Promoting Affirmative Action

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Given the legacy of apartheid, South Africa is one country where the case for affirmative action appears to be compelling. But it would be a mistake to expect affirmative action instantly to resolve the problems of a deeply unequal society. It will only be effective if used with caution and combined with coherent policies in key social sectors, argued Faundez at the 7th Annual Labour Law Conference.

Affirmative action involves treating people belonging to a specified group differently so that they obtain an equitable share of a specified good. In the area of employment, its object is generally to ensure that the target group is equitably represented in the work force of a particular employer.

Affirmative action is a controversial issue because it is seen as a challenge to the liberal principle of equality and because it is regarded as an undesirable intervention in decisions which, on efficiency grounds, are better left to the discretion of management.

Critics of affirmative action also point out that it has a negative effect on the general morale of the work force. For while those who benefit from the policy are made to feel that they are underqualified for the job, those who are not members of the target group feel that they have been treated unfairly and lose their drive to work.

Critics also point out that affirmative action policies only benefit a small segment within the target group, generally those who are better educated and hence do not need affirmative action to secure a job or a promotion. Thus, according to these critics, affirmative action not only fails to improve the lot of the target group, but also exacerbates differences within it.

Proponents of affirmative action, for their part, claim that measures which improve job opportunities for members of target groups act as an incentive for them to compete and develop new skills. They point out that by promoting wider participation of members of the target group in the labour market, affirmative action improves the morale of the workplace, and makes a contribution towards national integration.

Proponents acknowledge that while not all members of the target group will benefit from this policy, the fact that some individuals are given the opportunity to demonstrate their abilities and skills enhances the standing of the whole group in society.

The debate over affirmative action, informed as it is by the conflicting ideological perspectives of the participants, is interminable. The concern here is not to evaluate the merits of these arguments, but simply to offer background information which will, hopefully, help to clarify some of the points made by both proponents and critics of affirmative action.

For the arguments made by both sides raise important issues which can and ought to be the object of careful analysis. Affirmative action - not unlike any other public policy - can be good, bad or even indifferent.

A poorly designed or badly administered affirmative action policy can bring about enormous economic and political hardship both to individuals and to society. Affirmative action, on the other hand, can also be a necessary and useful policy tool to bring about social justice and to further the process of national reconciliation.

Affirmative action is a powerful and delicate instrument which ought to be used with caution. In the following paragraphs I discuss some of the main issues likely to arise in the process of formulating and designing an affirmative action policy for South Africa.

Limits of equality

Employment decisions are generally regarded as fair when there is equal opportunity for all participants. In an equal opportunities system, not all agents have the same chance of achieving the desired goal, but they are all provided with equal means to achieve it. Hence, an equal opportunities system does not yield equality of result.
The unequal outcome of an equal opportunities system is caused by the unequal skills or talents of the participants. While in theory the means available to the participants are equal, they do not all use these means with equal talent or skill. Equal opportunity is thus consistent with the model of a market system where unequal results are seen as the engine of the competitive process.

Since competition within an equal opportunities system is a continuous process, today’s losers know that with a bit of effort and perhaps better luck, the market is likely to yield better results tomorrow. Unequal outcomes are not regarded as unacceptable, either from a moral or political point of view.

Equal opportunity

The shortcomings of a strict equal opportunities system are well known. Unequal results do not come about only because participants fail to make use of the resources at their disposal with equal skill or application. The problem is that in practice, not all means that have a bearing on a given outcome are equalised.

In some instances - such as in the case of intelligence or individual aptitudes - because it is impossible; in other instances because it is morally objectionable - such as removing children from their parents to ensure uniform psychological traits. These examples are, on the whole, not contentious.

The real problem in an equal opportunities system is that the unequal distribution of means is in turn the consequence of unequal distribution in previous rounds of allocation.

Thus, a society which has consistently denied basic education and health to the majority of the population can hardly rely exclusively on an equal opportunities policy to judge the fairness of employment decisions.

One way of resolving this problem is by introducing policies which attempt to equalise the means at the disposal of participants, thus making their prospects more equal. Another way is to allocate means unequally among participants so that the prospects of achieving the desired goal are more equal.

These two approaches to the problem raise issues which have a bearing on affirmative action. The need for affirmative action in fact stems from the realisation that a formal system of equal opportunities, though desirable, is not adequate for achieving results which are fair or even economically sensible.

In the United States, for example, affirmative action came about as a consequence of the failure of the formal system of equal opportunity to eliminate discrimination against blacks and other minorities.

Thus, it is reasonable to expect that the outlawing of apartheid in South Africa - an essential first step towards a more egalitarian and democratic social order - will not instantly eradicate apartheid from the fabric of society. The legacy of apartheid is likely to live on for some time in civil society and in many of the country’s institutions.

It is within this context that a carefully designed affirmative action programme can make an important contribution. For policies giving preferential treatment to groups that were victims of discrimination should be aimed at eliminating the present consequences of past discrimination.

Affirmative action can thus become a key mechanism for remedying the shortcomings that are the inevitable result of a strict application of an equal opportunities policy.

The link between affirmative action and equal opportunity is clearly expressed in Canada’s Employment Equity Act. The purpose of the Act is to achieve equality in the workplace so no person is denied employment opportunities or benefits for reasons unrelated to ability, and to correct disadvantage by giving effect to the principle that employment equity means more than treating people in the same way “but always requires special measures and the accommodation of differences”.

In the US, the Equal Employment Opportunities Commission (EEOC) Guidelines on Affirmative Action place it firmly within the perspective of equal opportunities. Affirmative action is defined as action “appropriate to overcome the effects of past or present practices, policies or other barriers to equal opportunity”.

The actions which the Guidelines envisage include measures which are race, sex or national origin conscious; that is, measures which take these factors into account in order to enhance employment opportunities of minorities and women.

Measures

The link between affirmative action and equal opportunity provides us with a basis upon which to select appropriate affirmative action measures. These measures range from those which are meant to ensure the proper operation of an equal opportunities system to...
those which involve preferential treatment of people in target groups.

Because the ultimate objectives are to achieve fair equal opportunity these measures must be flexible: tailored to specific needs and only in place until the objective of equitable representation is achieved.

Affirmative action thus covers a variety of measures designed to ensure that equal opportunity obtains in practice.

For example, barrier elimination measures such as getting rid of testing requirements not related to the job, reviewing interviewing practices and fair recognition of qualifications and work experience are all essential components of affirmative action programmes. This is also true in the case of job accommodation measures such as flexible hours or the provision of facilities to ensure easy access to buildings.

**Acceptability**

Some affirmative action measures are less controversial than others. Measures such as those aimed at broadening the scope of a firm’s recruitment efforts, or which involve the review of selection and promotion procedures, are acceptable even to many who, in principle, are opposed to affirmative action.

Likewise, the provision of special training for groups who have suffered discrimination is widely accepted. Indeed, given the special needs of South Africa, the provision of accelerated training is likely to become one of the most important components of affirmative action.

Other measures are less acceptable either on grounds of economic efficiency or fairness. This is the case, for example, if employees are dismissed to make room for a person from a target group. Likewise, the creation of supernumerary jobs simply to meet affirmative action goals is neither economically nor politically wise.

Perhaps the most controversial of all affirmative action measures is the hiring of people who do not have the requisite skills or qualifications to do a particular job. This measure is unacceptable for several reasons. First, because it is economically inefficient and could well endanger the health and safety of a large number of people.

Second, because it generally involves excluding a qualified person, thus giving credibly to the allegation of reverse discrimination. And thirdly, because it is generally counter productive as the individual who benefits from such ‘token’ appointment is often the target of open hostility and isolation among colleagues.

Appointing or promoting unqualified people is rejected because it contravenes the merit principle which requires that the best qualified be chosen. Since affirmative action involves preferential treatment for certain individuals, it would appear that it is inconsistent with the merit principle.

This is an issue which has troubled promoters of affirmative action. In the US, for example, the 1964 Civil Rights Act provides that nothing in Title VII of the Act shall be interpreted as requiring an employer to grant preferential treatment to any individual or group because of race, colour, religion, sex or national origin.

This section was interpreted by the Supreme Court, which upheld a voluntary affirmative action plan in the case of United Steelworkers versus Weber (1979).

The plan had been established in a collective bargaining agreement between the Steel Workers Union and Kaiser Aluminium and Chemical Corporation, and its object was to eliminate racial imbalance in a craft workforce which was almost exclusively white. It established a training programme that reserved 50% of openings for black employees and set hiring goals for blacks at a percentage equal to that of blacks in the local workforce.

The Supreme Court rejected the argument that voluntary racial preferences were not allowed under Section 703(j). According to the Court, it does not limit what private employers or unions are permitted to do with respect to such preferences.

The Court argued that there was serious underutilisation of blacks in the relevant job categories, that the plan did not unnecessarily trammel the interests of white employees as it did not require their discharge, that it did not absolutely bar the employment or advancement of white employees, and was a temporary measure.

These four factors can be seen, in my view, as an attempt by the Supreme Court to reconcile affirmative action with the merit principle. The plan is acceptable to the Court insofar as it is flexible, is not an absolute bar to employment of persons who are not in the target group and it has a limited duration.

According to this interpretation, affirmative action is thus a temporary and limited departure from the merit principle in order to eliminate racial imbalance in the workforce. Other cases confirm that affirmative action is...
The ILO’s draft policy for Namibia reconciles preferential treatment with merit, using the notion of ‘suitably qualified persons’.

Setting numerical quotas is an indispensable feature of any meaningful affirmative action programme, but they must be flexible.

Quotas

One of the most heated controversies in the field of affirmative action concerns the extent to which affirmative action can be expressed in numerical terms: whether quotas can ever be justified.

To understand the nature of this controversy it is important to bear in mind that the use of statistics is a necessary tool in the process of determining whether discrimination may have occurred in a particular case. Likewise, the use of numbers and percentages is necessary in order to monitor progress in an affirmative action programme.

The issue of quotas may arise from the fact that employers who find that members of the target group are under represented may be required to set goals and a timetable to correct this problem. Goals and timetables, if interpreted rigidly, could easily become quotas which employers fill, regardless of the qualifications of the candidates, to comply with their affirmative action obligations.

The US Supreme Court has, on several occasions, approved court ordered plans which set numerical quotas. In these cases, the Court took into account the fact that the affirmative action plan which required recruitment or promotion quotas were flexible, narrowly tailored and did not impose an intolerable burden on non-minority applicants.

Setting numerical quotas is an indispensable feature of any meaningful affirmative action programme. An alternative approach is to interpret the goals as flexible targets which have to be realistically based on the circumstances of each employer.

This is the approach taken by the contract compliance programme in the United States. The ILO’s draft on Namibia also follows this approach: it requires companies to set numerical goals, but in determining whether an employer has complied with such goals, it takes into account the extent to which the employer has made good faith efforts to achieve them.

This flexible approach to the interpretation of employers’ obligations is consistent with the fact that employers are only required to afford preferential treatment to suitably qualified people. If such people are not available, employers would not be able to fulfill their obligations. Hence the need to interpret this obligation in a flexible manner.

Conclusion

In preparing an affirmative action policy for South Africa, it is important to take into account the experience of other countries. Affirmative action is used in many countries to achieve a variety of objectives. While there is no ideal model, the experience of others should be a valuable source of information and, perhaps, inspiration which may help in the choice and design of affirmative action in South Africa.

Given the legacy of apartheid, South Africa is one country where the case for affirmative action appears to be compelling. It would be a mistake, however, to expect affirmative action instantly to resolve all the problems of a society plagued by extreme forms of inequality. It will only be successful if combined with coherent policies in key social sectors.

Affirmative action should not be seen as a substitute for social policy. It cannot, by itself, bring about greater access to social goods such as employment, education, health and nutrition. The success or failure of affirmative action will, however, depend largely on the successful implementation of social policies at a wider national level.