

# Affirmative Action in the New South Africa: The Politics of Representation, Law and Equity

By Sisonke Msimang

*This is the next and more profound stage of the battle for civil rights. We seek... not just equality as a right and a theory, but equality as a fact and as a result.<sup>1</sup>*

U.S. President Lyndon B. Johnson



by Gisele Wulfsohn

**A**ffirmative action was born in the United States in the mid-1960s. U.S. President Johnson introduced it as a policy that would redress racial imbalances that existed in the U.S. in spite of constitutional guarantees and laws banning discrimination. Under pressure from civil rights groups, Johnson's administration issued an Executive Order that put

affirmative action in place. Affirmative action focused specifically on education and employment. The emphasis was on taking active measures to ensure that Blacks and other minorities enjoyed the same opportunities for promotions, salary increases, career advancement, school admissions, scholarships, and financial aid that had been the domain of Whites. From the outset, in the United States, affirmative action was articulated as a temporary measure that was necessary in order to level the playing field for Americans of every race.

In South Africa, the discourse around affirmative action has been similar. In fact, the terms and many of the ideas that eventually found their way into South African law books were borrowed from the U.S. experience.

In the South African context, affirmative-action policies in education,

as some of the key debates for and against affirmative action that are taking place in feminist circles and other civil society groupings in South Africa.

### Historical Context

Prior to 1994, Black South Africans were unprotected by the law. The legal codes of the country categorised human

the home and in the 'public' was limited for many women, by the conservatism of a patriarchy that was encouraged by the violence, conservatism and rigidity of the apartheid state.

White women were excluded from most types of formal employment except secretarial and clerical work. While this exclusion was not legislated, many White women were denied access to employment by conservative ideas within Afrikaans and English communities about women's place in society. Thus, White women's employment patterns mirrored their role in the family.

**Those who were not White lived in a country that persecuted them for the colour of their skin; denied them job and educational opportunities on the basis of their race, and ensured that their access to housing, health services, transport and economic opportunities was limited.**

employment and the political sphere have also been argued for in terms of their ability to level the playing field. The new government has insisted that the current competition for jobs is often an unfair one for Blacks, women, and people with disabilities, particularly those who were not entitled to the same educational and career advancement opportunities as White men.

This article will explore the difficult terrain of gender and race in contemporary South Africa by analysing the issue of affirmative action. The article will use the South African experience as a case study, to explore whether affirmative action necessarily challenges racist and sexist power, or whether it simply diversifies the pool of people who can occupy positions of class privilege, without changing the meaning of that power. In so doing, this article will examine the Employment Equity Act (EEA) as well

beings as African, Coloured, Indian or White.<sup>2</sup> Those who were not White lived in a country that persecuted them for the colour of their skin; denied them job and educational opportunities on the basis of their race, and ensured that their access to housing, health services, transport and economic opportunities was limited. Racism under apartheid was both informal (everyday practice) and formal (laws designating areas where Blacks could and could not live, banning interracial sex, and barring employment of Blacks for certain positions).

### Women Under Apartheid

In addition to the infamous laws that governed the lives of Black women and men, apartheid acted to curb the participation of women—particularly Black women—in various aspects of life. The system also had profound effects on the 'private' lives of women—what was possible both in

Furthermore, White women's aspirations and opportunities were limited by the policies of banks that would not let married women take out loans or open accounts without the permission of their husbands; employers who fired women when they got pregnant; and an educational system that encouraged women to take courses in nursing or teaching rather than dentistry or higher education. This varied depending on class, and began to shift towards the 1980s as university enrolment evened out for White women and men, and as career opportunities began to open up in a number of non-traditional disciplines. However, broadly speaking, White women are still economically and politically disadvantaged in relation to White men.

Many gender activists in South Africa have pointed out that while all women suffer under patriarchy, they suffer in different ways depending on

**Because race was so intertwined with poverty, Black women participated in the workforce in significantly higher numbers than White women did.**

their race, class, sexual orientation, religion and ethnicity. Although apartheid was primarily a racial ideology, it intersected with conservative class and gender ideologies in ways that made life much easier for White women than for Black women.

Similarly, Black women's participation in the workforce was also indicative of the gender division of labour within the home. Because race was so intertwined with poverty, Black women participated in the workforce in significantly higher numbers than White women did. The most common employment of Black women was in the domestic sphere. Black female domestic workers subsidised the lifestyles of White women under extremely exploitative conditions.

Black women also occupied positions as cleaners and 'tea-ladies' in office buildings. In addition, Coloured women in particular worked in factories in the food and clothing industry. However, in rural areas, unemployment was high, and many Black women relied on the paychecks of their migrant-labourer husbands who worked in the mines, to sustain them and their families. Others were farm labourers who worked alongside their husbands but were paid less because they were women.

Clearly, patriarchy limited the

opportunities for all women in South Africa, but apartheid and poverty worsened the situation for Blacks, while elevating the status of White women in relation to them. Most White women were not subjected to the humiliation of carrying passes, they did not carry the fear of police brutality that was a constant threat in townships that lay on the outskirts of major cities, nor were they denied access to education and housing in the same ways that Black women and men were.

### **Legislation in the New South Africa**

Given this history, the government of Nelson Mandela prioritised social spending in health, welfare, education and housing in its first term. In addition, the new government focused its attention on changing the laws of the country so that they would reflect the spirit of the new Constitution. Many of the old laws had to be scrapped and rewritten in line with South Africa's Constitution and international human rights agreements. Furthermore, the government set about writing proactive laws that would encourage the hiring of Blacks, disabled people and women, as well as guarantee their attendance at institutions of higher learning.

The Ministry of Labour had the job of drawing up the framework within which employers and employees would operate in the new South Africa. This

meant drafting legislation to ensure that all South Africans would be able to compete for jobs on an equitable basis. As such, the Ministry has drafted numerous pieces of legislation. The Labour Relations Act of 1995 (LRA) and the Basic Conditions of Employment Act of 1997 (BCEA) have also been instrumental in setting out the parameters under which workers can be employed and organise. The BCEA establishes clear rules about overtime, working hours and remuneration while the LRA allowed legal strikes and industrial action for all workers for the first time. Most relevant for the purposes of this article is the Employment Equity Act of 1998.

### **The Employment Equity Act**

While the progressive Constitution and laws of South Africa have been applauded for their role in fighting for and protecting the rights of poor people, women and socially marginalised groups, there are interesting ways in which activists are discovering that even the most progressive laws can be subverted. The laws around affirmative action serve as an example of both the power and the limitations of the law in effecting social change.

The key affirmative-action legislation in South Africa is the Employment Equity Act (EEA). Although the act was passed in 1998, it only came into effect at the end of 1999.

According to the Department of Justice Website, "the purpose of the Act is to achieve equity in the

workplace, by a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.”

The Act promotes fair treatment by prohibiting unfair discrimination on the basis of “race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.”

The Act then goes on to elaborate measures that constitute affirmative action. These measures are to be taken by employers to ensure that members of designated groups<sup>3</sup> are adequately represented in the workforce and have equal opportunities to compete for and advance in jobs. Affirmative-action measures include the “identification and elimination of barriers with an adverse impact on designated groups; the promotion of diversity; making reasonable accommodation for people from designated groups; retention, development and training of designated groups (including skills development); and preferential treatment and numerical goals to ensure equitable representation. This excludes quotas.”<sup>4</sup>

Furthermore, the Act states that employers aren’t required to take steps that may constitute “an absolute bar-



by Gisele Wulfsohn

Race and colour dictate a woman’s future.

rier” to people from non-designated groups.

Employers of 50 or more workers, or with an annual turnover greater than R4 million (US\$600,000) are required to draw up an Equity Plan which outlines the company’s commitment to equity over the next five years. The Plan is to be submitted to the Employment Equity Commission (a body created by the Act) on a yearly basis.

Although carefully worded so as not to infringe upon the rights of White South Africans, the Act caused an uproar and faced resistance from some quarters. A national newspaper, *The Weekly Mail and Guardian*, reported the following opinion:

“Tony Twine, an economist at the Johannesburg-based Econometrix, feels the Bill does not promote economic growth. He says it is the latest “cog in a

sequence of labour legislation” that puts “a heavy onus on businesses and protects various workers’ rights without leaving business much flexibility to decide its own future.”

Twine says the Bill, by implication, imposes quotas on companies. ‘You end up in the position that every market researcher [is] looking for a one-legged Black female... You end up in stupid situations.’”<sup>5</sup>

Defenders of affirmative action have argued that such comments are aimed at preserving White male privilege rather than addressing the widespread structural inequalities that have resulted in grossly skewed employment and educational achievement statistics. The difficulty is that the language of race and racism has become quite sophisticated in South Africa. Opposition to affirmative ac-

tion is usually voiced in terms of fears that it might be “inefficient” or difficult to monitor.

The Democratic Party (DP) opposed the Bill in parliament on the grounds that it would create another inefficient bureaucracy. For the DP, the benefits of challenging racism and sexism were outweighed by concerns about running a more efficient government. While outwardly this cannot be called racist or sexist, it is no coincidence that the majority of the supporters of the DP are White, affluent urban dwellers. Certainly, they have far less need (or desire) for an interventionist state than the poor, or those whose rights are in jeopardy. The subtlety of race politics in South Africa makes it all the more important that activists think critically about the positions taken by different groupings.

Opposition parties on the far right, such as the Freedom Front, have been more forthright about their opposition, arguing that they worry about the “selling out” of the Afrikaner male. Despite the fears expressed by the Freedom Front, the Act is not likely to lead to a workers’ revolution.

According to Urmila Bhoola, one of the attorneys who drafted the legislation, if the Act is followed correctly, staff goals and equity plans will differ from company to company, “depending on what is realistic and achievable, given the skills shortage in South Africa.” As *The Weekly Mail and Guardian* goes on to point out, “This means an engineering firm which employs a

team of 75 engineers cannot be expected to fulfil a quota of 50 Black engineers because of the shortage of Black engineers in South Africa.”<sup>6</sup>

In spite of the theoretical sides taken by different political parties, the reality is that employment patterns are raced and gendered in ways that demonstrate White men’s privilege. A 1998 survey of 455 South African firms indi-

**The implementation of new labour laws that encourage affirmative action has thrown up a number of questions about identity. The key question is whether affirmative action leads to an essentialisation of categories like woman, Black, disabled, HIV-positive, etc.**

cated that White males constituted 89 percent of senior South African management. Black males comprise six percent of senior management and the remaining five percent of senior managers are either Coloured or Indian. This contrasts starkly to the demographic reality of South Africa. Women make up 52 percent of the population, Africans are 77 percent of the population, Whites are 11 percent, Coloureds represent nine percent while Indians/Asians are the smallest group at three percent.

The EEA has forced the private sector to deal with transformation issues. In many equity plans, unfortunately, there has not been enough emphasis on transforming companies in ways that recognise work/family life splits. All companies are required to give maternity leave of at least four months and all are required to have policies dealing with sexual harassment.

Beyond this, little has been said regarding transportation issues, flexitime hours or paternity leave. The Act will not require companies to schedule meetings before 4 p.m. so those workers with family care obligations are not unduly inconvenienced. Currently, it is women who perform domestic labour and men who create subtle barriers such as this to women’s advancement.

Furthermore, the Act will not force companies to examine macho environments in which working all night is rewarded as is going out for drinks after hours to discuss business. For these practices to change, companies themselves will have to be committed to change. As long as women’s domestic labour subsidises men’s participation in the workforce, it is unlikely that the Act will make significant inroads in this regard.

While trade unions and traditionally leftist organisations supported the Act, civil society activists raised a number of concerns about its ability to address the problems of severely disadvantaged groups of people. The Employment Equity Act is aimed at an already privileged minority in South Africa—those who have jobs in the formal sector, in companies with a significant turnover and large numbers of employees. While the career ad-

vancement of middle-class women and Blacks is important, some have argued that there are more pressing problems—such as job creation—with which the Ministry of Labour should be concerned.

Assessing the impact of women in Parliament, an article in *The Weekly Mail and Guardian* raises this point about broader access to opportunities. A number of women activists were interviewed about the delivery of services to communities and/or the deepening of gender gains in the new democratic dispensation. One of them was Debbie Budlender who heads the Women's Budget Initiative:<sup>7</sup>

While the Employment-Equity Bill and affirmative-action policies within business and industry have seen increased numbers of women climbing the ladders of success, adult education remains a problem, says Budlender. Twenty percent of African women have never been to school and only one percent of the entire education budget is set aside for adult education.<sup>8</sup>

Clearly, the affirmative-action policies contained in the EEA cannot be implemented in isolation. If they operate without being fed by education policies that increase access to education and employment, there is a real risk that the EEA will simply empower an elite group of Blacks and women, further entrenching growing class (read: gender and race) inequali-

ties in South Africa. It is hoped that the Skills Development Act of 1998 will facilitate the implementation of the EEA.

While the backlash against the EEA has been relatively subdued, the entry of (relatively) large numbers of women in parliament in 1994 due to the one-third-women quota system of the African National Congress (ANC) was greeted with severe disapproval from some quarters. South Africa ranks seventh in the world in the number of women in parliament, and in Africa is second only to the Seychelles.

The main opposition parties argued vehemently against the policy. The ANC is the only party in parliament that uses the quota system. The main argument made by both the DP and the New National Party was that quota systems degrade merit and amount to tokenism. This is the most common argument used against quota systems of any kind. The implication here is that women lack the qualifications to do the job properly, and that standards are dropped in order to let them in. This argument seldom rethinks what the job entails and what 'qualifications' really mean. The corollary of this argument is that quotas amount to reversing discrimination against men.

Lying beneath these conservative criticisms of affirmative action are deeper questions about meaningful social transformation and identity. The implementation of new labour laws that encourage affirmative action has

thrown up a number of questions about identity. The key question is whether affirmative action leads to an essentialisation of categories like woman, Black, disabled, HIV-positive, etc. Theoretically, feminists like Chandra Mohanty, Alison Molyneux and Naila Kabeer have argued that women are different from each other, and it is impossible to assume anything homogeneous about women. Rich women, poor women, Black women, disabled women, lesbians, straight women, will respond to situations differently.

Thus, while it is important to recognise categories such as Black and White in order to address past imbalances, it is difficult to say that Blacks must be hired without risking the assumption that 'Blackness' has an inherent meaning. Is it important to hire Blacks because they will lead differently and change the culture? This is a big assumption that affirmative-action programmes sometimes risk making. Perhaps it is simply good to hire women or Blacks because they would not have a fair chance otherwise. The debate about the internal transformation of the institution may have to wait. The point here is that affirmative action—in theory—risks homogenising the experiences of Blackness or woman-ness or gayness and so on.

However, this theoretical risk is one that many human rights activists are prepared to take. The other option—which is to allow the privileged to rule unchallenged—does not augur well for

transformation. The most pragmatic approach is to find a way to draft legislation that takes class into account and simultaneously works to change the rules of engagement within organisations. This means forcing companies to look critically at work/family issues and transportation issues for those who use the dreadfully unsafe public transport system in South Africa. This allows for a diverse workforce (in racial and gender terms) that recognises class and works against negative gender patterns within the organisational culture.

More important, however, are questions about whether the presence of marginalised people in workplaces and decision-making institutions makes a difference to how these organisations function. In the case of the South African parliament, the ANC's quota system, and therefore the presence of significant numbers of women, has impacted significantly on the new laws of the country. Women in parliament have pushed the following changes through:

The tax tables were rewritten in 1995. Abortion was legalised in 1996. In 1998 the Customary Marriage Bill was passed by Parliament. It will accord full legal recognition to customary marriages and give equal power in marriage to rural women. In 1998 the Domestic Violence Bill was passed. With this, battered people will be able to get expeditious interdicts against abusers. New labour laws which

make maternity leave mandatory have meant that the days of women factory workers binding their stomachs to hide a burgeoning baby are (theoretically) past, and strip searches no longer happen.

A breastfeeding code is written into the new Basic Conditions of Employment Act and the sexual harassment code in the Labour Relations Act can be used to punish unwanted workplace slap and tickle. Women's laws have kept the government printer very busy in the past four years. The challenge now is to bridge the divide between law and practice.<sup>9</sup>

The challenge for those who live in the new South Africa, and for those who want to draw lessons about social transformation, is to understand whether affirmative action in parliament, the private sector and state agencies makes these organisations function differently. Over the last 20 years, feminists have challenged hierarchical power relations, and sought to create different kinds of power that do not depend on the threat (subtle or not) of violence.

One of the lessons that the South African experience can teach the world is that the presence of people from marginalised groups can make a qualitative difference in how power is exercised. However, as the private sector

has demonstrated, different faces don't necessarily mean different rules. ♫

*Sisonke Msimang is a Master Student at the University of Cape Town in South Africa. In addition to her research work at the African Gender Institute, on sexual harassment in tertiary institutions, she is a consultant of UNICEF working on issues of youth, gender and HIV/AIDS in Africa.*

#### Notes:

<sup>1</sup> Brunner B, "Bakke and Beyond, A History and Timeline of Affirmative Action." Website: <http://www.infoplease.com/spot/affirmative1.html>

<sup>2</sup> African refers to indigenous people without mixed race heritage, Indian refers to those of South Asian descent who were brought to South Africa as railway workers in the 1800s, Coloured refers to mixed race South Africans and White refers to the descendants of Dutch and English colonisers who are not of mixed-race heritage. The term Black refers to all non-White South Africans. The term Coloured is considered offensive to some although it is still widely used.

<sup>3</sup> Designated groups refers to African, Coloured, Indian, women, and disabled people.

<sup>4</sup> Website: <http://www.labour.gov.za>

<sup>5</sup> Edmunds M., Soggot M. "Parliament Faces the Big Divide," *The Weekly Mail and Guardian* on-line, 13 February 1998, Website: <http://www.sn.apc.org/wmail/issues/980213/NEWS5.html>

<sup>6</sup> Ibid.

<sup>7</sup> The Women's Budget Initiative is a project that has resulted in four books. It systematically analyses government spending in each portfolio to look at its spending and impact of its programmes on women. A Children's Budget book has also been drawn up. For more information on this initiative, see Website: <http://www.idasa.org.za>

<sup>8</sup> Haffajee, F. "Women in Power," 25 February 1999, Website: <http://www.mg.co.za/mg/news/99feb2/25feb-women.html>

<sup>9</sup> Footnote missing