AFFIRMATIVE ACTION AND BLACK ADVANCEMENT IN BUSINESS

Albie Sachs

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SA CONSTITUTION STUDY CENTRE

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One person's dream of advancement is another person's nightmare. What follows is an attempt to de-fantasise discussion, and to scrutinise the issue of affirmative action in business in the harsh/soft light of constitutional principle.

I. INTRODUCTION: DISPOSSESSION AS NINE POINTS OF THE LAW

The most striking thing about the legacy of apartheid is its tangibility. Just as no aspect of daily life was too grand or too petty to escape the system's active attention, so today its heritage pervades every aspect of daily existence, and does so in a most concrete way.

Dispossession, in our country, is nine points of the law.

South Africa should, but does not, belong to all who live in it. Because of apartheid, South Africa is today both territorially and legally owned by the whites. The problem is to establish a congruence rather than a divergence between ownership and equity. Put very simply, as a result of the injustices of apartheid, the whites own almost everything and the blacks possess virtually nothing.

It is painful and paradoxical for us to be speaking in categories of race. Our whole objective has been to look at human beings as human beings, and not as members of this group or that. Yet if we are to face up honestly and realistically to the problems of the country, whether in the economic or any other sphere, we cannot ignore the extent to

which the racial factor opens the door for some and closes it for others.

It is frequently said that the playing field for business activity is not level. The truth is far worse: we are not even on the same playing field.

This position of exclusion of blacks from ownership or active participation in the economic arena did not just come to pass. It was the result of a deliberate policy of successive governments, backed up by law and the police force. The objective, as proudly stated at the time by any number of Parliamentarians and recorded in the reports of countless Government Commissions, was to destroy all forms of African independence and to ensure that the vocation of blacks was not to be citizens or producers but to reproduce themselves as natives available for the employ of whites.

One of my earliest cases as a young advocate was defending a client on the charge that, "being a native, he did trade in a native location without permission." The accused - I think it was Chris Hani's father - had been trying to sell soap and candles and cigarettes and boot polish from a barrow. As a native, according to the law, he could not trade at all in a white area, that is, in most of South Africa. Even in what was called a native location he could not trade unless he had special permission, which he had to apply for annually.

The Native Land Act, the Native Urban Areas Act, the Native Labour Regulation Act and the various statutes obliging Africans to carry passes and to get permission to do just about anything, were used systematically and relentlessly to deprive Africans of any settled economic rights anywhere in the country.

The Group Areas Act was designed precisely to violate rights which people had acquired - against all the odds - through the market. Every transaction relating to land could only be registered if the deed stated that the parties belonged to the

appropriate race group. In the case of the Central Business Districts, this meant those officially classified as whites.

There was money to be made out of the Group Areas Act - by white developers, attorneys, architects and officials.

The result is that today the Central Business Districts of all cities and dorpies are owned by whites. This came about not just because whites had more money than blacks, or were better entrepreneurs, or because they were more willing to save, or to take risks, or to work hard, but because they were white. Blacks were simply excluded by law. They could neither own land nor put up buildings nor use land as security. Professionals were not even permitted as of right to rent premises in what were called white areas.

I remember how after I had argued my first appeal in the Appellate Division in Bloemfontein how excitement turned to dismay: my attorney told me of another young advocate who had just handled his first appeal - during the morning break he had not been offered the customary cup of tea in the court, and at lunch-time he had had to sit in his car and eat sandwiches and drink coffee from a thermos flask. This same advocate some years later had had to use my chambers in Cape Town clandestinely so that his breach of the Group Areas Act would not come to light. Intellectually boulevards ahead of those he had had to appear before in court, only now is he on the Bench - Ishmail Mohamed.

Historians have documented how every attempt by Africans to compete in the economic sphere was beaten back by the state at the invocation of white entrepreneurs. When, after the opening up of the diamond fields in the second half of the last century, African farmers were outproducing whites for the new market, special laws were introduced into the Cape Parliament to destroy the prosperity of the African farmers.

At the time of Union in 1910, Africans were seeking by means of purchase to re-acquire the land from which they had

been dispossessed by conquest. The Native Land Act was introduced to prevent this process from continuing, one of the arguments used in its justification being that African competition was unfair since Africans were communalistic and clubbed together to raise funds while whites were individualistic and had to bid on their own.

When Senator de Klerk introduced the Job Reservation Act into Parliament four decades later, his objective was to keep blacks out of competing with whites for skilled and semi-skilled jobs [and even some unskilled ones].

The Bantu Education Act was, in the words of Dr. Verwoerd, designed to prevent blacks from seeking to graze in the green pastures reserved for whites.

The figures today tell the story of past discrimination and present inequality.

Less than 3% of managers or executives in South Africa are black.

Less than 2% of all direct shares in companies listed on the JSE belong to black business. [This proportion is said to be increasing by half a per cent each year, which means that in just under a century, black business will finally account for half the shares].

Estimates of black shareholding in non-listed companies are of the order of 2%.

Black sole owners are said to account for approximately 15% of small formal businesses.

Lumping together all informal sector enterprises, it is estimated that Africans control about 40% of the total in number and about 30% of their capital and turnover.

Add all these figures together and we find that effective African participation in the business sphere is barely 10% of the total, even though Africans constitute about 73% of the population.
Thus what we are inheriting is not just inequality, but a system of structured inequality, and one brought about by deliberate state policy.

Removing the barriers created to equal participation in the economy cannot therefore be seen simply as an individual responsibility for socially conscious have's, or as a personal commitment by economically ambitious have-not's. It is a national task requiring active steps by all of us, and direct engagement between all the have's and all the have-not's in our country.

The answer will not, we feel, be found in re-directing the old racist laws against the old oppressors. We assume that as a matter of firm and unshakeable principle, the new constitution will prevent policies of dividing the people on the grounds of race and of reserving privilege for some and humiliation for others; that it will forbid uprooting people from their homes and businesses, as happened in the past; that it will outlaw apartheid, whether in old forms or new, and whether aimed at a majority or a minority or individuals.

How, then, can we resolve the conundrum: how can we create a non-racial society, which requires us to be completely
colour-blind, and at the same time overcome the effects of past discrimination, which compels us to stare the realities of continuing racial privilege in the face?

II AFRICANISATION

It is not so much that we wish to Africanise the South African economy, as that we seek to South Africanise it. By South Africanising South Africa we mean acknowledging its full dimensions as a country and actively recognising the value and worth of all its people. To achieve this, we have, all of us, to break through the laws, habits and assumptions that restrict participation in the country's public, economic and cultural life. The full and varied richness of all South Africans has to be able to express itself.

To the extent that the African people have been the main victims of exclusion in the past, so they will be the main beneficiaries of inclusion in the future. Yet the objective will not be to replace one form of race rule or hegemony with another. Rather, it will be to get rid of the system of race domination altogether.

This is why in political terms we say that power should pass from a racial minority to the people as a whole. Economically speaking we insist that all should be entitled to share in the country's wealth. We must put an end to the cycles of domination and subordination, of pride for one and humiliation for the other. We must become, all, South Africans.

This means far, far, more than simply declaring that the New South Africa is at hand or has arrived. Pleased though we might be that hated apartheid laws have been scrapped, the self-perpetuating structures of inequality still exist. Nor are mere intonements about the virtues of the market and free enterprise enough. The reality is that neither the job market nor the capital market in South Africa are free, and that the reward for enterprise and risk depends more on skin colour and connections than it does on effort or ingenuity.

If we wish truly to South Africanise the South African economy, then, we must dismantle all the barriers and

impediments - whether legal, financial, psychological or cultural - which keep the majority out of full and free participation in the country's economic life.

The African cultural dimension, whether expressed in terms of language, dress, humour, style or attitudes, will come through naturally and strongly when people of African origin take their rightful place at all levels of economic life. What has been called the Anglo-Saxon behavioral style will continue for those who feel comfortable with it - the directors of Anglo-American will not have to do the toyi-toyi to get to their office - but it will not be the only one, nor will it continue to be the prescribed form. Thus the African personality will express itself as part of the South African personality, neither claiming hegemony nor accepting inferiority, just demanding its rightful position as a major ingredient of the whole.

South Africanising South Africa is perhaps the greatest of all tasks facing our generation. We have to South Africanise our sports teams, our cultural life, our Parliamentary system and our economic activity.

It is the consciously guided process of enabling all that was suppressed and marginalised in the past to come out into the open. It means giving our society a new texture and personality without suppressing or marginalising those who tried unilaterally to control it in the past. It means the working out in practice of the principle that South Africa belongs to all who live in it.

III. NATIONALISATION

The term nationalisation, often preceded by the adjective wholesale, has come to have immense symbolical and emotive significance in South Africa. Just as the cultural boycott for years blocked serious debate about culture, so has taking positions against or for nationalisation obscured the asking of serious questions about the future of economic life in this country.

The word is put on to the agenda more by those who are against it [whether wholesale or retail], than by persons who feel it might have some positive role to play, particularly in ensuring the eradication of poverty and inequality.
The opponents of nationalisation would in fact strengthen their case if they made it clear that they were against any form of restriction on competition, from wheresoever it came.

Central planning is central planning, commandism is commandism, whether done by a few bureaucrats in a government department or a handful of executives in the boardroom of a giant, pyramidly-structured finance house.

Enterprise can be as un-free if strangled by a system of tightly interlocked pyramid ownership or by a price-fixing cartel as it could be if throttled by the state: to adapt a phrase by Samora Machel, some people do not mind being devoured by a capitalist lion as long as they are not eaten by a state tiger.

The figure of nearly eighty per cent of shares quoted on the Johannesburg Stock Exchange belonging to five major conglomerates is well-known, and has given rise to the jibe that if any real privatisation is needed in South Africa then it should be in relation to these economic mammoths.

Unfortunately, the voices that are most insistent on the need for diffusion of power in the political field, and that argue most persuasively for political pluralism and for diverse points of political competition, are the quietist in relation to

devolution and dispersion of power in economic life. We hear a lot about power-sharing in the political domain; it would not come amiss to hear a few words about power-sharing in the economic sphere.

When the ANC Constitutional Guidelines were drafted in 1987 the words relating to economic life were chosen with considerable care. The text referred to the responsibilities of the state in a mixed economy, without making any reference to nationalisation. Our view, implicit in the drafting, was that the issue of nationalisation versus privatisation was not a constitutional one, and that in any event it was being used to create a false debate with high emotional overtones and low practical significance.
In our view, concentration on the wrong issue would have taken attention away from the two really great economic questions: how could our economic resources best be used to deal with the massive problems of poverty and inequality created by apartheid? and, how could black people be able to participate on a basis of full equality in economic life? These were questions of direct constitutional significance, of basic human rights. The nationalisation/privatisation debate could continue, but as a political not a constitutional one.

What is worrying several years later is not that these questions still remain unanswered, but that so little attention to finding a solution to them is being given, particularly by those who have more economic expertise than we do . We are suddenly informed that South Africa is after all a poor country, that even the rich are really poor. We are told that without economic growth there can be no redistribution of wealth, even though as the late Simon Brand pointed out on several occasions, simply by recirculating the resources already available to the state there could be extensive and meaningful redistribution.

It is worth mentioning that all of us had had direct experience of living in African and other countries that had tried various forms of centralised state economic planning.

Our decision not to lock the future of our country into any ideological format, whether of the kind that committed the state to total commandist responsibility or of the sort that prescribed complete free-market irresponsibility, was not based on adherence to or repudiation of any doctrine, however credited or discredited it might have been. Nor was it a consequence of the collapse of Eastern Europe, which had not as yet taken place.

Rather, we made our assessment of what we felt the basic legal-economic framework for a new South Africa should be, in the light of our own assessment of the successes and failures of economic development in the post-colonial countries we had lived in.

Speaking for myself, after having lived for 11 years in Mozambique, I was of the view that governments should do the things that it they are good at, and that, conversely, the private sector should do what it performed well. At the same time, each should refrain from trying to exercise hegemony over areas where it did not function well.

DE-SATANISING THE STATE

Governments are not good at making or selling shoes or refrigerators, nor, it would seem, at growing or selling mealies. Yet by and large, they are much better than the private sector in seeing to it that basic services and utilities are provided to the whole population. In most parts of the world, if the government does not look to the furnishing of education, health services, water, electricity and rubbish collection, no-one else does, and the great majority of the population are simply left without.

There just is not a great market in teaching the masses arithmetic or healing the poor or providing storm-water drains or electric lights in the slums.

Similarly, in most parts of the world, the creation of an infrastructure of communications and transport, including the building of roads, railway lines, ports and telecommunications facilities, is seen primarily as a governmental responsibility.

In the past all these governmental activities have been directed in South Africa towards satisfying the interests of the voters, that is, of the white section of the population, and even then disproportionately in favour of those with the most influence with the ruling party. We need now urgently to ensure that everyone is covered on an equal footing by government. This means giving immediate attention to building up all the basic infrastructures of decent living in the areas where the majority live.

It requires prioritising the construction of roads and the furnishing of electricity, water, rubbish collection, postal services and telephones in the townships and in the so-called homelands and Bantustans.

This in turn means that the communities themselves must be involved directly in the decisions and their implementation. An important role awaits the black business community, acting in concert with the civics and other community organisations, in seeing to it that the services and facilities are what the people want, where they want and at a price they can afford.

We will not get very far if we rely on simplistic notions either that the state should do everything or that it should do nothing. The state should be neither glorified nor denigrated. It has a role to play, a role that might expand or contract over time. Silly anti-statism which regards the state as the new Satan is as unhelpful as blind belief in the state as the universal solver of problems.

The state creates conditions within which economic activity takes place. To see the state and the market as mutually

exclusive is to belie history. As Lord McGregor used to point out when he lectured at the University of London, it was the state that created conditions for the first developed capitalist market to come into being, namely, that of the United Kingdom

The Poor Laws drove people off the land and created a labour market, he pointed out. Laws relating to limited liability and establishing a supervised Stock Exchange, brought the capital market market into being, he continued, while the setting up of the Department of Trade and Industries provided a framework of common rules governing the operation of companies in the market.
Since that time, the state has taken on further functions. It promotes investments and exports, controls the quality of products, protects trade marks and patents, regulates the supply of money, raises and lowers basic interest rates, raises and spends vast sums of money on everything from bombs, which the free marketeers seem to love, to social welfare, which they appear to hate.

In many countries with thriving economies, the state liaises with employers and unions to establish a social contract governing the principles whereby national wage levels are to be fixed. Most developed societies provide machinery for collective bargaining and for the settling of disputes between capital and labour.

In all its activities, the state is a symbol, a doer, an employer, a contractor and an enforcer of the law.

The state as symbol: The state and the public administration are a mirror in which the people see themselves reflected. If their image is absent, they feel that something is missing. If the government is all-white, or all-male, or all Afrikaans-speaking, this might seem quite natural, even providential, to white, male Afrikaans-speakers, but will appear grotesque to all those who are excluded.

The great task facing us now is to have a government that represents and reflects all the people of our land in all their variety. We need a system of selection and a style of working which will lead everyone to say: I might not like what the so-and-so's are doing right now, but this is our government, our police force, our army and our civil service. Similarly, we want the people to feel that this is our transport service, our airline, our telephone system, our electricity supplier, our post office, and our public broadcast network.

The opening up of the para-statals at all levels thus becomes a socio-cultural-economic necessity. It is not required in order to provide jobs for pals nor should it be offered as a compensation for the exclusion of blacks from skilled jobs and managerial posts in the private sector.

The question of the best forms of management of para-statals so as to ensure their efficient functioning is quite a different one. Whether the emphasis is primarily on value for money or mainly on providing a good service to those who need it the most, opening up and diversification is imperative for three reasons:

in order to ensure that the public see themselves reflected and have confidence in the bodies that serve them,

to see to it that the diverse needs, languages and priorities of the public are attended to by those most in touch with their sentiments and expectations;

and to enable the talents, energies and life experiences of all to enrich the functioning of the bodies.

This is not to argue for fixed quotas based on race, language, sex, ethnic origin, region and so on, but to see the opening up and balancing out of the public service and of para-statals as an act not only of justice to those who have been excluded but as a matter of common sense and good government.

One of the most irritating phenomena of contemporary times is to find that as soon as the question of opening up any of the exclusive institutions dominated by apartheid and patriarchy is mentioned, the question of lowering of standards is immediately raised. Somehow, blacks and women are automatically associated with incompetence and stupidity and seen to be natural threats to standards. Yet how many of us do not know of wise, hard-working, competent and adaptable people employed their whole lives in jobs well below their capacities simply because they were black or female?

How many persons have been passed over, or not even considered, for promotion, for the same reason? The hidden networks that operate the more powerfully because they are unconscious, the glass ceilings that function the more effectively because they are transparent, trap people in pre-ordained categories almost as rigidly as apartheid did, with the added disadvantage that they are regarded as natural and necessary whereas apartheid was condemned as artificial and unjust.

The state as doer: for better or for worse, states are the greatest builders of our era and also the biggest destroyers. The role of the state in providing basic services and amenities for the population has already been dealt with. The function of the state as jailer, executioner, spy and killer is also part of the equation, and one that above all has to be submitted to constitutional control.

At the same time, the state has special responsibilities in relation to guaranteeing basic freedoms and liberties. Unlike private commercial bodies that tend towards as much secrecy and autocracy as possible, the state that respects constitutionalism sets up agencies to control itself. An open society is far more likely than a closed one to provide for the delicate human interactions which will be needed to secure advancement for all on a broad front.

We are going to need far more openness and accountability both in the public and the private sectors.

The state as employer: in all the advanced industrialised nations, there is no question as to who is the biggest employer - the state. Even Ronald Reagan and Margaret Thatcher were on the state payroll. The state employs civil servants, teachers, nurses and police. Para-statals that might be private in form but are really state-directed, employ pilots, engineers, telephonists and construction workers.

At present there are no blacks in any top positions at all in the South African state or para-statal apparatus, and they constitute less than 2% of upper middle to senior civil servants. Clearly there will have to be rapid advancement so as to create more balanced structures in middle and senior positions.

The state as contractor: the state is not only the biggest employer, it is the biggest contractor. The less the state does itself in the economic field, the more it secures by contract from the private sector.

Far from increased government involvement in providing such things as education, health and other services to the general population being detrimental to the private sector, it would stimulate the economy and open up vast new areas of entrepreneurial activity. The state would then be expected to move away from present patterns of almost total reliance on white business to supply the necessary goods and services, and pursue a policy of diversification of procurements.

The state as enforcer of the law: it is not the function of the constitution to prescribe economic policy. The ebb and flow of thinking on economic questions should be allowed to take its course, uninhibited by constitutional constraints. To command that there be a completely free market [wholesale free-marketisation] is in its own way as anti-libertarian as to prohibit a free market. The open society does not close off

avenues of choice, but, rather, guarantees the greatest number of options. One of the most important freedoms of all, and one particularly precious and needed in South Africa, is the freedom to say I was wrong.

Freedom of speech and assembly, coupled with political pluralism and regular elections, are vital to ensure that the avenues of choice are never blocked off irreversibly one way or the other. Successive governments in France nationalise and privatise in turn. Their right to do so is not considered a constitutional matter, though the question of compensation may well be.

LEARNING TO BE BUSINESS-LIKE WITH BUSINESS

If many of us have to learn to de-demonise the state, others have to find a way to live with business. Just as we need a state that attends in an effective, caring and accountable way to the issues that fall within its mandate, so will we require a vigorous, efficient and creative private sector to do the things that fall primarily within its sphere.

The choice in our world is not between omnipotence and impotence. We may avoid the evil of an omnipotent world of business dominating an impotent state, without having its opposite, namely, an all-pervasive state crowding out the private sector.

Business people like to be able to plan. They wish to know the rules within which they must operate. They want to be free to take decisions as their commercial judgement directs them. They cannot function well if their plans are constantly subject to reversal by a variety of state boards and officials. They are a part of civil society and entitled to a certain measure of autonomy.

If the government wishes to see them devoting more of their energies towards providing goods and services for the have-not's, the best way to do so is not by appeals for social

responsibility nor by commanding certain types of performance. Rather, it must create a secure and predictable legal framework within which business can operate, guarantee workers' rights, and follow policies that make it economically worthwhile to concentrate on attending to the basic needs of the general population.

There is no point in trying to force capitalists to feel guilty about making profits. Better to enable them to get a good return for doing good work. If, unfortunately, there is good money to be made out of manufacturing guns and bombs for the state, there should, happily, be a good income to be earned from building classrooms and clinics.
At the same time, business has to respect the basic rights of employees, consumers and members of the general public. Just as there are unfair trading practices and unfair labour practices, so are there hiring, training and promotion practices that are unfair because they violate basic constitutional rights. The almost automatic exclusion of blacks and of women from middle and senior positions in business is one of them.

The law does not intrude unnecessarily either in the home or in the office or on the factory floor. At the same time, human rights do not stop at the front door, nor at the entry to an office building, nor at the factory gate.

The basic principles of advancement, affirmative action, equal opportunity - whatever name is given to them - are the same for all businesses. They do not give commercial advantages to some enterprises as against others. A case can be made out for possibly exempting small enterprises, but otherwise, whatever their status in other parts of the world might be, they would appear to be essential in all spheres of business life in South Africa.

Conclusion: The real question is not whether there will be nationalisation or privatisation, but what contribution the state

should make, in the context of a mixed economy with a vigorous private sector, towards securing black advancement.

It is quite clear that there are great possibilities of the state setting an example to the private sector both as employer and contractor. It can significantly open up opportunities for those previously denied.

The issue remains whether the state should also act as legislator for the private sector. Should the state require as a matter of law that there be black advancement in the private sector, and if so, should this be accomplished through prescribed quotas?

IV 3, 4, 5, 6 ....THE QUESTION OF QUOTAS

The 3-4-5-6 programme has the advantages of clarity and simplicity. It is compact and it both exposes the present discriminatory system and suggests a formula for measuring progress in overcoming it.

NAFCOC, the African business organisation, invented the formula. They proposed that a new democratic government adopt legislation requiring the progressive opening up of economic opportunities for blacks according to set quotas. They refer to Malaysian experience as a precedent, and set out a system of minimum targets which would have to be reached by the year 2000. Their proposal was that all companies listed on the JSE should be required by that year to meet the following targets :

* black representation in the boardrooms not less than 30%;

* black participation in equity not less than 40%;

* external purchases from black suppliers not less than 50%;

* black involvement in management, not less than 60%.

As one supporter of the proposal said, business people deal in figures, and if you do not put a number to a proposal, no-one in the business world takes it seriously.

As a means of focussing attention on the question of the exclusion of black people from the medium and higher reaches of business, the programme has already been eminently successful. It encourages those who faintheartedly accept inferior positions to be bolder in their outlook. It shakes the complacency of those who somnambulistically imagine that the present set-up must be the best one because it placed such excellent persons as themselves in charge.

At the same time, as its authors readily concede, the concept is far from unproblematic.

Economists will be asking their own questions. What follows is an attempt to apply a constitutional perspective to the problem. The views expressed are exploratory and mine alone.

RACISM BECOMES COLOUR-BLIND

Suddenly the biggest racists became the most ardent non-racists; overnight the most chauvinist of men become the greatest non-sexists. With hardly a pause or a stumble, people who have been discriminating all their lives discover the virtues of non-discrimination and merit at last becomes meritorious.

Apartheid has gone, they declare, and now there is nothing to stop anyone from achieving their just due on the basis of merit alone. To give special preferences to blacks or women now would, they assert, be as bad as denying them opportunities was in the past.

We cannot in response pretend that the problem is an easy one. We who have spent all our lives fighting against racism and at least part of them struggling against sexism, do not come easily to accept that race and gender are factors that can legitimately be taken into account in relation to advancement in the workplace or business sphere.

We are uncomfortable in the world of quotas, remembering how they were used in a humiliating way in the past to limit rather than open up access to universities and other bodies.

In the light of our experience, we are against group rights, whether in the realm of politics or of business. We detest the stereotyping and assumptions that go with them. We take alarm at the very idea that anyone should benefit from or be

disadvantaged by the mere fact of being black or white, male or female.

At the same time, we are confronted with the reality that non-racism is suddenly being used to protect racial exclusion, just as the non-sexist principle is advanced to maintain male domination. If we are to be realistic, the greatest merit is still [in order] to have a white skin, to possess a male sexual organ, to speak English or to speak Afrikaans. Only after that do real qualifications enter the picture.

Decades, even centuries, of overt discrimination, have left us in a most paradoxical situation. While formal discrimination is being phased out, practical discrimination remains largely intact. The consequent anomaly is that the instrument being advanced to maintain the practice of inequality is the very principle of equality itself. Put another way, the concept of equal rights is becoming the main barrier to the actual enjoyment of equal rights. Whereas before inequality was justified on the grounds of the need to discriminate, now it is legitimised on the basis of the necessity not to discriminate.

We are told that if positions are not being opened up in significant number to blacks or women, it is because there are simply not enough qualified blacks of both genders or women of any race to take their places on the boards or on the bench [whether the workbench or the judicial bench]. It is claimed that `we' [the selectors] apply the merit principle only, without reference to race or gender.

Clearly the merit principle cannot be disregarded. We certainly cannot be opposed as a matter of principle to the concept of qualifications or of standards. We want the equal rights idea to triumph in South Africa. We want good quality performance. As true non-racists and non-sexists, we have no doubt that black persons of both genders and women of all races are capable of holding their own with anyone, that talents and capacities are to be found with equal dispersion amongst all groups and in both sexes.

Yet in practice we know that there is massive under utilisation of the skills and energies of blacks and of women. It is evident, too, that conscious and unconscious discrimination continues to play a big role, both in the public and the private sectors.

To get a position, blacks and women simply have to try harder, be better, be more highly qualified. Factors of supposed convenience or inconvenience still play a part: will white employees accept a black boss or supervisor, will men agree to having a woman in authority over them, unless, that is, the black person is manifestly brilliant and the female undeniably excellent?

The black must be more than equal to the model [not the reality] of the perfect white, but please, not a jumped-up imitation white. The woman must more than hold her own with her idealised male counterpart, but may we be preserved from someone who has lost her femininity, that is, her capacity to be pleasing and attractive to men. Sadly, what are self-evident daily experiences for those who are kept out, are simply not seen by those who control the points of entry or advance. Anyone who complains of feeling excluded is said to have a chip on his or her shoulder.

Once a black person or a woman is appointed, there is extra pressure to perform impeccably. Any lapse is immediately attributed not to any personal incapacity, but to black-ness or female-ness.

Then there is the question of the way that standards are defined and interpreted. Being a `good chap' is still a major qualification for being taken on. All things being more or less equal, the good chap, the known quantity, the person least likely to cause waves, will get the position. This is not only unfair to persons who are not socialised into being good chaps, and whose children are never going to have the possibility. It restricts the range of inputs and the variety of

life experiences that could enrich the texture of the organisation.

The model life situation that is taken into account as being normal and to which the applicant must conform is that of the successful standard white South African male. The language skills that count are English [or Afrikaans] - you may speak five languages, but if they do not include English and Afrikaans, you are not bilingual.

Liability for taking time off for maternity or for attending funerals or taking part in family indabas, is a definite minus. The psychological aplomb and sense of fitness that goes with being interviewed by your own kind, speaking your own language, responding to your own codes of communication in a style that is your own, and sharing the same allusions and points of reference, is a firm plus.

Interviewers and examiners are often quite unaware of the extent to which the very objectivity in which they believe biases them in favour of good white chaps. Conversely, they ignore the value of diversity and of the creative tension that variety can produce.

To sum up: The most difficult problem has been to reconcile the principle of non-racism, which seeks wherever possible to avoid any reference to race, with the principle of repairing the damage done by past racism, which requires paying attention to actual and continuing patterns of racial disadvantage.

Many attempts have been made to achieve this. The situation is intrinsically difficult and contradictory. Better to acknowledge the problems than to attempt a formulation that is either so bland as to say nothing useful, or so weighted to one side of the problem as to avoid the real difficulties.

It would be absurd if non-racialism became the main instrument for protecting racial advantage; it would be equally incongruous if taking account of the realities of racism meant ignoring completely the goal of achieving a race-free society.

What we need to do is to develop a principle which contains the possibilities of simultaneously outlawing racial or gender discrimination and looking concretely at the real disadvantages suffered by some persons compared to others because of race or gender.

The principle which has the greatest potential for achieving this is that of equal protection.

EQUAL PROTECTION

The first clause of any Bill of Rights in South Africa must be one guaranteeing the fundamental equality of all without reference to race, colour, creed, gender, ethnic origin, language or birth. So much is contained in these simple words. So many people have been driven off their land, so many cast into prison, so many forced to take up arms, to endure torture and banishment and exile, that they could be realised.

They are profound words, the moral and political foundation of the South Africa we wish to live in. We know what we must avoid, the "never again" aspect of the Bill of Rights. Never again shall we dispossess people from their land, homes and businesses because of race, never again, no matter who they are. Never again shall we have laws reserving jobs exclusively for members of one race, however great the need to deal with the imbalances we are inheriting.

Never again must we have divided and corrupt Tricameral own affairs institutions. Never again must our people be kraaled off from the mainstream into poor and overcrowded

Bantustans; and, as a matter of principle, never again should new forms of Group Areas be used to harass and segregate the former oppressors.

We are all South Africans, with equal entitlements and equal responsibilities as citizens of this land. No one has fought harder than the most oppressed section of the community, namely, the African people, for the achievement of this fundamental principle for equal rights and it was they more than anyone else who struggled against the division of our country into one group called settlers and another referred to as natives.

Whatever form advancement or affirmative action takes, even if it involves preferences which take race into account as a means of overcoming past discrimination, it cannot include total exclusion of anyone because of race. Never again should anyone be barred simply because of race from owning property or setting up a business or occupying any post.

Any statutes of the kind that were used in the past to oppress the African people would be unconstitutional. Even if their motive was to redress past wrongs, the method they employed would violate the principle of equal protection. As was said before, the cycle of domination and counter-domination must be broken if ever we are to have a real country called South Africa.

Yet equal protection should not be seen purely as a defensive principle to be raised against procedural inequality. Equal protection in the full sense of the term means looking at the reality of people's lives and ensuring that everyone is accorded the basic elements of equal dignity.

The law and the constitution cannot require that we all be equally happy or even be equally rich. Different philosophies exist as how best to become healthy, wealthy and wise. The function of the constitution is restricted to seeing to it as far

as possible that we all have an equal chance to become these things.

Properly understood, equal protection signifies that every South African is as far as possible given an equal chance to get ahead in life. In South African conditions this means five things, each of which should be attended to with its own mechanisms and in its own way.

The first takes race into account only in a negative sense, that is, to outlaw race discrimination. The next three are completely free of any reference to race; only the fourth one requires that race be explicitly taken into account in an affirmative way.

The principal argument that follows is that the fifth aspect should be seen as supplementary to and not substitutive of the first four, that is, that affirmative action will function in a just and effective way if it is seen as an extension rather than a contradiction of the principle of equal protection.

REMEDIES AGAINST DISCRIMINATION

The first aspect of equal protection that has relevance to the advancement of blacks in business is that it provides for the creation of remedies against racial discrimination.

A rather old-fashioned view of human rights and constitutionalism would have it that the constitution can only deal with the relationship between individuals and the state. Supporters of this view argue that discrimination by the state against an individual will be unlawful, but not discrimination by individual against individual. Thus freedom of contract would permit an employer to discriminate against a job applicant or to keep certain senior posts for members of one group only, without the state being able to interfere. At most, they say, the state can use its regulatory or policing power to bring such a firm into line, that is, it can refuse it a licence, or deny it tax benefits or state aid, or exclude it from

receiving state contracts. Yet it would not have the power to provide a direct remedy against the discriminatory act itself.

Such an approach flies in the face of practice in many countries where in the past two decades and in response to obligations undertaken in terms of international conventions, states have adopted legislation to combat discrimination in the private as well as the public spheres.

We in South Africa will have to establish agencies such as have functioned with a fair degree of success in other countries to investigate patterns of discrimination in relation to such matters as education, jobs, access to accommodation and entry into privately owned facilities serving the public, like restaurants, hotels and cinemas. The agencies would also have to provide means for receiving and responding to individual complaints, so that they can try to resolve the dispute by conciliation but invoke the law if necessary to get a just result.

It is usually recognised that small businesses employing only a few persons would be exempt from investigation. Yet medium-sized and large firms would no longer be able to discriminate as many of them overtly do today. This would mean that blacks could not be excluded from consideration for jobs or for advancement within firms or from receiving credit or from tendering for contracts simply because they are black. Nor could transparent devices be used which do not openly refer to race but which have the inevitable effect of excluding blacks, such as that applicants must live in a particular suburb.

Because of the all-pervasive character of racism in our society and its deep penetration into the business world, the functioning of a Human Rights Commission, or whatever the agency might be called, would be of major significance in opening up opportunities for black persons.

The most important employment agency in South Africa, namely the Broederbond, would be directly affected. This body is itself overtly/covertly both racist and sexist in its membership, and some say it might have some problems in the new South Africa if it could not see its way to opening up and transforming itself from being the AB into becoming the NRABSbond [the Non-Racial Afrikaner Broeder- and Susterbond].

In any event, even granting that the AB still has a role to play in bringing a rather recalcitrant section of the community into a new and democratic dispensation, it could no longer continue to influence the allocation of senior positions in the way it has been doing; it could not even carry on distributing posts by arranging a form of power-sharing with a secret African society.

The Human Rights Commission would essentially deal with overt racist practices and behaviour, where the intention to discriminate could be proved or else be presumed from the circumstances. Great attention will have to be given to establishing sensitive and participatory procedures, involving where appropriate unions [white as well as black], employers bodies, the Registrar of Companies, various licensing bodies, as well as skilled and independent investigators working with the courts or the tribunals that are given jurisdiction.

It would not, however, be capable by itself of helping black people achieve the qualifications, skills, credit-ratings or other attributes essential for really advancing in the business world. It is in this respect that the other aspects of equal protection are important.

EQUAL SPENDING

The second aspect of equal protection has significant implications of a generally redistribution character for South Africa. It is that all spending by the public sector, whether at

national, regional or local level, should be done on an equal basis.

At the moment we know through so-called own affairs budgeting how unequal the protection is: white children are either five times as stupid as black ones or else five times more privileged, since they receive five times as much per head from the state coffers on their education. White sickness is either four times as bad as black sickness, or else whites are four times as privileged as blacks, since they receive four times as much from the health budget.

Equal protection would mean narrowing and eliminating the gap. We will no longer have black and white pupils, just pupils, nor will we have black and white patients, just patients.

Equal spending will have a major impact on the building up of infra-structures and amenities in what are today called black areas. Not only would the health, education and living conditions of black people improve in general. There should be a considerable opening up of craft and entrepreneurial opportunities for blacks in relation to the necessary undertakings.

REGIONAL EQUALISATION

In the third place, the principle of equal protection requires that a person's opportunities should not be unduly influenced by which part of the country he or she is born in. The huge discrepancies between the rich and poor regions of the country and the wealthy and poverty-stricken parts of every town and village, will have to be attended to as a matter of constitutional duty. The mechanism here is to equalise spending, with a special view to building up equal infrastructures.

The principle of regional equalisation is known to many constitutions. It is an aspect of the principle of equal

protection, a means of ensuring that no-one is disadvantaged simply because of being born or growing up in any particular region.

It is particularly relevant to the areas presently referred to as homelands or independent states. At the moment they are reliant on subsidies from Pretoria that have been dispensed in a way that has maximised corruption and dependency and minimised true development. In future, as parts of new non-racial and non-ethnic regions, these areas will be able to press for the right to development. For once the fact that they are overcrowded will count in their favour. Their people will have the vote and accordingly be able to exert considerable influence.

The building up of basic infrastructures in these very poor areas will also require extensive involvement of the private sector, in relation to which black business people should find themselves well-placed because of their familiarity with the zones concerned.

AM EXPANDING FLOOR OF MINIMUM RIGHTS

Fourthly, equal protection requires the furnishing of at least the basic minima of a decent and dignified life for all on an equal basis. Society is under a duty to see to it that all its members enjoy at least the foundations of a dignified existence. This requires attention being paid as a matter of constitutional duty to ensuring basic nutrition, health services, education, shelter [including electricity and water] and welfare. Appropriate means must also be found to giving substance to the right to work.

Different mechanisms have been proposed for achieving this aspect of equal protection. The ANC' s draft Bill of Rights provides for a Social Rights Commission to monitor Clauses referring to an expanding floor of basic social, health, educational and welfare rights. The rate of expansion will be conditional on availability of resources.

EQUAL OPPORTUNITIES AND AFFIRMATIVE ACTION

The fifth and final aspect of equal protection (viewed in its full aspect as the foundation of equal dignity), relates to creating opportunities to overcome the barriers erected by past discrimination. The terms equal opportunities and affirmative action are sometimes used interchangeably, sometimes in an opposite sense. In general, equal opportunities tends to be the softer and more diplomatic version, affirmative action the more resolute one. They both involve special action to overcome the automatic replication from generation to generation of patterns of factual discrimination. Equal opportunities tends to put the emphasis on procedures, affirmative action on goals or outcomes.

The essence of the matter is not to separate the fifth aspect of equal protection, namely affirmative action, from the first four. The question in South Africa is not whether or not we will have affirmative action - the alternatives of inaction or arbitrary action are too unhappy to merit attention - but how we can ensure that affirmative action derives from, is integrated within and truly serves the principle of equal protection.

The following seven criteria are offered as a means of achieving the desired connection. The objective is to arrive at principles and procedures that will work, that seem to be eminently fair, that will promote real equality and that will reduce the oppressive sense of living in a society which is divided and unequal.

SEVEN CRITERIA TO GOVERN THE APPLICATION OF AFFIRMATIVE ACTION

Responsibility.

Equitability.

Proportionality.

Inclusiveness.

Security.

Accountability.

Flexibility.

These six -ities and one -ness seem at first glance to be the kind of things that both white and black business people could live with. However much the business world might like to see the word profitability added to the list, they would presumably accept that there is no constitution in the world that can guarantee its existence.

What precisely do these seven principles signify in relation to black advancement in business? More specifically, how would they relate to the programme of 3, 4, 5, 6?

RESPONSIBILITY

Given the way that the state in the past acted openly and through the statute book to discriminate against certain groups, it should not be necessary to prove responsibility to remove discrimination on a case by case and sector by sector basis.

What would be important would be to show the need for special intervention over and above the general extension of the principles of equal protection as set out above.

Thus the state would be expected to act with all deliberate speed to get its own house in order. The ordinary processes of recruitment, training and promotion will clearly be inadequate to rectify the towering imbalances in the state's own structures.

While non-racial elections will automatically de-racialise incumbency of elected offices, such as the President and members of the Cabinet, they will not directly affect the civil service, army and police force. Nor will they be sufficient to open up the middle and senior management levels of the para-statals.

Another area where the state would have clear responsibility to act would be in relation to land. While ordinary market mechanisms will undoubtedly have a role to play, they might in certain instances even intensify land hunger, as white investors sought to buy land in what have until now been called black areas. Responsibility to restore land to victims of recent forced removals is obvious, as is the necessity to find land on which people can live with at least a minimum of security and dignity.

Yet the problem goes further. If nothing is done to ensure a law-governed and progressive opening up of access to land on the part of those historically dispossessed, claims to land will be settled in a bloody and anarchic way outside of the law.

The setting up of a Land Claims Tribunal is a necessity. The Tribunal must be vested with clearly defined powers to recognise and reconcile in as equitable way as possible the claims of the dispossessed and the interests of present title-holders. Just compensation will have to be determined. The state cannot shirk its responsibility to supervise the process, create the necessary mechanisms, attend to the financial

implications and ensure that proper legal principles are followed.

No-one doubts the responsibility of the state to act in a decisive way so as to accelerate education and training for those disadvantaged by past discrimination. This implies creating special courses or targeting certain persons for existing courses. If the concept of equal opportunities has any meaning at all, at the very least it requires equal access to the acquisition of skills.

It is clear that in a post-apartheid South Africa, the main sphere for affirmative action will be in relation to repairing the damage done directly by apartheid yet the question arises as to whether there are other areas where it will be regarded as appropriate to single out groups for preferential treatment in order to make up for past exclusion.

The issue of gay and lesbian rights does not crop up in this connection - those rights should be covered by the general principles of equal protection mentioned above. Yet two groups would seem to have a strong claim for being beneficiaries of affirmative action programmes.

The first is women. Experience has shown that the question of rights for women never just solves itself. Nor is there ever a good time to pursue the issue. The question of basic rights is always inconvenient, uncomfortable for some, urgent for others.

In South Africa's case there is a strong overlay of black oppression and women's oppression, so that any attempt to level the playing fields, or grant equal opportunity, or do whatever it may be called, would inevitably require not special but special, special treatment to overcome the obstacles in the way of black women.

Yet the issue is a wider one. Affirmative action must be seen as part and parcel of a generalised programme of securing

respect for the human rights of all South Africans. If, as we increasingly say, South Africa is to be a non-racial, non-sexist society, it is not for nothing that we link anti-racism and anti-sexism. If the object of the exercise is to acknowledge the worth and liberate the capacities of all South Africans, then there can be no doubt that affirmative action must be used to back up the just claims of all women, both black and white, just as it must help realise the entitlements of all blacks, both men and women.

In other countries, anti-discrimination laws, have tended to give equal treatment to the issues of race and of gender oppression. In some cases, separate bodies have been set up to deal with the two; in other countries there is a single authority with blanket jurisdiction to cover both. It might be that in South Africa we will launch a generalised human rights agency to advance and defend human rights in all areas, but arrange for it to have separate specialised bodies to overcome race and sex discrimination, respectively.

Racial oppression and gender oppression have much in common in that they both block the development of the victim groups; both tend to justify themselves with similar arguments; and both end up blaming the victims for their plight. At the same time, their nature and roots are quite different, and the victim in one sphere can be the oppressor in the other.

The other group with a strong claim to affirmative action are the disabled. Society tends to see the problem as a welfare rather than a human rights one. Taking all forms of disability and infirmity, including those associated with advanced age, into account, it has been estimated that there are no less than nine million disabled persons in South Africa. Whatever the number, the basic claims of the disabled, as are being increasingly recognised on an international level, are for their right to participate in general life like everybody else and to be able to work like all others.

This requires that special action be taken to enable disabled people to have access to public transport, to be able to enter and circulate freely in buildings and to use their brains and energy to do useful and properly remunerated work. Legislation in many countries requires that transport and building licences will not be granted unless the interests of disabled people are properly taken into account. Frequently there is a further requirement that employers, particularly large ones, ensure that a certain quota of jobs is made available to disabled people.

Just as it is essential that women have the decisive voice in determining what sort of agencies and principles should be used so as to secure their rights, so is it fundamental that bodies like Disabled People of South Africa play a central role in working out affirmative action programmes for the disabled.

EQUITABILITY

It is not possible to promote equitable objectives with inequitable procedures.

The notion of equity is central to the whole enterprise of affirmative action. The basic idea is not that of a re-division of spoils that go with office. Nor is it a paternalistic handout made to appease consciences on the one side and to buy peace on the other. It is a project based on a sense of elementary justice that seeks to deal with and overcome inequities in an equitable manner.

This means that both the foundation of the programmes and the way they are handled must be equitable. Whereas the notion of strict rights always involves total triumph for one claimant and total defeat for another [you either have a right or you do not - you cannot have half a right], the concept of equity requires a balancing out of claims.

In the case of affirmative action it means that the interests of present incumbents or titleholders must also be taken into account, as well as of other persons from the privileged group who wish to get employment, advance up the ladder, farm or build a house. These interests must then be balanced against those of the groups that have been prejudiced by past and continuing discrimination.

To take a concrete case: in relation to restructuring the civil service so as to make it less unbalanced, it would be inequitable to adopt procedures which would have the effect of keeping out persons who satisfy at least the minimum requirements for the job, or which prevented special modes of training so as to enlarge the pool of candidates. At the same time, it would be inequitable to ignore the employment and pension rights of the existing incumbents.

Any affirmative action programme in relation to the civil service would accordingly have to be global in character. Basing itself on the principle of overcoming inherited injustice, it would have to operate in a just way. This would mean that in pursuing its clear objectives it would have to give a fair hearing to all concerned, give due weight to the interests of all, and opt for the solution that is least onerous to those affected. There would also have to be appropriate systems of review and supervision.

INCLUSIVENESS

Bit by bit, we build up a culture of South Africanising our processes and our solutions. The basis for doing this is to acknowledge a common claim to basic rights and aspirations and get into the habit of working together in the search for the most acceptable way of moving forward.

Affirmative action programmes should never be worked out unilaterally and then imposed, whether from above or from below, on recalcitrant employers, business people or landowners. Nor should they be worked out in government

departments and then announced to the proposed beneficiaries.

We have never in South Africa got used to taking joint, all-inclusive responsibility for designing and implementing projects. We still rely heavily on experts, secrecy and public relations promotion to get projects through. The more distant they can be kept from the people most directly involved, the better - in this way, so it is felt, unwanted emotions and unreasonable demands can be kept out of the picture.

The truth is that once the real problems are openly acknowledged, and all those likely to be affected brought into the process in a meaningful way, a solution that will be effective and lasting is far more likely to be found.

To return to the issue of opening up the civil service, it would be essential to involve all the unions and staff associations, however racist or else progressive they might have been, in the process. Government leaders, the companies concerned with pension funds, and representatives of all groups which deal with the civil service, whether they be private firms or community organisations, should also be involved in an appropriate way.

Provided that the basic objectives are not compromised, the more on-the-spot input there is, the better. It is not only that the solutions worked out are likely to be more efficacious, but that the people most directly affected are more likely to accept the compromises involved since they would have been party to them and at least have had their chance to make their position known.

SECURITY

Affirmative action is a serious business and must be treated seriously. The criteria for applying it must be established in

advance and be clearly spelt out so that all concerned know what the issues are and realise where they stand.
There must be a secure framework of principles and procedures governing its processes.

Put in other words, affirmative action must not be an excuse for dishing out rewards to friends, acolytes, neighbours, family members, helpful secretaries, old schoolmates, political associates, speakers of the same language, lovers, or even comrades who shared jail or exile and now have no property or pension to fall back on [they should have proper pension rights]. Nor should it serve as a pretext for victimisation, revenge or the discharge of racial animosity. Nor, on the other hand, should it be a cover for arbitrarily promoting friends of the boss, faithful retainers from sweetheart unions, long-time informers and spies, so-called loyal staff.

The rule of law must apply, not the subjective, corrupt, nepotistic or capricious whims of individuals. At the same time, affirmative action must be effective. Society must throw its weight behind affirmative action programmes. The law must back them up, supervise them, and see that they work.

ACCOUNTABILITY

We have to move away from the notion that all is fair in love, war and business, and the concomitant presumption that secrecy and deceit are business virtues. Genuine trade secrets can be protected without hanging on to information which will be required from all companies on an equal basis.

Openness and the free flow of relevant information is key ingredient of the principle of accountability. Without hard and reliable facts and figures, the participants involved in the process of elaborating the programme cannot function properly. Similarly, without solid information freely supplied, those entrusted with monitoring progress cannot do their job properly.

The private sector knuckled under with barely a whimper to apartheid regulation and the racialisation of everything. It should not be too difficult for it to learn to live with a genuine opening up of business at all levels, that is, with what will amount to anti-apartheid de-regulation, or the de-racialisation of everything.

Accountability involves not only openness but financial control, Parliamentary control and judicial review.

The question of affordability will clearly have to be reckoned with in every case. The government could double or triple the size of the civil service so as to create new posts for black persons and for women without disturbing the positions of white men. This would not be an acceptable solution. The cost to the country would be too high.

Similarly, private companies will have to take account of the costs involved in working out affirmative action programmes. They ought not to be able to avoid taking affirmative action simply because it involves expense. A certain degree of expense is inevitable, but if it is part of an across the board programme applied to the company's competitors, it should not put the firm at a disadvantage. The medium and long-term advantages of diversifying the workforce and management should then be positive for each company and for the economy in general.

The cost factor cannot in itself be used to block affirmative action altogether, but it is an important element that will have to be taken into account in relation to the phasing and extent of concrete programmes.

Parliamentary control implies that the persons responsible for initiating and monitoring affirmative action programmes will not function as autonomous individuals responsible only to their bureaucratic or political superiors, but will also have to

answer for their conduct and decisions to the elected representatives of the people.

This could be an important check against the pursuing of policies in conflict with principles agreed upon when affirmative action legislation was being adopted. It could also help to discourage abuse and corruption by officials.

Finally, there will have to be accountability to the courts. In the USA the courts have played an important role not simply in testing the constitutionality of affirmative action programmes, but in themselves designing such programmes and monitoring their implementation. In such cases, they appoint commissioners to help them with fact-gathering, receive information from all sides, and make a binding determination. Thus the courts have been directly involved in ordering everything from bussing to housing programmes to hiring and promotion schemes in large businesses.

It might be that South African courts will feel more comfortable with leaving affirmative action determinations to other bodies, and with confining their role to that of ensuring that the proper constitutional and legislative principles and procedures have been followed.

PROPORTIONALITY

The ends are laid down in the Bill of Rights and in legislation: are the means used proportionate to the objectives?

It seems that in most countries with constitutional courts the main issue with which the judges of these courts are confronted is that of proportionality. Cases of clear violation of, or manifest compliance with the constitution do not reach the courts. Those that do are usually concerned with reconciling or harmonising two or more competing principles.

Proportionality is a controlling mechanism based on reason and good sense which has the objective of relating means and ends.

The concept of proportionality is relied upon in many other parts of the law. It regulates the degree of force which may legitimately be used to repel an attack. One cannot used a gun to ward off a threatened slap on the wrist. Where there is joint negligence, damages are apportioned in accordance with the degree of negligence.

The reasonable man or woman, the mythical creature against whose judgement and actions the courts are always measuring behaviour, invariably has a good sense of proportion. The limits of the duty of care or the principles for assessing damages in negligence actions take into account the floodgates argument, that is, the need to balance the right to full indemnification in relation to wrongfully caused injury, against the ruinous cost to insurers of unlimited claims.

It should not be beyond the capacity of Parliament to draft legislation setting out the procedures for and criteria governing the elaboration and implementation of affirmative action programmes. Nor should it be beyond the wit of our judges to develop a sensible, just and efficacious interpretative jurisprudence based on the core principle of proportionality.

In the case of affirmative action there is an inherent tension between the principle of colour-blindness and the principle of being sensitive to the way colour impinges negatively and unjustly on people's lives. Completely to ignore either element would be to act in a disproportionate way.

Thus an affirmative action programme that totally disbarred whites or men from certain positions, would be disproportionately tilted towards the principle of resolute steps to correct imbalances. One which on the other hand ensured training or hiring policies that gave a positive

weighting to blacks or women [or, possibly, to poor people or people from rural backgrounds] as part of the general profile of candidates, without excluding whites or males [or rich people or those from the cities], would meet the requirement of proportionality.

There is also the question of balancing the public interest in deracialising and diversifying business against the good functioning and internal culture of any particular enterprise.

Any attempt, for example, simply to bulldozer through a programme of instant deracialising of underground jobs in the mines might be regarded as unconstitutional because of disproportionality in relation to process and timing. Conversely, a refusal to move towards the progressive opening up of well-paid underground jobs on the grounds that white miners would object and so disrupt production to the detriment of all, would equally fail the test of proportionality. The public interest and the rights of black miners could never be completely excluded, but neither would the need to phase in changes in a way that would cause the least disruption.

Disproportionality could relate to expense - it would be disproportional to saddle the firm or the taxpayer with manifestly ruinous expense, and equally it would be disproportionate to say that a programme could only be viable if it involved no cost at all.

It could refer to timing. A recent visit to a firm that prides itself on delivering packages anywhere in the world in record time showed that all the clerks at the main office were white. This clearly must have reflected hiring policy since the number of qualified and overqualified black persons capable of doing the work must have been enormous.

To give that firm until the end of the month to correct the imbalance would mean weighting the balance too much in favour of the public interest. To give them ten years would be disproportionate the other way. Acting with the direct

involvement of all those most directly and intimately concerned, the body making the determination [assuming it was not voluntary] would find out the normal hiring frequency. It should then provide that the firm advertise widely, and finally ensure that out of the pool of qualified applicants, say, at least two out of three new recruits in the next two year period should be black.

It could refer to means or criteria. It would be disproportionate to have criteria for appointment or advancement that were so restrictive as to exclude qualified persons. On the other hand, it would be equally disproportionate to have criteria that were so lax as totally to dilute the element of qualification.

FLEXIBILITY

Inflexibility of purpose is the foundation of flexibility of means. There can be no flexibility in relation to the objective of overcoming the effects of past discrimination. Apartheid is irremediably bad and offensive. There must be no wavering in relation to getting rid of its effects.

Once the firmness of the goal is accepted, it is possible to be extremely flexible in relation how to achieve it. Conversely, it is when there is doubt about the honesty of seeking the goal that people fight over every detail of the programme. The objective of flexibility must be to secure affirmative action, not to undermine it.

Flexibility, then, relates to the means, not the ends. If the bodies or persons concerned voluntarily introduce programmes that seriously and substantially bring about the required changes, if they follow appropriate procedures and involve all interested parties in the process of decision-making, then there is no need for external intervention in any form.

The principle of flexibility, then, encourages the voluntary principle, without foregoing the right of the law to intervene when there is no progress at all or the rate of advance is manifestly inadequate.

The principle also acknowledges the importance of process and timing, that is, of phasing advance, as well as of giving the parties affected considerable latitude in regard to the precise methods to be used: what matters is that the problem be tackled with resolution and that certain goals or targets be reached.

It is not affirmative action but history which has created the issues. Everyone knows what the basic problems are. Persons who have been unjustly and often cruelly excluded from access to opportunities are now claiming their rights. Others who are in privileged positions are anxious that in losing their monopoly they will lose everything.

Responsibility, equitability, security, inclusiveness, accountability, proportionality and flexibility. These are the seven sisters of affirmative action to deal with these dilemmas. Other writers could add a few more principles, or collapse several of this list into one.

The fact is that however it is structured, affirmative action could well be a law-governed and principled process that contrary to many expectations brought South Africans closer together.

When people are themselves involved in a process of change, they lose much of their anxiety. The end result might not be exactly what any of the parties wanted, but would be accepted on the basis that there really was no other way.

The mutual relief at jointly working out solutions that function in practice and that avoid unending strife and tension, could well encourage the beginnings of a new

consciousness that could be as rewarding as the results of affirmative action itself.

V CONCLUSION

If the above tests of constitutionality became the law, would 3, 4, 5, 6 pass?

There could be no question that the goal of opening up business at all levels would be constitutional. Legislation designed to ensure that this goal was reached and establishing criteria and procedures along the lines mentioned above would also be valid. Quotas would not be unconstitutional per se even if they gave express preference to blacks or to women or to disabled persons. The question would be, is 3, 4, 5, 6 based on

responsibility?..... Clearly, in the light of the way blacks were dispossessed by the state in the past, the state has a duty to repair the damage done. It is not just a matter of morality, but of survival. If the law is not there to attend to the problems in an appropriate manner, the nation will tear itself apart. The duty to act and to do so resolutely cannot be doubted.

equitability? .....To the extent that the proposal flows from one part of the business equation only it cannot be said to have emanated from an equitable procedure. In that sense, it would be inappropriate for a democratic government to pass legislation enforcing the programme simply because it sympathised with its original proponents. Equity would require that all interested parties be heard.

inclusiveness?.....The same factors would apply.

security?.....The importance of this element is that 3, 4, 5, 6 would have to be incorporated into legislation. This would mean Parliamentary debate about all its aspects and discussion about the detailed mechanisms to be established to ensure achievement of the goals.

accountability?.....If the programme were adopted, there would have to be specific mechanisms built in to take account of the costs involved, to ensure openness of information and proceedings, to guarantee Parliamentary supervision and to indicate precisely how review by the courts would operate. It would not be a programme simply left to state officials to implement on their own according to their personal judgements and predelictions.

proportionality?.....This is of course the key element. The procedural elements of equity and inclusiveness could be attended to. White business people and unions could be involved in the process, and the Johannesburg Stock Exchange and the Registrar of Companies brought in. Many questions would have to be asked, first by Parliament, then by the courts.

Would the package have to stand or fall as a whole? Could parts be constitutional and others not? Thus the government could more readily impose quotas on itself than on private firms. 3, 4, 5, 6 could accordingly more easily pass the test for advancement in the public sector, for which it was not specifically intended, than in the private sector, in respect of which it was initially proposed.

The issue of proportionality cannot be resolved without much more information. The problem is not to declare targets but to ensure that they are reasonable and reachable.

flexibility?.....If the basic scheme were held not to be disproportionate, there would be no inherent difficulty in building in the necessary degree of flexibility in ensuring compliance. Firms could be given considerable leeway in relation to how to find suitable candidates for the board and for general management, how to ensure shareholding by blacks and how to distribute procurement contracts.

The crucial element, then, would be that of proportionality. Are the means proportional to the end? Are there other and

better ways of achieving the same objective, with less cost both economically and socially? Are the figures adjustable? Can parts of the programme be severed from the rest without destroying the whole concept?

It was not NAFCOC'S intention to anticipate future constitutional determinations, but merely to put the question of black advancement firmly on the agenda. To the extent that they have helped in a simple and effective way to concentrate attention on a neglected subject, they deserve to be congratulated.

It might well be that application of the first four elements of the principle of equal protection would lessen the need for resort to affirmative action and quotas. New strategies could be advanced that were more securely and more broadly based.

The general opening up of education for blacks, the broadening out of access to learning and culture, the new patterns of directing state resources towards satisfying the needs of all, could result in the development of a strong and self-reliant black business infrastructure. At the same time, black economic power could be mobilised through workers, residents and consumer organisations. Black trade unionists and black savers could become shareholders with direct representation on the board.

Black business people could then advance on all fronts, as independents, through franchises and through joint ventures. With their community contacts, language skills and capacity to relate directly to the new business opportunities that a democratic government would develop, they would be in a stronger position to advance in the formal sector of business on their own terms.

The small business and the informal sectors should also expand without this being projected as an alternative to advancing in big business.

The future of black business people, then, would seem to lie in their maintaining close links with the community rather than in distancing themselves from it.

Relationships with the unions could become quite complicated, because there is no guarantee that black employers are any less antagonistic to organised labour than are white ones. Yet the more far-sighted black business people will see that the unions are important links with the community, that they control considerable funds and that they will be a major protagonist in influencing the country's economic policy, and especially spending in the socio-economic sphere.

Black business people will also be able to accompany and assist what should be a growing class of black farmers producing for the market. The same would apply to the civics, who would have considerable influence on the way schools and clinics and telephones and water pipes and electric lights were installed in the townships.

The prospect would be of the black entrepreneurial class contributing not only to their own advancement but to the advancement of all black people, and of doing so in a way that was consistent with the principles of constitutionalism and encouraged the evolution of a united South African nation in which, proud of different cultures, we all at last became South Africans.