Affirmative Action in a Democratic Society

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Prologue

As I write this article for a speech in southern Africa, I notice a short item, only a few lines, on the bottom of page 1 of the *Courier-Mail*,[1] Brisbane's daily newspaper. It reports that Lachlan Murdoch, the 25-year-old son of international publishing magnate Rupert Murdoch, is to take over as managing director of News Limited (Australia's biggest newspaper publisher) after spending a little over two years as General Manager of Queensland Newspapers, the publisher of the *Courier-Mail* and a subsidiary of News Limited. As I revise the article for the *QUT Law Journal* it has been announced that Lachlan Murdoch has been further promoted to the position of Chairman of News Limited.[2] I am sure he is likely to do a good job. But is he really the "best" person available to do a job that has been vacated by a person with 30 years' experience? If a merit principle is operating here, what is it? This is a familial (and familiar) form of preferential treatment. Nobody has alleged that it is unfair, or that it is, or should be, unlawful. Preferential treatment is in fact all around us.

Introduction

As democratisation sweeps Southern Africa after the abolition of apartheid, the region is passing into a new era which brings both promise and many challenges. Democracy in practice is of longer duration in Australia, but disagreements as to its

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1 September 24 1996.

2 *The Australian*, June 6 1997, p 1.

meaning (especially with respect to race relations) are both current and prevalent. The notion of affirmative action is one which is controversial, even in countries where it is not a new strategy for equality. This paper considers what affirmative action means, what it does in a democratic society, and how it in fact helps to define the very nature and meaning of a democracy.

Democracy

While affirmative action is a relatively new concept, democracy is an ancient one with a considerable (and sometimes contentious) pedigree, and the writings on it are voluminous. From its reputed antecedents in Ancient Greece (where slave-owning was not only considered to be lawful but also "natural")[3] it is now analysed from the point of view of human rights,[4] as well as from the point of view of ancient and contemporary theory,[5] philosophy,[6] social and political economy,[7] systems theory[8] and empirical description.[9] Indeed, as the history of the twentieth century has shown, the usurpation of the concept of democracy by regimes which in fact give to people little or no room to articulate their needs and wishes shows the extensive semantic manipulation to which the very word has been subjected.[10] Taken from its Greek roots (*demos*, the people; *kratia*, rule), democracy is taken to entail a universal adult suffrage in which sovereign power resides ultimately with the people. This is expressly provided in the Constitution of Namibia[11] but only arises by inference from the Australian Constitution.[12] Yet a mere majoritarianism is not what any reasonable person now considers to be democratic. The majority may

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3 See Aristotle *Politics*, I. 4-5 (trans. T.A. Sinclair, 1926, Penguin Books, London). The apparent contradiction inherent in this situation can be in part explained by the social paradigm (a perceived natural ability of some – but not others – to participate in the function of the *polis*) in which notions like equality before the law (*isonomia*) operated and out of which they developed. See generally Tahmindjis, *From Symbiosis to Synergy? A Comparative Analysis of the Impact of Human Rights Norms on the Legal Systems of Canada and Australia*, Chapter 2 (unpublished JSD thesis, Dalhousie University, 1996).

4 For example, Allan Rosas & Jan Helgesen (eds) *The Strength of Diversity: Human Rights and Pluralist Democracy* Kluwer, Dordrecht, 1992.

5 For example, Giovanni Sartori: *The Theory of Democracy Revisited*, 2 vols, Chatham House Publishers, New Jersey, 1987.

6 For example, Yves R Simon: *Philosophy of Democratic Government* University of Chicago Press, Chicago, 1951.

7 For example, Carol C Gould: *Rethinking Democracy: Freedom and Social Co-Operation in Politics, Economy and Society* Cambridge U P, Cambridge, 1988.

8 For a critique, see Jurgen Habermas: *Contributions to a Discourse Theory of Law and Democracy* Polity Press, Cambridge, 1996, (translated by William Rehg), Chapter 8.

9 For example, Jack Lively: *Democracy* GP Putnam's Sons, New York, 1976.

10 Christian Tomuschat, "Democratic Pluralism", Chapter 3 in Rosas & Helgesen, *supra* n 4, p 28.

11 Article 1(1), (2).

12 For example, Deane and Toohey JJ have referred to the notion of "the people" as infusing rights which can be implied in or from the Constitution (*Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 at 680) but there is no specific reference to the people in that document as a source of legislative validity.

rule, but it may not impose any rules it likes on a minority. Democracy is not just arithmetic.

Social pluralist theories of democracy, which acknowledge the non-homogeneous nature of society but project the social balance of power onto the distribution of political power, assume that the political system remains sensitive to the broad social spectrum of values and interests.[13] Similarly, economic theories of democracy assume that voters cast their ballots in a sense of enlightened self-interest[14] so that the balance of social good is obtained. The democratic process thus becomes "a process of plebiscites between competing leadership teams"[15] and such an approach cannot explain how democracy can satisfy (or ought to satisfy) the needs of the non-elites.[16]

Equal treatment in a substantive rather than in a merely formal sense requires equality to be interpreted in terms relevant to the minority as well as to the majority. While democracy is a process of achieving a general interest or a common good, a *fair* balance must be struck between the needs and aspirations of the community and those of the individual, and between the needs and aspirations of social groups. While factionalism and economic realities may affect the results, reciprocity rather than arbitrariness should be the outcome. While the most recent political declarations of democracy do stress its character of pluralism rather than homogeneity,[17] when the Oxford English Dictionary defines the word "democracy" as: "in modern use often more vaguely denoting a social state in which all have equal rights without hereditary or arbitrary differences of rank or privilege"[18] the notion of an equal opportunity to influence the decision-making processes (in what has presumably become the idealised level playing field once the privileges have been swept away) must be looked at in a sophisticated and *multi*dimensional way. We all act in and through different but intersecting sets of social relations,[19] depending on the context. The traditional theories of democracy, the classical theories of eighteenth and nineteenth century liberalism which viewed democratic governance as the condition of freedom represented by the liberty of individuals to do as they chose without constraint, as well as more recent theories such as systems theory and economic theory, are now inadequate for the demands of freedom and equality in the late twentieth century.[20] Mere instrumentalism is insufficient. It is here that the notions of democracy and affirmative action not only intersect, but feed off each other in a

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13 Habermas, *supra* n 8, at p 332.
14 A Downs: *An Economic Theory of Democracy* (1957, Harper, New York).
15 Habermas, *supra* n 8, p 332.
16 *Ibid,* p 333.
17 See the concluding document of the Copenhagen Meeting of the Conference on Security and Co-Operation in Europe, June 1990 (*International Legal Materials*, Vol 29, (1990), p 1306; Charter of Paris, 1991 (*International Legal Materials*, Vol 30 (1991), p 193).
18 Compact edition, p 183.
19 See Gould, *supra* n 7 who suggests an ontology for democracy of "individuals-in-relations", at pp 105ff.
20 See Gould, *supra* n 7 Chapter 1.

relationship which can be regarded as symbiotic. Significant and fundamental questions of equity, morality and public policy are raised. The values of the nation are not only exposed, but also tested and tempered by the practical realities of the political system and economic conditions.

Affirmative Action

Affirmative action is well known in international human rights law. Both the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) and the *Convention on the Elimination of All Forms of Discrimination Against Women* (1981) expressly provide for affirmative action.[21] Namibia and Australia are parties to both of these treaties,[22] and as a result of Article 144 of its Constitution the provisions in these treaties are part of the law of Namibia. The same is not the case in Australia where legislation is necessary for their domestic implementation.[23] Several International Labour Organisation Conventions also relate to affirmative action.[24] Although not identical, the provisions of these treaties refer to affirmative action as temporary special measures necessary to attain or accelerate equality for the groups which are the focus of those treaties. Unequal or separate standards are expressly prohibited.

But affirmative action programs can also be traced to earlier times. New Deal legislation in the United States, introduced to overcome the devastating effects of the Depression, referred to affirmative action in 1935.[25] Affirmative action is not therefore a bumptious upstart of the last few years. It was in particular President Kennedy's Executive Order 10925 (1961) which required positive action to identify and eliminate barriers to the recruitment, selection and promotion of members of minority groups. This had been done particularly in response to militant action by African Americans, but was later extended to women as a result of legal and political activism by feminist groups.[26] But, as Marian Sawyer has remarked, from the beginning there were misgivings because of a lack of fit between affirmative action concepts (which centre upon group-based special measures) and the highly individualistic tradition of the "American way".[27] Precisely because the concept sits at the intersection of democracy, law, equity and perceived traditions, it has

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21 Articles 1(4) and 4 respectively.

22 Namibia acceded to them on November 11, 1982 and November 23, 1992, respectively, in both cases without reservation. Australia acceded to them on September 30, 1975 and July 28, 1983, respectively, in both cases with reservations, none of which are relevant here.

23 See *Minister for Foreign Affairs and Trade v Magno and Another* (1992) 112 ALR 529, especially the judgment of Gummow J at pp 534-5.

24 For example, *Convention Concerning Discrimination in Respect of Employment and Occupation* (ILO 111), Art 5.

25 *National Labour Relations Act 1935* (now codified as 29 USC '151 et seq).

26 For a detailed history, see Kathanne W Greene, *Affirmative Action and Principles of Justice* Greenwood Press, New York, 1989.

27 Marian Sawyer (ed) *Program for Change: Affirmative Action in Australia* Allen & Unwin, Sydney, 1985, p xiii.

rarely been without controversy.

Affirmative action is, in its *generality*, easily comprehended. Greenwalt has defined affirmative action as "a phrase that refers to attempts to bring members of underrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial program."[28] However, in its *particularity* affirmative action has been the victim of muddled use of terminology and misconceived application. Greenwalt considers the term affirmative action to be interchangeable with the term "reverse discrimination."[29] Indeed, affirmative action is criticised on the basis that it contradicts the philosophy of non-discrimination: one form of discrimination appears to be merely substituted for another. However, preferential treatment in the form of "reverse" or "positive" discrimination (depending on where one stands on this issue) is not necessarily the same thing as affirmative action, not only because of the presence or absence of quotas, but depending on the approach taken to key concepts like equality and merit. This terminological inexactness has added confusion to the already controversial concept of affirmative action, leading to scepticism at best and to vituperative antagonism at worst. It has for some become a weasel word. The literature on it is vast.[30]

The Guidelines developed in 1978 by the United States' Equal Employment Opportunity Commission, the Department of Justice and the Department of Labour describe affirmative action as one part of an effort to remedy past and present discrimination and considered essential to assuring that jobs are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics.[31] In the United States, affirmative action can be court-ordered.

In the Policy Discussion Paper *Affirmative Action for Women* the Australian government in 1984 defined affirmative action as:

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28 Kent Greenwalt: *Discrimination and Reverse Discrimination* Alfred A Knopf, New York, 1983, p 17.

29 *Ibid.*

30 To give but a few examples, a detailed philosophical approach can be found in Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* Yale UP, New Haven, 1991; for an exposition of courts and affirmative action see Melvin I Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* Charles Scribner's Sons, New York, 1991; for an Australian perspective see Chris Ronalds *Affirmative Action and Sex Discrimination,* 2nd ed, Pluto Press, Sydney, 1991; from the perspective of political economy see Michael L Wyzan (ed) *The Political Economy of Ethnic Discrimination and Affirmative Action: A Comparative Perspective* Praeger, New York, 1990; from the psychological perspective see FA Blanchard & FJ Crosby (eds) *Affirmative Action in Perspective* Springer-Verlag, New York, 1989; from the moral perspective see John Edwards *When Race Counts: The Morality of Racial Preference in Britain and America* Routledge, London, 1995; for a survey of diverse attitudes to affirmative action see Nicolaus Mills (ed) *Debating Affirmative Action: Race, Gender, Ethnicity and the Politics of Inclusion* Delta, New York, 1994. All of the above refer to hundreds of articles in learned journals, in which affirmative action is discussed from various jurisprudential viewpoints (for example, Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia" [1990] Duke LJ 705, which looks at the concept (with approval) from the critical legal studies viewpoint).

31 *Uniform Guidelines on Employee Selection Procedures* 1978: 38308.

> A systemic means, determined by the employer in consultation with senior management, employees and unions, of achieving equal employment opportunity for women. Affirmative action is compatible with appointment and promotion on the basis of merit, skills and qualifications. It does not mean that women will be given preference over better qualified men. It does mean that men may expect to face stiffer competition for jobs. This is not discrimination.[32]

These definitions and descriptions are interesting for their similarities, their differences, and their silences. While it would be agreed that, in general terms, affirmative action is about securing a higher degree of participation and diversity, it is with respect to the particularity of the concept – a higher participation by whom, in what, how and when? – that divergences occur. Looking briefly at the US and Australian versions just described, the US approach is of a remedy for discrimination, on the basis of sex, race, ethnicity or disability, in the area of access to jobs. It can be mandatory. In the Australian version, on the other hand, the vision is systemic and process-oriented, applies only on the basis of sex (ie, to women), and cannot be ordered by a court.[33]

Affirmative action as a concept does not so much solve problems as pose options. There is no obviously "correct" policy or approach, and the problem is that often more than one option or one group's interests will have value and worth. It is the choices made between the competing options which can give both colour and definition to the type of democracy any society is or wants to become. Affirmative action reflects, and its processes test, the principles of social justice which that society is supposed to hold dear. In this regard, it can be a much more accurate indicator of true social values than the most earnestly expressed sentiments in a constitution, in legislation or in any form of legal or political discourse.

Choices and Values – the How of Affirmative Action

Affirmative action as a remedial concept necessarily implies that inequalities be first of all identified, and then appropriate strategies be put in place to secure equality. These processes in themselves import value-based assumptions and presumptions – and problems – about the nature of equality itself. The identification process requires of every society that it not only assess current conditions honestly, but that it look history square in the face, no matter how unpleasant this may be. The strategies, being linked to the purpose of attaining equality, will reflect what the society considers equality to mean. Moreover, as affirmative action amounts to temporary special measures, regular monitoring and assessment must be undertaken to determine, in the light of the meaning given to equality, when this stage has been reached. All of this is predicated on something which is an essential

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32 Department of Prime Minister and Cabinet, Policy Discussion Paper, *Affirmative Action for Women*, AGPS, Canberra 1984, Vol 1, p 3.

33 *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth).

component of a democracy: a healthy, honest and open dialogue.

The Constitution of Namibia provides in Article 23(2) that Parliament may enact affirmative action legislation for "persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices." No particular group is identified, although Article 23(3) recognises the special discrimination traditionally experienced by women. And although the public service, police force, defence force and prison service are expressly mentioned, no particular area in which affirmative action is to operate has been mandated. It can be used to redress "social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices." To have a policy on affirmative action written into the Constitution is a significant achievement and I am not aware that any other countries in the world except Namibia and India[34] have yet done this.

Court decisions in Namibia have recognised that "the Constitution of a nation is not simply a statute ... [but] a mirror reflecting the national soul."[35] The Namibian constitutional policy is, however, purposely cryptic as to its application. The choices have still to be made. The democratic processes themselves can affect and effect those choices. Affirmative action is not necessarily limited to any particular group in Namibia. In the countries of western capitalism such as the United States, Britain and Australia, the emphasis has been on special measures for women and racial minorities, and to a lesser extent for people with disabilities. This is because of the history of those countries and the relative strength and effectiveness of lobby groups there.[36] In Australia, for example, there is federal legislation expressly on affirmative action,[37] but it only applies to women and only in the area of employment by the Commonwealth, universities and private employers with 100 or more employees. The fact that there is not similar Australian legislation for Aborigines or people with disabilities is attributable, according to one commentator, to the strength of Australian women "in the marketplace, at the ballot box, and at the breakfast tables of decision-makers."[38] But political influence is only one element in democratic processes. It is possible for affirmative action to be provided for unpopular and relatively powerless minorities as a matter of, on the one hand, humanitarian government policy or, on the other, of sheer utilitarianism. Affirmative action for the housing of Gipsies in Hungary is an example.[39] Affirmative action can also be provided for majorities which have come to be dominated by minorities. Affirmative action for Malaysians in Malaysia (who have come to be

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34 *Constitution of India*, Article 46 and Part XVI.

35 *S v Acheson* 1991 (2) SA 805 (Nm HC) at 813A.

36 See above with respect to the history of affirmative action in the US.

37 *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth).

38 Margaret Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford U P, Melbourne, 1990, p 227.

39 See Lynn Turgeon, "Discrimination Against and Affirmative Action for Gipsies in Eastern Europe", Chapter 7 in Michael L Wyzan (ed) *The Political Economy of Ethnic Discrimination and Affirmative Action, supra* n 30.

economically dominated by the Chinese, despite, interestingly, discrimination against the *latter*) is an example.[40] It has been hypothesised that affirmative action could be used in other areas, such as with respect to land reform in Latin America.[41]

There is also no universal template for the processes of application of affirmative action. This is so even for countries with similar values, systems and backgrounds.[42] In the United States, affirmative action has come in the form of Executive Orders covering government contractors, programs under Title VII of the *Civil Rights Act* covering private employers, federal government programs run for federal employees, and state-based affirmative action programs. The application of the US system has been extended specifically to include people with disabilities[43] and has for many years applied to benefits for war veterans (a form of affirmative action which never seems to attract any opprobrium at all). Thus, the simultaneous operation of multiple constitutions in a federation, together with patriotism, are also a part of the fluid mix which mediates between the available options. In Canada, affirmative action since 1985 has been another mix of federal and provincial initiatives towards employment equity for women, Native people, visible minorities and people with disabilities.[44] The European Community, on the other hand, has taken action particularly with respect to equal pay for women.[45]

Australia, after a pilot program involving 28 private sector companies and three higher education institutions,[46] introduced voluntary affirmative action in 1986 (as described above), but only after affirmative action provisions which were to have been in the *Sex Discrimination Act* 1984 were removed in a political compromise to get the latter Act passed. An Affirmative Action Agency is set up to which annual compliance reports must be sent by universities and private employers with 100 or more employees, and, since 1992, trade unions and non-government schools have been included as well. (Public sector organisations are covered by state and federal public sector equal opportunity legislation).[47] The sanction for non-submission of a report (and *not* for non-compliance with affirmative action goals) is being given the lowest priority when tendering for government contracts. Under the legislation, employers are required to follow an eight-step program (although they can go beyond this): issue a policy statement; appoint an affirmative action co-ordinator; consult

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40 See Michael L Wyzan, "Ethnic Relations and the New Economic Policy in Malaysia", Chapter 3 in Wyzan, *supra* n 30.

41 William C Thiesenhusen, "Human Rights, Affirmative Action and Land Reform in Latin America", Chapter 2 in Wyzan, *supra* n 30.

42 For a comparison of Britain with the US, see John Edwards *When Race Counts ..., supra* n 30, Chapter 7.

43 *Rehabilitation Act* 1973 29 USC '706 ff. See also the *Americans With Disabilities Act* 1990 42 USC '12101 ff.

44 For example, the *Employment Equity Act*, RSC 1985, c.23 (2nd Supp.); *Human Rights Act*, RSC 1985, c H-6.

45 See Article 119 of the *Treaty of Rome*, the Equal Pay Directive of 1975, the Equal Treatment Directive of 1976 and the EEC Council's Recommendation for Positive Action for Women of 1984.

46 See Chris Ronalds *Affirmative Action and Sex Discrimination, supra* n 30, pp 20ff.

47 For example, *Public Service Act* 1922 (Cth); *Government Management and Employment Act* 1985 (SA).

with trade unions; consult with employees; conduct a statistical analysis of the workforce; review personnel policies and practices; set forward estimates and objectives; and monitor and evaluate the implementation of the program. This is a softly-softly practical approach. It encourages ownership of affirmative action programs by relevant constituencies, is tailored to the needs of each individual workplace, has targets rather than quotas, and relies upon (indeed, assumes) continuous monitoring and refinement.

South Africa, in a Green Paper entitled "Employment and Occupational Equity" released by the Department of Labour on July 1, 1996, is proposing an Employment and Occupational Equity statute. Focused primarily on race and gender, but also with a proposed application to people with disabilities, it aims to redress disadvantages arising from past discrimination through organisational transformation, the removal of unjustified barriers to employment, and the acceleration of training and promotion of people from historically disadvantaged groups. It suggests a process similar to that in the Australian legislation but, by way of contrast, will apply to all employing organisations and is more closely linked to industrial dispute settlement processes than is the Australian scheme. The Commission for Conciliation, Mediation and Arbitration will play a central role not only in the anti-discrimination aspects of the legislation, but also with respect to its employment equity aspects.

An increase in representation and diversity in any sector is therefore achieved through a set of relationships which are not only complex, but also fluid. There is no "right" form of affirmative action. Each society must devise the form that is right *for it*. It is thus a reflection of the values which that society holds paramount. In the employment context, where most affirmative action programs operate, this necessarily assumes that it is acceptable to regulate corporations in order to achieve this goal and to place the burden on them to change. It is here that the programs often garner criticism. It must be reasonably questioned, however, whether in this regard affirmative action is any more unjustifiable than other burdens placed on the corporate sector for the social good. Laws on insider-trading, takeovers, pollution or monopolies are examples.[48]

Choices and values – the Why of Affirmative Action

The goals of affirmative action policies and programs can be as telling as the selection of the groups which are its object or as the strategies adopted for its implementation: compensation; equality of opportunity; the promotion of diversity; enhancing the quality of life for a group; distributive justice.[49] It is a combination of justice with utility (the advantages for business are often touted). But redistribution is not in

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48 See Ronalds, *supra* n 30, p 12.

49 Distributive justice in particular has been used as a philosophical justification for affirmative action. See, for example, Ronald Dworkin *A Matter of Principle* Harvard U P, Cambridge, 1985; Alan Goldman *Justice and Reverse Discrimination* Princeton U P, Princeton, 1979; Richard Wasserstrom *Philosophy and Social Issues: Five Studies* U of Notre Dame Press, Notre Dame, 1980.

itself the end, it is the means. The South African Green Paper, for example, has detailed statistics of inequalities in income and status, but also considers the systemic problems outside the workplace which affect entry into the workforce and performance there: disparities in education; housing and household infrastructure; and responsibility for housework and childcare. Australian studies have made similar observations, stating that to limit reforms to "changing the shares of the cake ... leaves the unsatisfactory nature of the cake untouched."[50]

Affirmative action thus differs from anti-discrimination legislation in that it does not emphasise individual solutions but rather relies on the analysis of, and remedial strategies for, structural discrimination. It aims to be proactive rather than simply reactive. Indeed, it aims to change a culture, both in the macro and micro sense. The argument that affirmative action for women, blacks, or people with disabilities does this by introducing a new form of discrimination against able-bodied white males misses the essential point: while affirmative action policies may be based on circumstances of historical discrimination, they act upon inequalities which *still* exist,[51] and which will persist unless remedial action is undertaken. Indeed, it is a logical sleight of hand to contend that affirmative action is discrimination reversed when the historical context in which opposing groups (black/white, men/women) have emerged is ignored. By removing this context the groups and the people in them become mere abstractions which can be made interchangeable in a seemingly logical fashion.[52] But such interchangeability, viewed in context, is impossible as the following account (from an Anglo-Protestant white male) indicates:

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50 *One Step Forward: Two Steps Back? Women and Affirmative Action: A Case Study of the Victorian Teaching Service*, Department of the Parliamentary Library, Research Paper 33 1995-96, http://www.aph.gov.au/library/pubs/rp/1995-96/rp33.htm, at p 11.

51 For example, the recent study by the Glass Ceiling Commission established under President Bush in the US and quoted in the Report to President Clinton "Affirmative Action Review"(July 19, 1995) indicates that white males hold 97% of senior management positions in Fortune 1000 industrial and Fortune 500 service industries, while only 0.6% are African American, 0.3% are Asian and 0.4% are Hispanic; African American men with professional degrees earn only 79% of the amount earned by their white counterparts; there are only two women CEO's in Fortune 1000 companies; the unemployment rate for African Americans was more than twice that for whites in 1994; the average income for Hispanic women with college degrees is less than the average for white men with a high school diploma. The situation in Australia reveals that women earn 67% of average male weekly earnings and are clustered in low status, low earning jobs (House of Representatives Standing Committee on Constitutional and Legal Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and equal Status for Women in Australia* AGPS, Canberra, 1992. In the legal profession in most countries there is a similar dearth of women in senior, especially judicial appointments. It is similar in academia. In countries like Australia, the US and the UK, it cannot be said that there are too few women in the pool from which to select. Rather women are missing out on the opportunities to enhance their reputations which make them the obvious choice for appointment to the bench or to full professorships. There are systemic problems relating both to division of household work and childcare, but also with respect to the profession's or society's image of a competent barrister or academic.

52 See Stanley Fish, "Reverse Racism, or How the Pot Got to Call the Kettle Black" *The Atlantic Monthly*, November 1993.

> I was admitted without difficulty to the ivy league college my father had attended. ... the admissions people spoke of the children of alumni as "legacies", but whether this was because the college was inheriting us as students or because the college hoped to inherit money from our families, I was never quite sure. I got a teaching job right out of college in the heart of the depression – my father was a school superintendent well liked among his colleagues. After World War II, when I became a university professor, I received promotion and tenure in record time, more quickly than many of my female colleagues. Of course, the decision makers knew me better – I was part of the monthly poker group and played golf every Friday afternoon.[53]

It is not just overt discrimination which is the problem: a social structure can systematically provide to one group more than to another certain educational, social or economic advantages. To require that people be treated equally in a formal way assumes that such things as education or social advantages are formally available to all. This form of equal treatment will in fact guarantee that the social order will continue to reflect the distinctions of the past. Moreover, it is likely to magnify them.[54] There is no symmetry between the plight of racially discriminated "blacks", and "whites" who are not hired because of a racial preference – the *animus* is totally different. To claim, for example, that whites are singled out for unfavourable treatment because of their race is an acceptable argument only from a purely abstract perspective divorced from the historical and contextual parameters which give the situation meaning.[55] Affirmative action policies require as a starting point not a disembodied equality but the assumption that differences based on gender or race do exist.[56] What whites, or members of any other dominant group, are being deprived of by affirmative action are not "rights", but unearned benefits. Affirmative action means that members of dominant social groups have to compete more keenly in the marketplace, not that they are excluded from it. Affirmative action should have no greater impact on whites, males or the able-bodied than a sudden increase in the pool of quality applicants against which to compete.[57]

However, a further criticism of affirmative action is that, as it applies to groups, it will apply to those individuals who are members of a discriminated group but who have not themselves suffered discrimination and who need help the least. In addition, any benefits will only be felt by the best qualified members of the subordinated group in any event.[58] In response to such an argument it may be said that a successful person of colour or a successful woman may still have been discriminated against:

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53 "An Open Letter to Five Justices" by Dave Malcolm, entered into the Congressional Record by US Representative Esteban Torres of California, September 13, 1995.

54 Thomas Nagel, "Equal Treatment and Compensatory Discrimination" (1973) 2 *Phil & Pub Affairs* 348 at p 353ff.

55 See Michel Rosenfeld *Affirmative Action and Justice, supra* n 30, pp 306ff.

56 See Marion Maddox, "Bodies, Equality and Truth", *supra* n 30, pp 168-9.

57 Rosenfeld, *supra* n 30, p 325.

58 See Alan Goldman: *Justice and Reverse Discrimination* Princeton UP, Princeton, 1979.

they may have had to work much harder than others to achieve what they have.[59] In any event, in the absence of any preferential treatment at all, the more qualified members of any group will be better off than others. To say that affirmative action in this sense merely shifts the focus onto a different set of victims (eg, from blacks onto underprivileged whites) misses the point, which is justice rather than mere colour-blindness.

The issue is therefore *not* one of the ends justifying the means. But it is one of vision, commitment and honest dialogue.

Some complain that affirmative action can have a stigmatising effect on the very people whose interests it is meant to promote – the feeling that they would not have got the job had they not been black, female or disabled. This is not just an ungracious or downright offensive retaliation: it is a view now espoused by some African Americans.[60] There are two responses to this, one which has to do with the meaning of merit, and the other which has to do with the way affirmative action programs should be run.

Looking at the second issue first, it is easy to point to spectacular failures of affirmative action programs. When some public college systems in the US introduced an "open admissions" policy people of colour poured into the colleges. Unfortunately, many of them failed out of the system almost as quickly. This is not because they were inherently less intelligent than their white peers. A person who has suffered sub-standard schooling for their whole life cannot cope as well as the average white student with the demands of tertiary study. Affirmative action is not just getting people *into* education (or jobs), but giving them the skills and techniques to stay there.[61] Apparently (and this puts a further spin on this already oscillating issue) some of the students considered that the offer of remedial help was patronising.[62]

With respect to merit, this can also be used as a formalist device to decontextualise a transaction.[63] Merit is not an *a priori* concept possessing intrinsic meaning, but a relational concept which derives its meaning only in the context of a particular job or institution.[64] It is a construction. It is, in essence, the relationship between a person's qualities and those *required* (rather than traditionally assumed) for performance of particular tasks.[65] It means that Lachlan Murdoch can

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59 See, for example, Patricia Williams: *The Alchemy of Race and Rights: Diary of a Law Professor* Harvard UP, Cambridge, 1991, where she describes the system of buzzers in boutiques in New York City and being kept out because of her appearance, despite the fact that she was a tenured law professor.

60 See Stephen Carter: *Reflections of an Affirmative Action Baby* Basic Books, New York, 1991.

61 In this regard, the author, as Law Faculty Equity Convenor at QUT, administers a special orientation program at the beginning of the year for students admitted to study law under special entry programs, and also the running of extra seminars specifically for such students during semester. A pre-law course for Aboriginal and Torres Strait Islander students is at present under consideration.

62 See Melvin I Urofsky: *A Conflict of Rights, supra* n 30, p 34ff. This has never been this author's experience with respect to the QUT Law Faculty's programs mentioned in the previous footnote.

63 See Richard Delgado, "Rodrigo's Tenth Chronicle: Merit and Affirmative Action" (1995) 83 *Georgetown Law Journal* 1711.

64 See Ronald Dworkin: *A Matter of Principle* Harvard U P, Cambridge, 1985, p 299.

65 See Clare Burton, "Redefining Merit" Affirmative Action Agency, Monograph No 2, 1988.

competently run News Limited even though he has far less experience than many of his subordinates who might also be able to run it. It means putting a *value* on the totality of peoples' skills and experiences.

Choices and Values – The Clawback from Affirmative Action

There has recently been a retreat from affirmative action principles. Diversity is being swamped by an adherence to formal equality and an oversimplification of the dynamics of discrimination. Thus the Supreme Court of the United States has begun a clawback process in terms of "strict scrutiny" of affirmative action programs (requiring *narrowly* tailored measures designed to serve a *compelling*[66] governmental interest),[67] applying this approach to federal programs in a way in which it had been applied to state and local affirmative action measures since 1989,[68] and based on the "equal protection" guarantee in the Fourteenth Amendment of the US Constitution. The 5th Circuit Court of Appeals ruled in March, 1996, that the University of Texas may not use race as a factor when admitting students,[69] the European Court of Justice the following October held that an affirmative action program in the German state of Bremen discriminated against men,[70] and the Canadian province of Ontario has begun dismantling its affirmative action programs for women, as has the state of California for minorities.[71] In Australia, the already limited sanctions attached to the *Affirmative Action (Equal Employment Opportunity for Women) Act* have been lessened by the Affirmative Action Agency no longer being permitted to publicise which companies are disobeying the law with respect to women's employment and promotion, the requirement for the submission of annual reports being waived for companies which have been shown to comply with the Act, and relevant government departments no longer being allowed to make clear the contract compliance policy (under which firms which did not comply with the *Affirmative Action Act* were given the lowest priority in tendering for government contracts) to

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66 In *Regents of the University of California v Bakke* 438 US 265 (1978) the controlling opinion of Justice Powell had held that increasing the racial and ethnic diversity of a student body at a university constitutes a compelling interest.

67 *Adarand Constructors Inc v Pena* 115 S Ct 2097 (1995). This is not isolated to affirmative action but can also be seen with respect to cases on voting rights (*Miller v Johnson* 115 S. Ct. 2475, holding that Georgia's congressional redistricting plan created a majority-black district in violation of the Equal Protection Clause), and with respect to school desegregation (*Missouri v Jenkins* 115 S Ct 2038 (1995), holding that remedial measures seeking to desegregate Kansas City schools were too broad).

68 *City of Richmond v J.A. Croson Co* 488 US 469 (1989).

69 *Hopwood v State of Texas*, UCSA Update, March, 1996. The majority of the court held that racial and ethnic diversity in the student body of the university's Law School was not a compelling interest, holding that the decision of Powell J in *Bakke* was only a minority view. This case is on appeal to the Supreme Court.

70 *Issues in Human Resources* Jan/Feb 1996.

71 *California Civil Rights Initiative* - Prop. 209.

tendering firms. The latter is dismantling affirmative action by subterfuge.[72]

Affirmative action is a process, but it brings with it no guarantees. The factors which impel its introduction can equally be factors militating against it. Certainly it is a temporary measure to be used only until equality is achieved. But we must be sure what we mean by equality, so that we can know that it has in fact been achieved. Judge Tanaka in his well-known separate opinion in a case before the International Court of Justice in 1966 concerning Namibia, the *South-West Africa Case*, said that what is equal should be treated equally, and what is different should be treated differently.[73] In other words, different treatment can amount to equality given the context, and, conversely, the same treatment (in that particular case, the application of apartheid) can amount to inequality. Equality is always relative, otherwise the result is injustice. The often-used metaphor of the level playing field is in fact a fiction. Because of history, the playing field is already tilted and this can turn words like "fair" and "equal" into cruel jokes.[74] What we need is equity and justice, not a formally colour-blind legal system or juridical androgyny. Equality, like beauty, is relative rather than standard. It is (or can be) quintessentially postmodern. As a result, affirmative action, like liberty, must not only be valued, but also carefully guarded.

Conclusion

Virtually all educators acknowledge that a place of higher learning is a better academic enterprise if the student body and faculty are diverse. A police department will be more effective in protecting and serving the community if its officers are somewhat reflective of that community. Judges and government policy makers must be able to reflect the concerns, aspirations and experiences of the public they serve in order to do their jobs well and to enjoy real legitimacy.[75] Affirmative action is not, for example, an attribution to all whites, males or able-bodied persons of a personal guilt for past discrimination against people of colour, women or people with disabilities. It does not destroy the gist of fundamental rights, whether they are constitutionally entrenched (as in Namibia) or not (as in Australia). It is a useful, if imperfect, tool for overcoming entrenched hierarchies.

In today's democracies, the fragmentation of political power does not make the task of choosing between the options raised by affirmative action an easy one. Indeed, compromises are frequently made in order to get affirmative action programs running at all. But it is not only the processes of power which are significant. At a more fundamental level affirmative action seems to sit rather awkwardly in most of our

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72 The policy was revealed in a confidential letter from the Minister for Administrative Affairs to federal government departments which was leaked to a newspaper: *The Australian*, June 23, 1997, p 5.

73 *South West Africa Case (Second Phase)*, (1966) ICJ Rep at pp 305-6.

74 Stanley Fish, "Reverse Racism ...", *supra* n 52.

75 These examples are taken from the "Affirmative Action Review" Report to President Clinton, *supra* n 51, 1.2.2.

societies. To borrow terms from Eugene Kamenka and Alice Tay, it is essentially a *gemeinschaft* notion (ie, based on a paradigm of society being an organic social family) trying to operate in societies which are either *gesellschaft* (ie, based on a paradigm of society being made up of atomistic individuals) or bureaucratic-administrative in nature.[76] To look at it from a postmodern perspective, affirmative action represents the "problematization"[77] of discrimination and equal opportunity while also having a "normalizing" function. The discourse of affirmative action has grafted considerations of substantive justice directly onto policies which have been formulated in procedural terms.[78] To put it more simply, we have the enigma of affirmative action trying to explain the conundrum of democracy.

Affirmative action is a process, not an end. Whether it be the redistribution of, or equitable access to, wealth, power, land or jobs, this cannot be brought about simply by a stroke of the legislative pen. For example, any strategy which addresses the impact of structural hierarchy on job opportunities for women, people of colour or people with disabilities, must ultimately be multi-faceted. Opportunities with respect to education, housing, and social benefits generally all feed into the issue of job opportunities. Indeed, law and policies geared only to social redistribution as an end in itself may in fact conceal structural dependencies which create inequality in the first place.[79]

Policies and programs must be continually monitored, re-thought and revised. In the United States, as a result in part of the Report to the President on Affirmative Action Review,[80] there is to be a year-long examination of race relations.[81] Serious debate that leads to improvement is essential, but uninformed debate which ignores the successes of affirmative action in giving a chance to untold minorities and to women, as well as the fact that the workforce remains dominated by white males,[82] is counter productive. The next review of the Australian legislation should occur in 1997, this being the second major review of the legislation since its implementation in 1986. As announced by the federal Treasurer on June 28, 1996, the guiding principle of the review is the effect of this (and other) legislation restricting business competition. This is a clear (and ominous) priority which will impact upon the type of working nation Australia will be, indicating how justice is ultimately socially

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76 See Eugene Kamenka & Alice Ehr-soon Tay, "Public Law-Private Law", Chapter 3 in S I Benn & G F Gaus (eds): *Public and Private in Social Life* Croom Helm, London, 1983.

77 Foucault means by this term the set of discursive and non-discursive practices that makes something enter into the play of the true and false, constituting it as an object for thought: Sylvere Lotringer (ed): *Foucault Live: Interviews 1966-1984*, trans. John Johnston, Semiotexte, New York, 1989, p 296.

78 Mark Yount, "The Normalizing Powers of Affirmative Action", in John Caputo & Mark Yount (eds): *Foucault and the Critique of Institutions* Pennsylvania State U P, University Park, 1993, p 194.

79 See I M Young: *Justice and the Politics of Difference* Princeton UP, Princeton, 1990, p 76.

80 *Supra* n 51.

81 Announced by President Clinton on June 14, 1997: *USA Today*, June 16, 1997, p 18A.

82 *Ibid*: a 1995 study by the Glass Ceiling Commission, a bipartisan US federal panel, found that while white males comprise 43% of the workforce they hold 95% of top management jobs: *Good For Business: Making Full Use of the Nation's Human Capital* http://www.ilr.cornell.edu.

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constructed.[83]

Ultimately, the essential element of any transformation is the creation of community sentiment strong enough to enable the groups in a pluralist democracy to entrust their fate to the good faith and decency of the others.[84] While democracy can be said to rely on ancient traditions, from the earliest times this has never precluded experimentation and innovation.[85] Affirmative action policies and programs represent a part of the contextual definition of a democracy, and are an investment in – and an aspiration for – the future.

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83 See John Rawls: *A Theory of Justice* Harvard U P, Cambridge, 1971.

84 Randall Kennedy, "Persuasion and Distrust: The Affirmative Action Debate", in Nicolaus Mills (ed): *Debating Affirmative Action, supra* n 30, p 66.

85 Stephanie Lawson, "Tradition and Democracy", Chapter 1 in *Tradition versus Democracy in the South Pacific* Cambridge U P, Cambridge, 1996.