

To D.I.P.

MEHQ-106-1-2

From. Albie Sachs 222626

No. of pages. 22. (including this one)

Dear DIP,

At last my piece on Affirmative Action. I hope it's not too long. Perhaps you want to edit it? go ahead in consultation with me.

You could intro. it as follows:

"We asked Professor Albie Sachs to share with us some of his ideas on affirmative action."

Albie.

21/12/93.

AFFIRMATIVE ACTION AND THE NEW CONSTITUTION

1. WHY WE NEED AFFIRMATIVE ACTION

INTRODUCTION

There's an old saying: one person's meat is another person's poison. So it is with affirmative action. For millions of South Africans affirmative action means advance to a better life, a long overdue chance to come into their own and start enjoying the good things the country has to offer. For others, particularly those leading comfortable lives today, it signifies a new form of discrimination and injustice, a vengeful form of juggling around with race quotas so as to threaten their livelihoods and security.

We see this as a false choice. If well handled, affirmative action will help bind the nation together and produce benefits for everyone. If badly managed, it will simply redistribute resentment, damage the economy and destroy social peace. If not undertaken at all, the country will remain backward and divided at its heart.

The question is not whether or not to have affirmative action. Have it we must, and in a deep and meaningful way. The issue is how best to handle affirmative action, how to ensure that it is conducted in a principled and effective manner.

We reject the idea of anything in the new democratic South Africa being meat for some and poison for others. That was what apartheid was all about. Our whole approach is that what is good for the majority can and should be good for the minority as well, depending on the involvement of both in the process. The whole country - rich and poor, black and white - wants peace, prosperity, progress and justice. Our country is rich enough to ensure not meat for some, poison for others, but fair nourishment for all.

We in the ANC were the ones who put affirmative action on the agenda, and we have to give some indications about what it means. The time was the middle 1980's, the context preparation for change. One of the toughest questions facing the Constitution Committee, formed under the leadership of Oliver Tambo, was how to deal with the enormous inequalities created by apartheid.

Two options were being urged upon us. The one was to adopt a Constitution and Bill of Rights that would scrap apartheid

laws, but establish the constitution as a chinese wall against any attempt to alter the social and economic status quo.

The other and opposite option was simply to require the new government to confiscate the spoils of apartheid and share them out amongst those who had been dispossessed. While this approach had the immediate attraction of correcting historic injustice, it could not be realistically advanced in the context of an anticipated negotiated transition to democracy. Furthermore, its adoption would have led to capital flight, the destruction of the economy and international isolation just at the time when the people would most be wishing to enjoy the benefits of their age-old struggle.

Our experience of living through and supporting the radical transformations in Angola and Mozambique had taught us that sometimes the processes that brought the greatest rewards to the poor and the oppressed in the short term, caused them the greatest hardship in the long run. Real victory for the people meant being able to deliver - not just promises and abstractions, but houses, jobs, electricity, water, schools and clinics, real freedom and real choices in the fullest sense. We wanted democracy to be associated with a better life and peace, not with poorer living standards and civil war.

The solution we chose was that of affirmative action. The phrase had no Cold War associations. It was sufficiently open to take on a specific South African content and meaning, and yet concrete enough to have an unmistakable thrust in favour of the oppressed.

Whatever form might emerge or whatever definition be given, everyone knew what the essence of affirmative action was: it meant taking special measures to ensure that black people and women and other groups who had been unfairly discriminated against in the past, would have real chances in life. In particular, it signified a concerted effort to enable them to overcome the obstacles that had been put in their way, to develop their capacities to the full and receive appropriate reward for their efforts.

Indeed, one of the lessons we had learned was not to start with rigid definitions and then attempt to force reality into them. It was far more productive to build up principled and functional processes and institutions to deal with concrete situations and then let the analysts tell us afterwards what model we had come up with.

The most direct and vocal criticism of affirmative action came from the ranks of those who had benefitted from privilege in the past. In essence, they claimed that affirmative action was both unjust because it denied the merit principle, and unworkable because it involved undue state interference in the economy.

It is not easy to deal with the merit principle on its merits. We have fought our whole lives against looking at people in terms of race and gender and against those who refused to look at us all just as human beings. The non-racial, non-sexist democracy that we believe in and for which so many gave so much, is based on the fundamental idea of equal citizenship and non-discrimination. We long for the day when we can all regard ourselves simply as South Africans, celebrating even glorying in the diversity of our cultures, backgrounds and life experiences, but doing so on the basis of total colour- and gender- blindedness.

Alas, we are a long way from there. Fly over any city, and you will see who lives where and who owns what. Indeed, look at your fellow passengers, and you would think you were flying in Norway [except there would be more black passengers on a Norwegian plane]. Shop anywhere, have your teeth attended to, go to a cinema, be born, die - the inequality in life circumstances is virtually total.

Your chances of getting on and enjoying the good things of life depend least on your talents, energies and skills, and most on which Group Area you were born in [and which genitalia you were born with]. How you fare later in life is overwhelmingly fixed not by your determination or abilities, but by whether your parents are called Macarthy or van der Merwe or Molefe or Mtolo or Mendel or Marney or Moosa.

The inequality in South Africa did not just come to pass. It was the result of generations of deliberate state action. That is what the Land Act, the pass laws, race classification, job reservation and Group Areas were all about. One of my first cases as a young advocate was defending Chris Hani's father on a charge that 'being a native' he did trade unlawfully. The exhibits in court were candles and shoe polish, the merchandise of the poor which he had allegedly tried to sell from a barrow in Langa Location. The prosecution had to prove that he 'was a native.'

All the central business districts of every town and village are today in white hands because blacks were driven out by

racist statutes. White farmers got credit, loans and subsidies on a vast scale, while blacks got nothing. Black schooling was segregated and inferior. Jobs were reserved by law and practice for whites only.

The objective now is not to keep these odious statutes alive but reverse perpetrator and target. We do not wish to replace one form of injustice with another. Our task, rather, is to deal with the divisions and inequalities created by the past, in a new, effective and principled way. It is not only apartheid we reject, but the methods of apartheid. Previously, governmental intervention was dictatorial and intended to divide the nation, while the measures we contemplate will be democratic and participatory in nature and be undertaken with a view to uniting the nation.

Affirmative action is a matter of doing right, but it is more than that, it is a question of survival. If our country and every region and city in it is divided into manifestly rich and flagrantly poor areas, there will never be social peace. Without opening up the economy and making entrepreneurial activity more representative, the production of wealth in our country will take place on a precariously narrow base.

We have to free the capacities of millions of people who have never had a real chance to show their mettle. Widening the pool of candidates for any post should lead to greater competence, not less.

A further consideration, backed up by international experience, is that diversity in such key areas as education, law, health and the civil service, is a value in itself. The admixture of life experiences, the organic cultural and linguistic links with all communities and the consequent sense of representivity, enrich and improve the functioning of the bodies concerned.

We long for a truly South African civil service that looks like South Africa, speaks all our languages, has natural contact with all our citizens. We want an army and police service that draw their best people from all our communities, so that everyone feels this is 'our' service intended to protect all of us, not 'their' institutions designed to protect them.

For provisions in the new Constitution that deal with these matters, see the Appendix generally.

11. AFFIRMATIVE ACTION IN OTHER COUNTRIES

There is no uniform model of affirmative action. In the USA, the issue is highly controversial. It proceeds from the majority to a minority, has no secure constitutional foundation, and gets caught up in electoral politics. We certainly do not need to import all the complicated arguments specific to the American situation into our debate. What most commentators seem to accept is that although affirmative action in the USA has undoubtedly helped a black professional class to grow and enabled women to advance their professional careers, it has not significantly improved the lives of the mass of poor black persons, nor in any major way counteracted sexual oppression.

In India, affirmative action has certainly helped members of the untouchable and other oppressed groups. Yet it has been criticised for giving people a stake in identifying themselves as members of a group simply because it gives them material advantages, in this case, quota access to universities and state employment.

A similar point has been made about affirmative action in Malaysia, where it has helped in a significant and visible way to open up the economy and the civil service to the majority Malay population, but at the price of encouraging communal rather than national consciousness.

11.1. AFFIRMATIVE ACTION AS AN ASPECT OF GOOD GOVERNMENT

In South Africa, we are dealing with a majority, not a minority, that has been subjected not just to prejudice but to state-organised discrimination. Affirmative action comes on to the scene at the same time as the vote. It forms part of the new citizenship. Parliamentary democracy, the rule of law and the application of the principles of good government will all act affirmatively to improve the lives of the formerly disenfranchised majority.

There is a vast amount of injustice that is automatically corrected simply by the application of normal and non-controversial principles of good government. Indeed, this is the main form that affirmative action will take. This will be the guarantee that affirmative action is grounded in the general advance of the poor and oppressed, and does not become a mechanism simply for enabling a new elite to emerge. How tragic it would be if after generations of struggle the ANC succeeded in doing what apartheid had never accomplished: legitimising inequality.

Equal Protection

In its broadest aspect, then, affirmative action is completely non-racial and non-sexist. It means applying the universally accepted principle of equal protection to all citizens.

At the moment, every white schoolchild gets three times as much spent on his or her education as every black pupil. I do not know if white kids are three times more stupid than black children, but, having been one myself, I think I was the beneficiary of privilege rather than the recipient of remedial treatment. The same applies to just about every other form of governmental spending, whether on health or street lights or rubbish collection or farm support.

It is the haves rather than the have-nots who have been the main beneficiaries of government expenditure. This is morally, socially and constitutionally quite unacceptable. The principle of equal protection in relation to the disbursement of funds means that in future the delivery of services and access to utilities will be done on a per person and not on a per race basis.

Some things will be free for everyone, some things we will all have to pay for equally. Possibly we will have a means test which would ensure that certain forms of public spending were targetted at those who most needed it. Otherwise, if the rich want a little more, they can pay a little extra.

The basic entitlements to nutrition, education, health, shelter and recreation must be equal for all. That is what governments all over the world regard as one of their major responsibilities. Most post World War Two constitutions, including those of Germany, Japan and Italy, and nearly all post-dictatorship constitutions, including those of Portugal and Brazil, make the provision of equal living conditions for all citizens not simply a political but a constitutional duty.

Choice is extended, not reduced, when everyone is guaranteed at least the minimum decencies of life. Affirmative action therefore gives real autonomy to millions who otherwise would be compelled to spend all their energies and thought on survival.

See Appendix sections on Equality and on Local Government

Regional Equalisation

Good government also requires attending to the huge inequalities that exist between one region and another. The migrant labour system was not a result of poverty: poverty was created so as to produce the migrant labour system. Indigenous peasant agriculture was deliberately undermined. When black farmers outproduced whites in provisioning the diamond mines, the Cape Parliament took special measures to knock out this competition. Special head and hut taxes were imposed throughout South Africa with the express intention of compelling African men to leave their ancestral lands and work for white mine-owners, farmers and industrialists. These were anti-market, anti-choice mechanisms, and, incidentally, they were introduced by the British not by the Boers.

The result is that today large portions of the Northern Transvaal are underdeveloped and poverty stricken. The same applies to much of the Eastern Cape, the Eastern Orange Free State and Northern Natal. Some regions became poor so that other regions could prosper.

The internationally accepted method of correcting the disparities is through regional equalisation. This means that public funding is deliberately directed towards transferring support to underdeveloped areas. Note: these fiscal transfers are not regarded as aid, but as constitutionally required fiscal arrangements directed towards balanced national development.

We first heard the phrase regional equalisation in Germany, then in Australia. Now we encounter it all over the world. It is desperately needed in South Africa. Far from joining in the clamour for autonomy and aid, which some of the regional elites support, the great majority of people in the regions are demanding integration into national life and development. Cultural vigour goes with participation in national economic life, not with existence as an isolated backwater.

Affirmative action in this context means special investment in rural infrastructure. It signifies roads, schools, water, electricity, clinics, telephones, cinemas and sportsfields.

The same applies to the cities and towns. We have to follow through on the principle of one town one tax base. Infrastructural development and services should be the same for all parts. It is completely unacceptable that the millions of people living in SOWETO have to do without

cinemas, theatres, parks and bowling greens, while all these facilities are simply taken for granted in the Northern Suburbs.

In the broad sense, then, affirmative action simply means taking appropriate steps to normalise South African society. It amounts to applying the ordinary principles of good government that should have operated all the time but which have been suppressed because of racism and apartheid. It presupposes that we start looking at our country as a country, and our people as citizens. It signifies removing all the barriers, legal, physical and psychological, which have been placed in the way of the majority coming into its own and enjoying full citizenship and economic rights.

See Appendix sections on Regional Equalisation and on Local Government

IV. AFFIRMATIVE ACTION AND ANTI-DISCRIMINATION MEASURES

Recently the Centre for Human Rights at the University of Pretoria organised a conference on de facto discrimination, as day to day discrimination in ordinary life is known. One of the speakers, a lecturer from the University of the Western Cape, wishing to look at his best, went to a rather posh hairdresser in a shopping arcade. The receptionist was blunt and unapologetic: we don't do ethnic haircuts here, she told him. As it happened, if hair can be non-racial, then his hair was as about as non-racial as you could get, but the problem was not the texture of his hair but the colour of his skin and the character of the receptionist's mind.

The fact is that my colleague had no remedy. Nor have people who are turned away from hotels and restaurants because of discrimination. The internationally accepted principle these days is that all facilities on offer to the public, whether they are publicly or privately controlled, must be made available to the public as a whole on a non-discriminatory basis. The same applies to access to housing, schooling and employment.

Anti-discrimination law is common in modern democracies, and if we wish to claim this designation for ourselves, we must ensure that the law is there so that people going about their normal peaceful pursuits are protected from insult, indignity and gratuitous inconvenience. If individuals wish to discriminate in their private lives, that is their

business: they can marry, live with and entertain whomever they like. Yet if they choose to involve themselves in undertakings that operate in the public sphere, then they must respect the rights of all members of the public.

Customer choice may have a role to play in reducing these grossly offensive forms of behaviour, but, unfortunately, racist exclusion is often seen as a market bonus rather than a market minus. Unless there are law-governed means of dealing with the badges and practices of apartheid humiliation, people will find their own remedies, and the social and economic peace will be ruined.

See Appendix sections on Equality and on Special Bodies

V. AFFIRMATIVE ACTION IN DIFFERENT SECTORS

[i]. BALANCE IN THE ARMED FORCES, THE POLICE AND THE CIVIL SERVICE

The name South Africa always appeared: the South African Defence Force, the South African Police. Yet these bodies have never had a truly South African character. They were controlled completely by one small section of the South African population, and, in fact, saw their mission precisely as being to frustrate the creation of a South African nation.

What we are trying to do is to South Africanise South Africa. This means that we wish all public institutions and organs of public authority to possess a truly South African quality. Within the framework of universally accepted principles of good and fair government, they must look like and behave as South Africans.

If we accept, as scientists do, that brains and talents are randomly distributed amongst individuals in all race groups, then any normal system of recruitment and advancement would result in the army, the police service and the public administration at all levels reflecting in its composition the neighbouring population.

Yet at the moment all these institutions have totally unrepresentative and unbalanced structures. Again, this is not something that just came to pass. As the agencies that enforced apartheid, they were the first to practise what they enforced. Now, as the servants of democracy, they must be the first to achieve a truly non-racial and non-sexist character.

The defenders of the new constitution must themselves be imbued with the spirit of the constitution. The public, all the public, must have confidence that they are dealing with a civil service and protected by an army and police service that have a national character and a national vision.

Diversity, competence and impartiality all go together and jointly promote public trust and good functioning. A representative public service means that the life experiences, talents and wisdom of all communities are drawn upon, that all the languages are used, that there is no sense of it being responsive to one or other section of society only. Each civil servant, each soldier and each policeman or woman, then, does not serve only the community from which he or she comes, but all people equally.

Only when these bodies are truly de-racialised can they be fully professionalised. The restructuring of the public service is therefore not just a question of doing justice to those who have been excluded; it is vital to the survival and good functioning of the administration.

See Appendix sections on Equality, Representivity in the Public Administration and on Reconstitution of the Defence Forces

[ii]. AFFIRMATIVE ACTION AND LAND REFORM

In South Africa, dispossession is nine tenths of the law and nine tenths of the land. Property rights will never be secure as long as the majority feel that existing title has been achieved through wrong rather than through right. World Bank experts insist that unless there is what they call rapid market-assisted land reform, any future economic development will be precarious.

An active policy of restoring usurped land rights has to be followed. Steps have to be taken to ensure that land is made available for housing the homeless and as a source of productive activity for those who wish to farm. Any affirmative action programme in this area will have to take account of the need for appropriate, just and realistic compensation, on the one hand, and of affordability and technical and financial back-up on the other.

See Appendix sections on Land

[iii]. EMPLOYMENT EQUITY

This is the term used in Canada and elsewhere to connote principles and procedures to ensure that the workforce becomes representative of the talents and skills of the whole population. Diversity is seen both as a social good in itself, and as a functional advantage. In other words, employment equity improves both acceptance and performance.

Employment equity requires that special steps be taken to search for and encourage talented persons in all communities, develop their skills and promote their advancement. The objective is to make the profile of the workforce at all levels correspond roughly to the profile of the surrounding community.

This does not require the lowering of standards. In South Africa we have enough white male donkeys up there without adding black or female asses as well. On the contrary, being able to draw on a wider pool of candidates and removing the shields against competition which currently exist, should improve quality. Present incumbents might or might not have made it on ability: they are certainly not the unique archetypes of merit.

In any event, it is totally incorrect to assume that those who have already suffered disadvantage want to transform themselves into advantaged [second class]. On the contrary, the masses want nothing but the best for themselves and their children. Doctors must be able to diagnose, counsel and heal, whatever colour they are, whatever the race of the patient. Germs know nothing about so-called local standards. Nor do bridges, buildings or bank balances. Where the social dimension comes in is not in relation to the quality of knowledge but the character of service, and in respect of who the beneficiaries are, how institutions are organised and how they relate to the community.

Thus affirmative action in relation to health means that black people and women of all races will be encouraged to acquire the highest professional medical skills. Yet it also requires the development of a comprehensive approach to health that includes nutrition, clean water, housing, immunisation, a safe environment and the encouragement of good habits of life; the training of para-medics and health education workers; the structuring and financing of medical services in such a way as to ensure basic health care for all; special care for mothers and children; voluntary control of fertility all these are matters that affect the poor more than the rich. Black advancement into the higher reaches of medicine is a necessary ingredient for South Africanising the profession, but it is not a

substitute for measures to promote health amongst the majority of the population. Both are necessary.

See Appendix sections on Equality which authorise voluntary action and legislative provisions directed towards achieving employment equity.

[v]. EQUITY IN EQUITY: BLACK ECONOMIC EMPOWERMENT

Nowhere is inequity greater in South Africa than in relation to equity. Black people just do not have shareholders' equity, that is, ownership of capital and the decision-making power that goes with it. Black people are producers and consumers but not owners.

When racist economic laws were repealed, black people had neither land to serve as collateral, nor capital for investment, nor meaningful sources of credit. Nothing was less free in South Africa than enterprise. Nothing obeyed market principles less than the market.

The South Africanising of the South African economy means that all the obstacles to the development of black entrepreneurial capacity have to be removed and the full potential of all South Africans to contribute to wealth creation has to be unleashed.

This implies far more than placing a few black persons on the boards [usually in non-executive positions]. It means real hands-on decision-making by black businesspeople whose authority comes from the share capital they represent.

We are totally against people using their positions in the state to enrich themselves - we do not wish to repeat the miserable experience of the Bantustans which caused untold anguish to genuine patriots in those areas. Nor do we envisage the state becoming an instrument of racially-based extortion and patronage, so that friends are favoured, opponents disadvantaged, and bribes accepted from any quarter.

We do expect government, however, both as employer and as contractor to take steps to encourage capacity building amongst those who have been held back by racist law and practice. This will be particularly important in relation to infrastructural development in the townships and rural areas. The skills and entrepreneurial capacity of people from the areas concerned have to be advanced as part and parcel of the total project of development.

We have one recent example of what can be done. Money was made available for the building of a school in a Transvaal township. Instead of hiring one of the major construction firms to do the job, four local builders were employed. Quality control was maintained by the architects. The builders, who previously had only done small-scale house construction, were given on-the-job training in relation to accounting and control of materials and labour. The work was finished ahead of schedule, and what remained in the township was not only a new school but the profits of the enterprise, and, above all, the skills and confidence necessary for further medium-scale construction work.

The question of credit is also vital. The whole culture of loans and investment is based on financial and psychological assumptions appropriate to apartheid realities. As the context in which business is done changes, however, so must the character of risk-taking. The poor are not just the rich without money. The nascent Afrikaner capitalists were not Englishmen who spoke Afrikaans. Black entrepreneurs inhabit a world with its own multiple dynamics and networks. People from that world will have a much greater chance of assessing risk and guarantees than those outside. If, as we are told, capital should be free to seek out its most enterprising and efficient utilisers, then we have to maak 'n plan in relation to ensuring its free circulation.

See Appendix sections on Equality which authorise voluntary action and legislative provision directed towards achieving black economic empowerment.

VI. BLACK, BROWN AND BEIGE

Duke Ellington chose this title for one of his most magisterial compositions. His objective was to show the unity of experience and interests of all persons of colour in the United States. It is alarming to see affirmative action used in a contra-affirmative manner to impose exclusion on coloured people and South Africans of Indian origin.

Even if their status was relatively privileged compared to Africans, they were subject to various forms of discrimination and are entitled to be the beneficiaries not the victims of affirmative action. They are still largely treated as second class citizens. Few are to be found in the higher reaches of national or local government, and they are virtually non-existent at the control level of mining, banking and insurance, let alone in the civil service, the police and the army.

The main thrust of affirmative action should be directed towards the advancement of the African people who were by far the most oppressed by apartheid. Yet this does not mean that the principles of diversity and capacity building should not be used to promote as well the advancement of coloured people and Indians in every sphere of life.

See Appendix sections on Equality and on Special Bodies. Affirmative action as authorised by these sections, whether voluntary or as a result of legislation, would have to be applied in a balanced way consistent with the principle of overcoming disadvantage.

VII. AFFIRMATIVE ACTION AND GENDER

When you speak about affirmative action inside the ANC, everybody knows what you mean: dealing with the rights of women.

At first sight it should be easy to deal with racism and sexism in the same manner. They have much in common - both involve stereotyping and the achievement of advantage for one group on the basis of disadvantage for another. Yet the sources of racial and gender oppression are very different. Racism operates in the public domain and affects communities as a bloc. Sexism is less visible, more intimate, more dispersed and more related to relations regarded as private. Solidarity amongst its victims is less easy to achieve. It embeds itself more in culture than in law.

Affirmative action to promote full enjoyment of human rights by women will then base itself on counteracting the specific way in which the lives of women are restricted by the accumulated practices of the past. They will also be guided by the concrete demands which women themselves make for advancement.

The two processes - affirmative action to deal with racial oppression and affirmative action to deal with sex-based oppression - can then be viewed side by side to see points of overlap and areas of divergence. The modern tendency is to view both under the general heading of promoting human rights, but to deal with each in separate legislative provisions and to establish institutions which take account of the specific character of each.

In South Africa it is important that we acknowledge both the specificity of each area and the overlap. This is the age of advance for all South Africans. Freedom and dignity are

indivisible, both for individuals and for society as a whole. Noone should be afraid, not at work, not in the street, not at home.

Any comprehensive programme of affirmative action designed to deal with the effects of sexism will accordingly have to be based on the lives women lead and the choices women want to be able to make. All the equal protection and capacity-building measures mentioned above will apply to all women as part of the citizenry. Black women, who have been the main victims of social and legal oppression, will be amongst their main beneficiaries.

At the same time, affirmative action in respect of gender inequality and subordination will require much more: special measures to deal with physical integrity and control of fertility, to guarantee maternity and birth rights, child support, to secure protection against moral and physical abuse, to acknowledge the value of housework and to discover ways and means of overcoming social and political invisibility and marginalisation. Particular importance will have to be paid to finding sensitive and effective ways of ensuring that respect for cultural and religious rights is not used to deprive women of choice and subject them to inequality and discrimination.

See Appendix sections on Equality, on Representivity and on Special Bodies. Application of the principles of equality and non-discrimination and the undertaking of programmes of affirmative action as authorised by the Constitution would go a long way to overcoming gender imbalances. This would not, however, deal with sexism in everyday life. The equality principle needs to be related to the dignity principle, and account must be taken of the lives that women lead and what women claim as their right. One of the first tasks of the Commission on Gender Equality could be to consider the adoption of a Charter of Rights for Women which could be attached to the final Constitution as an organic law enjoying special status. This Charter could build on the Fundamental Rights provisions dealing with equality, dignity, personal integrity and privacy. Its objective would be to respond to the need set out in the Preamble to create a new order in which there is equality between men and women so that all shall be able to exercise their fundamental rights and freedoms.

VII. CONCLUSION: THE SEVEN SIBLINGS

The subject of affirmative action is a vast one, and its full dimensions in South Africa are far from being

acknowledged. It is quite clear that there is no simple formula that can be applied to all situations. Affirmative action in the army is one thing, in relation to land another, in respect of economic empowerment something different again. Affirmative action with regard to overcoming the effects of racism and sexism respectively, has large areas of overlap, but also quite distinctive features.

Yet despite the differences, certain common themes can be found.

In essence, affirmative action represents a conscious effort to correct the racial and gender imbalances in South African society in a principled and effective way. Underneath the various modalities that might be adopted one can detect seven basic principles. These may be referred to as the principles behind the principle.

RESPONSIBILITY: Not every form of injustice attracts affirmative action. The special programmes of accelerated search, capacity building and advance must be well focussed. In the light of South African realities and priorities, there are two areas where a special responsibility to intervene exists, namely in relation the effects of race and sex discrimination. A strong case can also be made for affirmative action in respect of disabled people: it is increasingly being recognised at the international level that not only must disabled people not be discriminated against, but that special measures should be taken to ensure that obstacles to their free circulation in society are removed and that employment opportunities are guaranteed.

We do not, however, want to become a nation of groups all walking around with calculators doing head counts and demanding special programmes for this group or that. We do not want the thrust of affirmative action to be lost in infinite competitive fragmentation to secure more places for members of this or that language group, or people born in this or that region, or persons who went to this or that type of school.

EQUITY: the objective must always be to ensure basic fairness. Affirmative action is about removing injustice, not about revenge, extortion or patronage. This means that its goals and methods must be equitable.

INCLUSIVITY: The processes should be as inclusive as possible. Those most directly affected, whether positively or negatively, must have the greatest say in how affirmative

action should proceed. We do not want government steamrolling decisions from outside, but we do insist that there be guarantees of meaningful internal transformation. Trade unions and staff associations should play a particularly important role in ensuring that the most efficacious and least onerous solutions are found.

SECURITY: the principles and processes must be securely located in the constitution and legislation, and not be dependent on the subjective whims or the fluctuating zeal of particular officials. Everyone must know where they stand legally. The law should give every encouragement to voluntary forms of affirmative action. The government itself must set an example, and require appropriate affirmative action in parastatals as well as enterprises to which it awards contracts. In the USA and Canada the courts and independent tribunals have played an important role in establishing obligatory guidelines for affirmative action in particular enterprises, and consideration will have to be given in South Africa for having similar procedures if appeals to common sense and social responsibility get nowhere.

PROPORTIONALITY: The means used and the time frame must be proportionate to the ends to be achieved. When ordering school desegregation, the American Supreme Court used the phrase "all deliberate speed." The rapidity of transformation will be influenced by normal hiring and firing practice, average rates of staff turnover, genuine needs of rationalisation and legitimate interests of productivity. These factors cannot however be used to block affirmative action. Search and capacity building must go on all the time. A vague sense of social responsibility is not enough. The whole enterprise must seriously commit itself to transformation.

ACCOUNTABILITY: the processes must be transparent, non-corrupt and accountable to public opinion, Parliament and the courts.

FLEXIBILITY: affirmative action works well if it is neatly tailored to the particular situation it is intended to deal with and takes appropriate account of the in-house culture of the enterprise being transformed [excluding, of course, the culture of racism and sexism].

APPENDIX

CONSTITUTIONAL PROVISIONS RELEVANT TO AFFIRMATIVE ACTION

A. Provisions dealing with equality and affirmative action.

Note: Those that directly authorise affirmative action are in italics.

Preamble

WHEREAS there is a need to create a new order in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

Chapter 3 Fundamental Rights

[Note: These provisions will come into force after elections on 27 April 1994]

Section 8. Equality.

[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, and, without derogating from the generality of this provision, on one or more 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.*

Section 10. Human Dignity

Every person shall have the right to respect for and protection of his or her dignity.

Section 11. Freedom and Security of the Person

[1]. Every person shall have the right to freedom and security of the person

Section 13. Privacy

Every person shall have the right to his or her privacy
.....

Schedule 4 CONSTITUTIONAL PRINCIPLES

[Note: These are general principles only. They will be binding on the new Parliament when it drafts the final constitution for South Africa.]

1. The Constitution of South Africa shall provide for
..... a democratic system of government committed to achieving equality between men and women and people of all races.

.....

111. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

.....

V. The legal system shall ensure the equality of all before the law *Equality before the law includes laws, programmes, or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.*

B. Provisions dealing with regional equalisation

155 [1]. A province shall be entitled to an equitable share of revenue collected nationally

[4]. Allocations shall be determined in accordance with an Act of Parliament, with due regard to the national interest and taking into account -

[a]

[b] economic disparities within and between provinces

Schedule 4 Constitutional Principles

A Financial and Fiscal Commission shall recommend equitable fiscal and financial allocations to to provincial

and local governments from revenue collected nationally, after taking into account economic disparities between the provinces as well as the population and developmental needs

C. Equal provision of services by local government

175

[3] A local government shall make provision for access by all persons residing within its area to water, sanitation, transport facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

D. Representivity in the public administration

212 [2] [The] public service shall -

.....

[b]. promote an efficient public administration broadly representative of the South African community;

Schedule 4 CONSTITUTIONAL PRINCIPLES

XXX

1. There shall be [a] public service broadly representative of the South African community

E. Representivity in the Constitutional Court

99 [5] [d] In submitting its recommendations to the appointing authorities the Judicial Service Commission shall have regard to the need to constitute a court which is representative in respect of race and gender.

F. Reconstitution of the defence forces

Section 224 provides for the creation of a National Defence Force made up of members of the South African Defence Force, the defence forces of the TBVC states and the armed forces

of recognised political movements which take part in the first elections.

G. Land

Chapter 3 Fundamental Rights

Equality

8. [3] [b] Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection 2 had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

Restitution of Land Rights

121. [1] An Act of Parliament shall provide for matters relating to the restitution of of land rights

[2] A person or community shall be entitled to claim restitution of a right in land from the state if -

[a] such person or community was dispossessed of such right at any time after a date to be fixed[not earlier than 1913]; and

[b]. such dispossession was effected under a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8 [2].

Section 122 contemplates the creation of a Commission on Restitution of Land Rights to investigate and mediate disputes over land claims. Section 123 provides for unresolved disputes to be referred to a court and lays down principles governing expropriation and compensation.

H. Special bodies created to ensure the achievement of equal rights

Chapter 8 provides for the creation of a Human Rights Commission [sections 115 to 118] and a Commission on Gender Equality [sections 119 and 120].

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