that certain races are inferior to the other (Dworkin 1985).

In the United States advocates of affirmative action argue that giving preference to groups is required because compensation is owed to all blacks and other minorities, not only those who have been the victims of an identifiable acts of discrimination (Greene 1989). They point out that discrimination is systematic so any remedy must also be systematic (Boxill 1984). Those who justify affirmative action on compensatory grounds argue that the policy is intended to compensate groups that have been the victims of both specific acts of discrimination and the effects of past discrimination. They hold that because the original discrimination was not against individuals but against groups who continue to suffer from the effects of that discrimination, compensatory justice requires that compensation be made to the group. This is actually a response to the opponent's claim that only the actual victims of discrimination should benefit from affirmative action. Advocates claim that all blacks are the victims of discrimination since discrimination is not simply isolated acts against certain individuals but is a systematic process that operates against all blacks.

Boxill (1984) makes the argument that all blacks have been victims of discrimination. He argues that the harms of discrimination need not be economic or political but can be psychological. Even if a particular black person has not been directly discriminated against, that individual will experience a loss of self-confidence and self-respect when he or she witnesses discrimination against other black people. The loss of

self-confidence and self-respect can affect future opportunities by reducing the individual's expectations. Women and minorities may differ in the extent to which they have been harmed by discrimination, but that does not lead to the conclusion that some are less deserving of compensation than others (Boxill 1984, 153).

Boxill also addresses the issue of requiring white males to make reparations as well. The critics' argument is that affirmative action not only removes the advantages white males received under a discriminatory system, it also costs them the time and effort they have put into their education and career. Boxill states that affirmative action "does not require young white males to pay, at an additional cost to themselves, the price of their advantages ... but proposes instead to compensate the injured with goods (jobs) that no one has yet to establish a right to (Boxill 1984, 167)." He further points out that the policy does not violate a white male's right to fair competition for a job but, instead, affirmative action, by refusing to allow the white male a job because of an unfair advantage, actually makes the competition more fair.

There are strong arguments to support the idea of group compensation for the wrongs done in the past. As a basis for compensatory action, the argument is that people who have been classified by race for purposes of adverse discrimination in the past can be classified by race for purposes of preferential treatment in the future. Since women and minorities were discriminated against as groups, not individuals, they deserve compensation as such and the problem of identifying individuals who have been injured by discrimination is beside the point. As compensation is owed to the group, it is group claims that must be weighed, not individual ones.

Conclusion

Numerous legal routes exist for reversing discriminatory practices in the United States. This chapter reviewed some of these strategies. The Fourteenth Amendment to the Constitution, as well as the Civil Rights Act of 1964, serve as the primary legal routes to ending discrimination. Affirmative action, by contrast, provides a means of achieving a greater measure of substantive equality, thereby addressing the effects of past discrimination.

Data indicates dramatic improvements in the opportunities for women and minorities, especially after the 1960s. The nondiscrimination and affirmative action approaches no doubt contributed to these improvements. The Civil Rights Act of 1964 introduced a proactive approach to end discrimination and increase opportunities for the disadvantaged. It strengthened efforts to remove inequalities in the society and opened the doors to those who had been excluded in the past. Voluntary affirmative action supplemented the nondiscrimination approach through training, recruitment, and hiring programs that assisted women and minorities in moving up the socioeconomic ladder.

CHAPTER 4

POSITIVE DISCRIMINATION IN MALAYSIA

Malaysia is a multiethnic society in which equality among the ethnic groups has been of primary concern since the country's independence from Britain in 1957. The Malays, the indigenous people of Malaysia, were faced with historical socioeconomic disadvantages vis-a-vis the immigrant communities. According to Ramasamy (1993), the government instituted various measures to reconstruct the society on the principle of protective discrimination. State directed efforts to implant educational, commercial, and administrative traditions among the Malays assisted them to gradually overcome their disadvantages. Although there is a dispute as to whether Malay is the indigenous group, this study assumes this is the case. This chapter examines the efforts of the Malaysian governments to remove social inequalities, particularly the identification of race with economic function.

The Malaysian Context

According to Edward Phillips (1992), there are three components which, historically, acted in partnership to create modern Malaysia: the British colonial administration, the Malay aristocratic and bureaucratic elite, and the non-Malay business and labor sectors. These components have produced the tensions which exist today in modern Malaysian society. They also explain the existence of the constitutionally entrenched provisions on positive discrimination.

At the time of independence Malaysia was a plural society of minority communities, where no one racial group constituted an absolute majority. However, in the last thirty years there has been an increase in the Malay population to an estimated 58 percent of the total population in 1991 (Demaine 1996).

The traditional analysis of Malaysian society is that Malays control political power while the non-Malays, particularly the Chinese, wield economic power. Phillips (1992) argues that there is some debate regarding the accuracy of this analysis but there is no doubt that at the time of independence, the Malays were substantially more economically disadvantaged than their non-Malay counterparts. Phillips notes that the Chinese and Indians had contributed to, and were beneficiaries of, a prosperous colonial economy. They were concentrated in the urban and more developed parts of the country and had enjoyed a measure of control over trade, commerce and finance. They were, therefore, well-placed to take maximum advantage of the period of sustained growth both before and after independence. In contrast, the Malays were left on the land. The vast majority continued to live in the rural areas. While the Chinese and Indians were actively participating in a capitalist economy and being subjected to the modernizing influences which flowed from abroad, the Malays were engaged in a subsistence economy and otherwise restricted to the traditional and feudalistic constraints of a rural and agricultural existence (Phillips 1992).

With the approach of independence, the question of constitutional provisions for the Malays was raised to ensure and safeguard their rights to a dominant position by virtue of their indigenous status. The motive for the inclusion of these provisions was to

assist the Malays who were lagging behind in the modern educational and economic sectors so that they could be placed on an equal footing with the non-Malays. Such safeguards were felt imperative because the Malays feared that they might be overshadowed in their own country by the aggressive Chinese. They had political power but were far behind in terms of economic development. The government took formal action to remove inequalities by adopting policies that give special treatment to the Malays.

Constitutional Provisions

The Federal Constitution of Malaysia is a result of an informal bargain among the three main parties representing the Malays, Chinese, and Indians. When the 1957 Constitution was being drafted, a Commission was appointed to investigate the disadvantaged position of the Malays. The Commission found that in at least four areas the Malays were already receiving preferential treatment as a result of colonial policy (Phillips 1992). There were Malay reservations of land, quotas for admission to the public services, quotas in respects to permits or licenses for businesses, and in many forms of educational aid. What is so interesting about this development is the attitude of the non-Malays towards these measures. The Commission reported that there was little opposition to the continuance of that system for a time. The Commission recommended that the system of preferences should continue because the Malays would be at a serious disadvantage compared to other communities if it was suddenly withdrawn (Phillips 1992).

Ramasamy (1993) notes that Article 153 (1) of the Constitution recognized the special position of the Malays, and Article 153 (2) ensured that they receive special reservation in the public service, education, and in the grant of licenses for the operation of any trade or business. According to Phillips (1992), an attempt was also made to ensure that the legitimate interests of the non-Malays received some protection through the right to equality provisions in Article 8 of the Constitution. Two important conclusions can be drawn from this arrangement. First, the leaders of the three parties agreed that the Malays, as the indigenous race, should be recognized as *primus inter pares* and should assume major political control. Second, the non-Malays were promised that there would be no interference in their economic pursuits. Originally, the agreement was that the special provisions of Article 153 would remain in place for a period of fifteen years from the date of independence, but the course of events, in particular the race riots of 1969, led to the removal of the fifteen-year time limit and the Article is now a permanent feature of the Constitution (Phillips 1992).

The Pro-Malay Policy

The pro-Malay policy began before independence, especially in the civil service. The British colonizers established an administrative system and filled the higher echelons of the service by the British officers recruited from England, Ceylon, and India. Subordinate positions were open to Asians. Advancing economic, social, and administrative developments called for English-educated Asians to staff both the colonial administration and the expanding private sector (Ramasamy 1993). Initially, the British

officers brought along with them some of their technical and clerical subordinates from other countries. They hoped to gradually encourage the entry of natives into the government services as much as possible. Ramasamy points out that the prevailing attitudes of the Malays towards the English education smacked of indifference and suspicion. As a result, the British officers continued accepting expatriate staff into the bureaucracy. English education in the Malay states was in its infant stage and the Malays continued to send their children only to Malay schools. The British administration, however, required a knowledge of English as an indispensable qualification for all appointments (Ramasamy 1993, 218).

The British officers began to educate the Malays at the turn of the century. They undertook effective measures to educate them for government service by first educating in English the sons of rulers and chiefs. A Malay Administrative System was set up to recruit Malays who would eventually be absorbed into the Malayan Civil Service. Education policies made it possible for Malays to spend time in a Malay school and then enter special Malay classes in English schools. Official policy emphasized the recruitment of Malays even at the temporary cost of some efficiency. The "Malayanization" of the senior positions in the public service was intensified. New conditions for government employment were introduced, such as a local-born and locally-educated status, and a pass in Malay language. This, accompanied by the reduction in the recruitment of non-Malays, resulted in a gradual increase in the intake and promotion of Malays into all grades of the establishment (Ramasamy 1993).

The quota system was applied in the Malayan Civil Service (MCS) through the

ratio of four Malays to each non-Malay in the recruitment of officers for a number of key positions in the service (Ramasamy 1993). The quota system ensures that the MCS will always be dominated by Malays which is what the pro-Malay government wanted. Table 8 indicates that by 1970 Malays occupied more than 86 percent of the MCS. As the Malayization process took place, British dominance in the MCS was replaced by Malay dominance.

TABLE 7

Ethnic Composition of the Malaysian Civil Service, 1950-1970

Ethnic Group	1950	1957	1963	1970
Malays	31	124	250	603
Non-Malays	--	13	31	93
British	114	221	9	--
TOTAL	145	358	290	696

Source: Adapted from Mavis Puthuchery, *The Politics of Administration*. Oxford: Oxford University Press, 1978.

It is quite interesting to note that despite criticism of the quota system in some countries, the bureaucracy in Malaysia, created mainly by means of quotas, has been praised for its dedication, hard work, and loyalty (Puthuchery 1978). The country required a civil service that is competent and committed to the policy objectives of the government, and the MCS has been able to efficiently implement the policies and programs of the government which are distinctly partial towards Malays. The quota system assisted not the minority group in the society but the largest single group in the country which also happened to be the most economically disadvantaged.

Non-Malay criticism of the quota system is that it gives privileges to some citizens and denies these privileges to others, thereby depriving the country of some of the ablest leaders, and lowers the standards of administrative efficiency. It was considered by some to be unconstitutional and against the equality principle which recognizes equal treatment for all citizens irrespective of race, gender, color or religion. The Malay answer is that the quota system is a necessary short-term measure to achieve adequate Malay representation, while at the same time efforts will be made to increase the numbers of Malays in institutions of higher learning so that there would eventually be an adequate supply of Malays in the professional and technical services. As regards the lowering of standards, the Malay answer is that the main reason for this is to be found in the legacy of the colonial administration which concentrated on providing general education for Malays so that they tend to fill positions in administrative and semi-professional departments where university education was not regarded as essential in the past (Puthucheary 1978, 59).

The concept of representative bureaucracy was adopted in Malaysia to make the MCS reflect the racial composition of the society. By this the government meant increasing the number of Malays in the senior positions who are to be responsive to government directions. However, in the beginning shortage of Malay qualified personnel to fill up the technical and professional positions was a serious problem. But due to the quota system Malays have become the dominant group in the MCS while the Indians and Chinese dominate the private sector. Preferential policies in Malaysia continued after independence, and were accelerated and extended under the New Economic Policy to

give Malays special treatment in the areas of education, employment, and access to ownership of assets.

The New Economic Policy

Phillips (1992) argues that the 1969 riots in Malaysia opened the eyes of the government towards real change. Malays were frustrated with progress and the promise that they would secure economic interest from the Chinese and Indians. The National Operations Council (NOC) which ruled during that period concluded that the major cause of the riots was the widespread Malay economic discontent. While a small group of the ruling elite had benefited from the positive discrimination schemes, the overall economic position of the Malays, the majority of whom were concentrated in rural areas, was adverse. Despite undisputed Malay domination in politics and governmental decision-making, there was little tangible evidence of benefits. To address this problem, a New Economic Policy (NEP) was introduced in 1971, to be implemented over twenty years to 1990. It is part of the eight development plans launched since independence.

The NEP had two main goals: to eradicate poverty, irrespective of race, and to restructure the Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function (Phillips 1992; Pong 1993; Ramasamy 1993; Jayasankaran 1995; Demaine 1996). More specifically, the purpose was to enhance the economic standing of the Malays and other indigenous people. The realization of the government that poverty was caused by inequality in the distribution of income and of wealth, and that the status quo benefited the non-Malays

more than the Malays, was a powerful force behind the introduction of the NEP (Ramasamy 1993). Since independence, preferential policies have been implemented that give special treatment to Malays in education, employment, and access to ownership of assets. According to William Case (1993), the New Economic Policy sought specifically to bolster the Malay middle class. The government adopted economic growth strategies that enlarged the middle class, and undertook redistribution policies that made its composition more multiethnic. Jesudason (1989) notes that the most tangible benefit of the NEP was the creation of a larger Malay middle class and the shift of the Malay population from predominantly agricultural occupations to more diversified occupational activities. The expansion of the state enterprise sector, the vigorous promotion of Malay business, and the battery of regulations imposed on private firms to employ Malays in rough proportion to their population opened up a greater number of positions in the urban sector. The Chinese occupational structure remained more or less the same between 1970 and 1980 while there was mobility within the Malay group in the same period.

Despite its limitations the NEP has gone a long way towards fostering the national harmony that was its goal. Jayasankaran (1995) submits that as a sweeping affirmative action program, the policy was designed to propel the bumiputra (Malay and natives) into the economic mainstream. He adds that the chief aim of the policy was national unity, and it has brought profound social and economic change amid a remarkable absence of strife. He further argues that the policy worked because it was premised on growth; it was never about "robbing Peter to pay Paul." The goal was to benefit the bumiputras, but not at the expense of other races; and redistribution would take place in a

growing economy, which is what happened since 1970 (Jayasankaran 1995, 24).

Today, no single sector of the economy can be described as the exclusive domain of one ethnic group. The success of the policy has given the government the confidence to liberalize the system. Thus, when the NEP expired at the end of 1990, it was replaced by the National Development Policy (NDP), a far less restrictive approach that arguably puts creating wealth ahead of distributing it. The emphasis on racial economic restructuring in the NEP shifted towards overall economic growth and eradication of poverty under the NDP. Malay leaders, for the first time, are talking about a time when all races would be equal, under a united Malaysian race (Jayasankaran 1995).

The transition from a strictly race-conscious policy to one which attempt to give equal treatment to all citizens has been a great challenge for the government. Some members of the society, particularly Malays, believe the approach of the NEP is still needed. The government is also facing pressure from international groups to remove race-conscious measures. Malaysians agree that following the adoption of the NEP, Malaysia's economic growth was impressive.

Trends in Equal Opportunity Efforts

Efforts to increase opportunities for the Malays have gone a long way since 1970. The NEP produced major changes in the socioeconomic life of the Malays and the general public. For example, Demaine (1996) notes that over the period covered by the NEP, the level of poverty in Malaysia was reduced from 52 percent of all households in 1970 to 17 percent by 1990. Inequalities between the three ethnic groups have been

reduced, and with this, political stability has been sustained. This section looks at three areas under the focus of the NEP, that is, education policies, employment in the private sector, and ownership of assets.

Educational Policies after Independence

Education is one benefit which the NEP conferred on the Malays. The government used education to increase Malay opportunities in other areas. Two policies are relevant to the study of educational inequality in Malaysia: the National Education Policy, enacted by the Education Act of 1961; and the New Economic Policy, implemented in 1971. The National Education Policy is the foundation for a national education system using the language spoken by Malays (*Bahasa Malaysia*), as the medium of instruction in all secondary schools and all higher education institutions. The new education policy also provided universal free primary education for all Malaysians (Pong 1993, 247).

The preferential policy legitimated quotas for Malay students in higher education. Access to the country's universities is governed by an ethnic quota system heavily weighted in favor of Malays (Vatikiotis 1993, 15). The government reserved the majority of governmental scholarships for Malay students entering Malaysian universities. It is argued that at the time of independence, the Malays had attained fewer years of education than had the Chinese and the Indians, but in the 1970s the gap began to close (Pong 1993). The narrowing of the gap between Malays and the other two groups is seen as a product of increasing education for all which helped the previously disadvantaged

Malays.

According to Pong (1993), a number of studies have been conducted to evaluate the impact of education policies in Malaysia, particularly at the secondary level. One study found that the New Economic Policy raised Malays' educational aspirations. Students' expectations of university admission heightened their aspirations and this substantially increased their representation in the five Malaysian universities. Another study found that the overall educational attainment of the Malays increased significantly, relative to that of the Chinese and Indians. Pong concludes that Malaysia's preferential policies played a major role in eliminating ethnic differentials in educational attainment. The language policy, which enables Malay to use their home language helped them to improve their performance in school. Education has been the biggest success story of Malaysia's NEP. The NEP made access to education universal and created a Malay professional class. Government statistics, no longer broken down by ethnic group, show that 99 percent of Malaysians complete primary education, 82 percent lower secondary school, and 53 percent upper secondary school. A total of 7.6 percent now attend university, up from 2 percent in 1970 (Jayasankaran 1995).

Employment Policies

Employment in the public sector is discussed in the section on pro-Malay policy. The following section examines employment in the private sector. The English-educated Chinese and Indians benefited most in terms of employment opportunities both in the public and private sectors. To offset these imbalances the government introduced special

assistance programs in education for Malays as well as a quota system in employment both in the public and private sectors. As indicated in the preceding sections, Malays used to dominate the civil service whereas Chinese and Indians dominated private employment. This has changed over the last three decades. Through aggressive preferential policies, Malays have increased their share in all sectors of employment.

In line with the government's objective to achieve 30 percent Malay stake in the economy of the country, significant measures were taken to correct Malay under-representation in the scientific, technical, and managerial professions. The expansion of facilities and enrollment in local institutions of higher learning and the introduction of preparatory, pre-university, and matriculation courses brought more qualified Bumiputra professionals and semi-professionals to the field of science. Enrollment of Malays in institutions of higher learning increased. The Third Malaysia Plan stated as its objective that employment in the various sectors of the economy and employment at all occupational levels should reflect the racial composition of the country by 1990. Ramasamy (1993) notes that by 1985, when the Fifth Plan was implemented, the Malay share of employment in the professional and technical group was the highest with 61.7 percent in government service and their share in the corporate sector had increased to 17.8 percent. By 1988, they had achieved the subsequent target reflecting the racial composition for Malays who made up 55.6 percent in professional and technical employment. This is understandable when taking into account the establishment of five universities and other educational institutions with predominantly Malay enrollment. Various training programs were provided to augment the number of skilled and semi-

professional Malays in order to facilitate employment restructuring. Private companies intending to qualify for government contracts were forced to increase Malay representation in their workforces (Ramasamy 1995).

Ownership of Assets

The final area in which the New Economic Policy aimed to redress inequalities is in the ownership of wealth. As in the other two areas, the Malays were poorly represented in this area too. A few elites owned property but the majority still depended on the subsistence economy in rural areas. Regarding the government's objective to eliminate identification of race with economic function, the NEP identified a number of issues to be addressed in order to increase opportunities for the Malays. It was intended that, by 1990, 30 percent of commercial and industrial share capital would be in bumiputra ownership (the ownership of Malays and other indigenous communities, or public enterprises acting on their behalf). Private companies, mainly owned by Chinese and a few Indians, had to be part of the development process. Financial assistance was provided by the government for Malays to acquire businesses. New businesses were opened by the government and then sold to Malays. There was a substantial expansion of Malay participation in industry and commerce, achieved in part through the creation of public enterprises.

When the NDP was launched in June 1991 the target of 30 percent bumiputra ownership of the country's corporate assets was retained, but there was no deadline set for its achievement. The emphasis was set on the development of skills to promote the consolidation of bumiputra wealth (Demaine 1996). Table 10 indicates the trends in

ownership of the corporate sector by each ethnic group between 1970 and 1992.

TABLE 8

Ownership of Share Capital of Limited Companies, 1970-1992

Ethnic Group	1970	1982	1988	1990	1992
Malay	1.9	15.6	---	---	18.2
Chinese	22.5	33.4	32.6	---	38.0
Indians	1.0	0.9	1.2	1.1	1.0
Foreigners	60.7	---	---	---	32.0
Nominee Co.	---	5.0	8.1	---	10.8
Others	13.0	1.6	1.0	---	---

Source: Data obtained from Phillips (1992), Ramasamy (1993); Jayasankaran (1995).

The share of privately held national wealth in Chinese hands actually increased, from 22 percent to 38 percent between 1970 and 1992. The Malays also saw their stake grow from 2 percent to 18.2 percent. The gains came at the expense of foreign holdings, which declined from over 60 percent to 32 percent during the same period. Brown (1996) notes that the bumiputra's share of the corporate sector increased from 2.4 percent to 20.3 percent between 1970 and 1990. Chinese and Indian equity ownership increased from 32 percent to 46 percent over the same period, while that of foreigners was reduced from 63 percent to 25 percent. The proportion not accounted for was held by nominee companies not classified by race. Overall, Malays increased their share in ownership of wealth in less than three decades. As mentioned above, today no group can be identified with a particular economic function. All this occurred through strong government intervention in restructuring the economy to make sure all citizens benefited from this process.

Conclusion

The Malaysian approach to affirmative action is a three part strategy: educational assistance to Malays, economic assistance to Malay-owned businesses, and employment quotas. The Constitution recognizes the special position of the Malay and other indigenous groups, and grants them special privileges and protection. Through negotiation, the three ethnic groups agreed that Malays will have to be assisted until such time that they could stand on their own. The New Economic Policy played a major role in restructuring the economy and redistributing wealth to the disadvantaged.

The quota system was adopted as a short-term measure to increase Malay representation in all areas. In education, public institutions are required to reserve a certain number of positions for the Malays. Private employers intending to get government financial assistance are required to give special preference to Malays. The government used its power to make sure that Malays get special treatment in education, employment, and business ownership. Plans were implemented to eradicate poverty and eliminate identification of race with economic function. This enabled the government to introduce a new development plan in 1991.

CHAPTER 5

THE RELEVANCE OF A LEGISLATED MODEL FOR SOUTH AFRICA

Affirmative action and equal opportunity are on the agenda in South African political debates. The question is how to go forward in implementing these programs. Academics, politicians, and the public in general, realize the need to remedy the effects of past (and present) discrimination in order to create equal opportunities for all. There is a considerable amount of support for the notion that policies must be developed in order to redress the past wrongs and to achieve equality, but there is lack of agreement about how to do so. Scholars have gone out of their way to recommend the best strategies to achieve this goal, but thus far the government has not taken any formal steps to concretely address inequalities in the society, especially for black people. The purpose of this chapter is to provide some thoughts regarding the relevance of legislation designed to strengthen equal opportunity programs. The argument is that unless the government takes a leading position to redress inequalities, poverty and suffering will remain a way of life for many people among the black majority. The only way to change this is for the government to put into place a legal tool to remove present and future discrimination, as well as disadvantages caused by historical discrimination.

The Legacy of Apartheid

Historically, blacks have been denied equal opportunities in the society while a minority enjoyed all the privileges. Apartheid divided the population according to race,

ethnicity, wealth, education, employment, sport, and other socioeconomic factors.

Apartheid was entrenched in the constitution and laws of the "old" South Africa.

Legislation such as the Group Areas Act of 1966, Population Registration Act of 1950, and Job Reservation Act, ensured that one race dominated others. For more than three centuries blacks lived like sojourners in the land of their fathers. The homeland (or reserve) system divided black people according to ethnicity. Previous governments applied the principle of divide and rule to oppress the black majority. The point here is that previous South African governments always regarded black people as a race apart. They treated them not as so many individuals on the basis of their distinctive personal qualities but as members of a group. Therefore, policies which treat black people as a group in order to eliminate inequality should be put in place by the government. Simply abolishing the legal apartheid system will not remedy the effects of racial discrimination in the country.

New Constitutional Dispensation

An Interim Constitution is in operation in South Africa. The present government is writing a new constitution to be effective in 1999. The basic principles will remain the same except for a few changes and additions. Among the constitutional principles is the provision that the legal system shall ensure the equality of all before the law and an equitable legal process, and this includes programs or activities that have as their object the amelioration of conditions of the disadvantaged including those disadvantaged on grounds of race, color or gender (New Constitutional Guidelines 1994).

Affirmative action, constitutionally provided, gives ground for such help by way of exception to the principle of equal treatment (Ncholo 1992). The Constitution guarantees equality to all citizens, as well as efforts for the advancement of persons who in the past had been disadvantaged by discrimination. The problem is that the equal opportunity principle of the Constitution alone offers a passive approach and it might perpetuate the present position in the society. In other words, whites may become richer, while blacks remain poor. Constitutional provisions are necessary to provide for the special position of the disadvantaged people until they can compete on an equal footing with others. Efforts to really redress inequalities will have to be enforced by legislation which will open the doors to people disadvantaged by apartheid. A bill of rights is necessary but should not hinder government policies to promote equal opportunity. This requires a judicial system that is responsive to the directions of the government, and promotes compelling public interests and justice for all.

Preferential Treatment

Preferential treatment is not a new concept in South Africa, but this time it will be applied to promote the interests of the majority. When there are inequalities resulting from past harm and injustice, talking about racial integration and reconciliation is just a waste of time. Distributive measures that divide the society's benefits and burdens equally to all individual members promote equality of opportunity. However, in a society characterized by inequalities, compensatory measures are necessary to achieve social justice (Aristotle 1925). Some scholars argue that compensation is due to individuals who

can demonstrate that they have been injured by discrimination (Goldman 1979). In South Africa there is, at least to a lesser degree, a consensus that black people are the victims of discrimination and therefore deserve compensation. The problem is how to practically achieve this goal. By passing legislation the government will guarantee special treatment to all victims of discrimination identified by that legislation. It will also specify appropriate action that needs to be taken to help those people. The goal of affirmative action is not to reject the spirit of integration in favor of race-consciousness but to bring black people into the mainstream of national life. According to Gwyneth Pitt (1992), protective measures can be either exclusionary or inclusionary. Measures taken to bring disadvantaged groups into the mainstream of society and industry are acceptable, whereas discriminatory practices to keep them out are not. Recognition of this difference is unlikely to cause problems in practice. Less advanced people need special measures to secure their advancement, and such measures are not to be considered discriminatory even if those already advanced are treated unequally. It is not the fact of differentiation that counts, but its purpose or effects.

Equality of Access v. Equality of Results

One argument against legislating affirmative action and equal opportunity is that these policies do not just level the field but carry the victims of discrimination into positions they don not deserve. Clive Thompson (1993) argues that policies which dictates results, such as a demographic quota systems, will be unworkable and counter-productive. My question is how is the government or society going to measure the

success of these policies if there are no standards? How can employers be held accountable if there is no standard to measure the results? Black people do not want just equality as a right and theory but equality as a fact and equality as result. If there was no discrimination in the past and all individuals have always been judged on the basis of their individual qualities, opening equal access would not be a problem. But access cannot be equal if some members of the society are not prepared enough for the race. The results will definitely be skewed toward the group which for years has been preparing for competition. Thus, black people will have to start the race a little bit forward in order to catch up for lack of preparation. Opening equal access will not change the present situation. Legislation is needed to ensure that action is taken to provide necessary opportunities to black people and to move them up the ladder.

The Courts and Individual Rights

It will be a big mistake if the struggle against racial discrimination in South Africa has to be based on appeals to individual rights alone. The courts in the United States have always found a way not to impede government efforts to promote equal opportunities. In most cases judges have argued that action to advance members of disadvantaged groups can be constitutional. All this is possible because of the Civil Rights Act of 1964, which among its provisions, is the need to order employers to take appropriate affirmative action to redress imbalances if they have violated the Act. Voluntary programs that are race- or gender-conscious have been upheld as well. In South Africa, the Supreme Court in particular has to develop criteria to judge programs that are aimed at increasing

opportunities for people denied opportunities in the past. Compelling public interests should take precedence over individual rights until a normal society is achieved. The courts must be sympathetic to the cause of the government.

Identifying Target Groups or Individuals?

The problem of identifying the victims of discrimination will have to be addressed by legislation. The Constitution does not specifically identify the beneficiaries of equal opportunity programs. Its provisions are extremely vague. Critics of affirmative action policies often raise the question that these policies cause an injustice to individuals by pushing for group compensation. But, in South Africa black people have always been treated as a group, not individuals. As a group, they were told where to live, work, or play. All this was made possible by the laws passed by the previous governments. To remove the effects of these discriminatory practices, legislation is needed. Group-oriented discrimination can only be removed by group-oriented affirmative action. Legislation should recognize the position of black people as a group, not individuals. Because black people were discriminated against on the basis of their race, to offset their disadvantages requires race-conscious measures. An individualistic approach may only perpetuate the status quo. Legislation should provide for individual remedies in court, but this should not be used to block government efforts to remove inequalities.

Government Intervention

Bikhu Parekh (1992: 263) identified three reasons why the state should take

action to assist the disadvantaged. First, the state is the sole available instrument of collective action. Unlike individual efforts to tackle the extensive and tenacious causes of human suffering, the government can reach and undertake activities individual efforts cannot. Commitment to help the disadvantaged remains an important rhetoric unless translated into a collective political commitment. The second source of duty to help the disadvantaged has to do with the moral interests of all. The argument is that the fundamental moral and spiritual interests of all men and women coincide. According to Parekh, "to degrade and dehumanize others, to damage their pride, self-respect and capacity for growth, is both to deny ourselves the benefits of their possible contributions and to increase the collective moral, psychological and financial cost of-repairing the damage they are likely to do to themselves and to others. . . . Either we all grow together or none will. It is not possible for one group fully to develop its moral, intellectual, emotional and other distinctly human capacities at the expense of another (Parekh 1992, 264)." The third source of duty arises when their predicament is a result of the past actions and practices of the privileged group.

As regards the South African situation, the third reason is the most compelling. The bottom line is that the current condition of black people is largely a result of what the whites did to them. Previous governments enforced racial discrimination against black people. Therefore, the government has a special responsibility and duty not only to end the harm but also to heal the wounds and help them become whole human beings. Opposition to school desegregation proves that voluntary affirmative action will not work in South Africa because of the attitudes of white authorities, racial stereotypes and

educational inequalities. Meritocracy will cripple the efforts for black advancement. In Malaysia conditions began to improve after the government formally adopted policies to assist the marginalized people.

Why Legislation?

Studies indicate that in order to redress racial inequality due to past discriminatory practices and policies a formal approach is necessary (e.g. the United States and Malaysia). The government should play a leading role, particularly in inducing private employers to take affirmative action seriously. Affirmative action not only aims at preventing discrimination in the present or the future, but also at redressing the injustices of past discrimination. The society cannot rely on the good faith of white employers who are used to being privileged. They must be held to certain standards, and they have to be made accountable for the results. Without legislative guidelines, this is not possible. Legislation will induce them to comply with the stated purposes of the government. Evidence in the United States and Malaysia show that after formal government intervention, through legislation or declared policy, opportunities increased substantially for the disadvantaged groups.

Conclusion

The relevance of a legislated model for South Africa emanates from two arguments. First, because racial discrimination was entrenched in the laws of the country, it will take legislation to successfully redress inequalities due to past discrimination.

Second, the Constitution does not provide a mechanism to formally deal with the effects of past discrimination. It only prohibits present and future discrimination. Any black advancement program must have teeth, teeth that are clearly outlined in law.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Inequalities between ethnic or racial groups in many countries sometimes lead to the adoption of policies which are race-conscious, especially when such inequalities result from the legacy of past discrimination. Equality of opportunity is an ideal state in many democratic societies. This study provided an analysis of the need for government intervention in combating discrimination and increasing opportunities for the disadvantaged in South Africa. It draws on the experience of two countries: the United States and Malaysia.

United States

In the United States, the federal government relies upon two approaches. First, the nondiscrimination approach relies upon the courts to remedy individual acts of discrimination. The Fourteenth Amendment guarantees equal protection under the law. Title VII of the Civil Rights Act of 1964, prohibits discrimination in employment on the basis of race, gender, color and national origin. However, the nondiscrimination approach represents a relatively passive approach to equal opportunity. Other than providing judicial remedies to individuals the approach takes no steps to assist members of disadvantaged groups as a whole.

The second approach, which is more active, is known as affirmative action. It is because of the aggregate effects of past discriminatory policies and practices that the

government adopted this strategy. Affirmative action seeks to compensate for past harm and to promote greater equality of opportunity. It takes further steps to make sure that the victims of past or present discrimination are brought to the same level of opportunity with others. These include special recruitment programs, special training programs, adverse impact analysis, workforce analysis requiring federal contractors and subcontractors to establish hiring goals, and mandated quotas. It also allows other employers to maintain voluntary plans which take gender or race into account when making hiring decisions.

Evidence shows that the nondiscrimination approach is not a sufficient mechanism to increase opportunities for the victims of discrimination. It is good as a tool to protect the equal opportunity principle but a more active approach is required to remove injustices and redress social inequalities. After the abolition of slavery, discrimination against black people continued. Little was changed by the equal protection clause. Instead, the equal opportunity principle perpetuated the status quo. It was discovered that seemingly neutral personnel policies such as seniority, aptitude and personnel tests, high school diploma requirements, and college admission tests could perpetuate the effects of past discrimination. This led to development of the affirmative action concept.

The Civil Rights Act of 1964, as amended, brought a new era in the history of the United States. Section 706 (g) of Title VII enables the courts to order companies to take appropriate affirmative action measures, not only to prevent further discrimination, but to assist members of the disadvantaged groups to obtain jobs and promotional opportunities. Executive Order 11246, enforced by the Federal Contracts Compliance Office, requires

government contractors to set hiring goals and make a good effort to achieve them. The Supreme Court also plays a major role in correcting injustices by upholding voluntary affirmative action programs that allow employers to consider gender or race when making employment decisions.

Malaysia

Malaysia is perhaps the closest comparator for South Africa in the sense that statutory affirmative action policies have been adopted in favor of the majority. The Malaysian government uses political power to increase opportunities for the disadvantaged people. The Constitution recognizes the special position of the Malay and other indigenous groups, and provides for positive discrimination to assist the Malays. Legislation was passed to restructure the colonially established system of education. This legislation legitimized group preferential treatment of the Malays until such time that they could stand on their own. The government's argument was that a system of competitive individualism based on merit is a system that favors those who are already more advanced and more powerful, for they can serve their interests more effectively than the less advanced and weaker.

The NEP which attached economic growth to efforts to increase opportunities was a great success. Based on aggressive education policies and economic plans, the NEP moved the Malay from the conditions of poverty to prosperity. Of course, not everybody can claim to have benefited from this policy but a significant number did and the new National Development Plan is a continuation of that process. Evidence indicates that

today a significant majority has education and jobs, and own businesses, something they did not have in 1970 when the NEP was established. The policy enabled the government to redistribute wealth to the poor and the disadvantaged.

The Malaysian experience also shows that state intervention can successfully remove inequalities in the society without punishing the privileged members. The economic position of the Chinese and Indians remains more or less the same, even with aggressive efforts to increase opportunities for Malays.

In Malaysia concepts such as individual rights, which sometimes block government initiatives to correct past wrongs, do not exist. The role of the courts is very limited. In fact, they are not even mentioned in most publications on racial discrimination. This does not mean there is no law in Malaysia, but with regard to racial matters the government plays a dominant role.

Lessons for South Africa

There are two important lessons to be learnt by South Africa from these two cases. First, the nondiscrimination approach alone will not help the disadvantaged majority of the people of South Africa. Instead, *laissez-faire* will perpetuate the status quo. Second, achieving substantive equality requires an interventionist approach, preferably through legislation that establishes strong affirmative action mechanisms.

Recommendations

Analysis of the United States and Malaysia reveals the three basic approaches to achieving substantive equality: 1) a nondiscrimination approach which prohibits discrimination and allows individuals to pursue judicial remedies through the courts, 2) an affirmative action strategy that requires government contractors to pursue hiring goals to achieve representative workforces and allows other employers to do so voluntarily, and 3) a multi-factor approach that provides educational assistance to the disadvantaged, direct economic assistance to businesses owned by disadvantaged groups, and hiring quotas in public employment and private companies intending to qualify as government tenders.

The study recommends that the government of South Africa adopt a combination of these strategies. The nondiscrimination approach will enable individual victims of discrimination to seek remedies in court by suing those employers who intentionally engage in discriminatory practices. Legislation should empower the courts to order employers to take appropriate affirmative action to correct those injustices. Second, the affirmative action approach will require employers to establish hiring goals and timetables for achieving representative workforces. This may be voluntary but legislation should provide for measures to be taken against employers who do not comply with the objectives of the government. Finally, preferential treatment in education, employment, and assistance to businesses should be given to black people until they can compete on their own without preferential treatment.

Specific recommendations include the following:

1. Parliament should enact **Legislation** requiring employers to commit themselves to the goal of equal employment opportunity by establishing affirmative action programs to recruit members of the disadvantaged group.
2. A **Commission** should be established to enforce this legislation. This commission should be empowered to investigate and prosecute employers who engage in discriminatory practices and those who refuse to apply affirmative action in their employment policies
3. Legislation should empower the **Courts** to impose penalties on those employers who continue engaging in the acts of discrimination.

The South African government should play a leading role in achieving substantive equality for black people. The Interim Constitution does not provide a mechanism to end discrimination and help its victims. The government should go beyond just prohibiting discrimination, by taking measures to assist the victims of discrimination. A mechanism should be developed to make sure that those who suffer because of historical discrimination receive sufficient help in order to be able to compete with the rest of the citizens on an equal footing. South Africa can learn from experiences of other nations, and the United States and Malaysia provide important lessons. Events of the 1960s, in both countries, illustrate the consequences of the disadvantaged people's frustration with change. In the United States, after many years of slavery black people thought they had finally won the war against racial discrimination when the Fourteenth Amendment was

passed in 1868. But it would be almost another century before they could see real change. The riots of the 1960s, led by the Civil Rights Movement, culminated in the passage of the Civil Rights Act of 1964, which opened great opportunities for blacks and other minorities.

In Malaysia, the race riots of 1969 resulted from Malay people's lack of progress even when they had won political power. A small elite benefited from the new order while a majority was suffering. These events forced the government to develop new policies that directly and specifically addressed inequalities among the Malays. The NEP was an overall strategy to fight and eliminate inequality among the different ethnic groups, particularly Malays. With the adoption of the National Development Plan (NDP) in 1991, the government hope withdrew from economic planning and ownership, partly privatizing and gradually giving way to market incentives.

The important thing is that the South African government should recognize the reality of the situation, that is, it is the majority against whom discrimination has been aimed. Therefore, there is an urgent need to address inequalities in order to have peace and political stability.

REFERENCES

- Aristotle. *The Nicomachean Ethics* translated by David Ross. New York: Oxford University Press, 1925 (1980).
- Boxill, B. *Blacks and Social Justice*. New Jersey: Rowman and Allenhold, 1984.
- Brown, Ian. "Malaysia" *The Far East and Australasia*. London: Europa, 1996.
- Cooper, Mary H. "Racial Quotas" *CQ Researcher*, May 17, 1991.
- Case, William. "Semi-Democracy in Malaysia: Withstanding the Pressures for Regime Change" *Pacific Affairs* 66, no. 2 (Summer 1993).
- _____. "Malaysia in 1992: Sharp Politics, Fast Growth, and a New Regional Role" *Asian Survey* 33, no. 2 (February 1993).
- _____. "Malaysia in 1993: Accelerating Trends and Mild Resistance" *Asian Survey* 34, no.2 (February 1994).
- Demaine, Harvey. "Malaysia" *The Far East and Australasia*. London: Europa, 1996.
- Economist*. January 15th, 1994.
- Edmonds, David. "Race against positive discrimination" *New Statesman and Society*. 15 April, 1994.
- Fiss, Owen M. as quoted in Michel Rosenfeld. *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry*. Ne Haven: Yale University Press, 1991.
- _____. as quoted in Vernon van Dyke. *Human Rights, Ethnicity and Discrimination*. Westport, Connecticut: Greenwood Press, 1985.
- Fullinwider, R. K. *The Reverse Discrimination Controversy*. New Jersey: Rowman and Littlefield, 1980.
- Glazer, Nathan. *Affirmative Discrimination: Ethnic Inequality and Public Policy*. New York: Basic Books, 1975.
- Goldman, A. H. *Justice and Reverse Discrimination*. Princeton: Princeton University Press, 1979.

- Greene, K. W. *Affirmative Action and the Principles of Justice*. New York: Greenwood, 1989.
- Hepple, B. A. *South Africa: A Political and Economic History*. New York: F. A. Praeger, 1966.
- Interim Constitution of the Republic of South Africa, 1993.
- Israel, David and David Ankey. "Happy Birthday Affirmative Action" *HR Magazine*, Sept., 1994.
- Jayasankaran, S. "Balancing Act" *Far Eastern Economic Review*. December 21, 1995.
- _____. "A Degree of Success: Education overhaul creates Malay Professional class" *Far Eastern Economic Review*. December 21, 1995.
- Jesudason, James V. *Ethnicity and the Economy: The State, Chinese Business, and Multinationals in Malaysia*. New York: Oxford University Press, 1989.
- Lane, David. *New Equals*, April 1980.
- Masondo, Siphosiso. "Affirmative Action and Black Advancement: A Black Manager's Perspective," paper delivered at the *Conference on Affirmative Action and Black Advancement in South Africa*. Cape Town, 29 April 1992.
- Ncholu, P. "Equality and Affirmative Action in Constitution-making: The Southern African Case" in B. A. Hepple (ed) *Discrimination: The Limits of the Law*. London: Mansell, 1992.
- Parekh, Bikhu. "A Case for Positive Discrimination" in B. A. Hepple (ed) *Discrimination: The Limits of the Law*. London: Mansell, 1992.
- Phillips, E. "Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom" in B. A. Hepple (ed) *Discrimination: The Limits of the Law*. London: Mansell, 1992.
- Pitt, Gwyneth. "Can Reverse Discrimination Be Justified?" in B. A. Hepple *Discrimination: The Limits of the Law*. London: Mansell, 1992.
- Pong, Suet-ling. "Preferential Policies and Secondary School Attainment in Peninsular Malaysia" *Sociology of Education* 66 (October 1993).
- Puthucherry, Mavis. *The Politics of Administration: The Malaysian Experience*. Oxford:

Oxford University Press, 1978.

Ramasamy, Rajakrishnan. "Racial Inequality and Social Reconstruction in Malaysia" *Journal of Asian and African Studies* 28, no. 3-4 (1993).

Schwartz, Bernard. *Statutory History of the United States: Civil Rights*. Volume 1. New York: Chelsea House, 1970.

Sowell, Thomas. "Weber and Bakke, and the presupposition of Affirmative Action" in W. E. Block and M. A. Walker (co-editors) *Discrimination, Affirmative action, and Equal Opportunity*. Vancouver, British Columbia: The Fraser Institute, 1982.

Thompson, C. "Legislating Affirmative Action: Employment Equity and Lessons from Developed and Developing Countries" in Charl Adams (ed) *Affirmative Action in Democratic South Africa*. Johannesburg: Rustica Press, 1993.

Tompkins, Jonathan. *Human Resource Management in Government*. New York: Harper Collins College Publishers, 1995.

U.S. Bureau of the Census. *Statistical Abstracts of the United States*, 1993.

U.S. Bureau of the Census. *Statistical Abstracts of the United States*, 1995.

U.S. Equal Employment Opportunity Commission. *Indicators of Equal Employment Opportunity: Status and Trends*, 1993.

U.S. Equal Employment Opportunity Commission. *Indicators of Equal Employment Opportunity: Status and Trends*, 1991.

U.S. Equal Employment Opportunity Commission. *Indicators of Equal Employment Opportunity: Status and Trends*, 1990.

Van Dyke, Vernon. *Human Rights, Ethnicity, and Discrimination*. Westport, Connecticut: Greenwood Publishers, 1985.

Vatikiotis, Michael. "Staying On: Malaysians combine study at home and abroad" *Far Eastern Economic Review*, June 10, 1993.

Wasserstrom, R. *Philosophy and Social Issues: Five Studies*. Notre Dame: University of Notre Dame Press, 1980.