

ContentsNon-Racial Affirmative
Action in Employment **1****Authors**Mark Oppenheimer
and Cecelia Kok**Editor-in-Chief**

Frans Cronje

Editor

Anthea Jeffery

Head of Research

Lerato Moloï

Head of Information

Tamara Dimant

Consultant

John Kane-Berman

Typesetter

Claudia Folgore-McLellan

Contact details*Telephone:* (011) 482-7221*e-mail:* info@irr.org.za*website:* www.sairr.org.za

Non-Racial Affirmative Action in Employment

South Africa has a moral obligation to address past wrongs, but a race-based policy of affirmative action is an unjust and ineffective way of doing so. Race is no longer an accurate proxy for disadvantage, while the present system harms rather than helps the truly marginalised. Race classification also contradicts the Constitution. An 'equal opportunity' approach would be fairer and more effective – especially as it would also help to counter the widespread joblessness that is the main reason for poverty and inequality.

Introduction

Apartheid deprived millions of South Africans of a fair and equal opportunity to compete for employment. Until the 1970s, an official policy of 'job reservation' ensured that only those designated by the State as 'white' could work in jobs at skilled (and better paid) levels. Those designated as 'black', 'Indian' or 'coloured' were generally barred from such jobs and further discriminated against in a host of ways.

Compensatory justice is at the heart of our legal system; and it demands that individuals who have been maltreated should be provided with compensation. Some proponents of affirmative action argue that 'race' must be used as a proxy for disadvantage, and the injustices of the past can be remedied by giving preferential treatment to 'blacks'. They also want these preferences to continue until every workplace is demographically representative of every race group at every level of employment.

South Africa has a moral obligation to address the wrongs of the past by taking positive measures to ensure that individuals who suffered prior injustices are compensated. But a race-based policy of affirmative action is an unjust and

When we treat people differently, we must do so for morally relevant reasons. But neither sex, nor religion, nor race is morally relevant.

ineffective way of trying to achieve redress. In addition, proportional racial representation is not a desirable goal we should be striving to achieve.

Justice and Equality

Justice requires us to treat people in accordance with what they deserve. Individuals who work hard deserve to be rewarded for their efforts, while those that do wrong deserve to be punished. A proper understanding of justice must also be rooted in the value of equality. Paying due

regard to equality does not require us to treat all people in exactly the same way, but rather enjoins us to take the different needs and abilities of people into account in deciding how to treat them fairly.

When we treat people differently, we must do so for morally relevant reasons. Sexism is wrong because it arbitrarily discriminates against people on the morally irrelevant basis of their sex. Similarly, treating people unequally because of their language, religion, or sexual orientation is unjust because none of these factors provide morally relevant reasons for differential treatment. 'Race' is no more morally relevant than any of these other attributes.

Understanding Affirmative Action

Affirmative action policies are usually concerned with three goals: compensation, correction, and diversification. Compensation is backward-looking in that it seeks to remedy past injustices. Correction aims to rectify present discriminatory practices, while diversification attempts to create a multicultural society. Affirmative action policies aim to achieve these goals either on a race-neutral basis or by taking 'race' into account.

Race-based affirmative action policies usually take one of three forms:

- i) a tie-breaker approach,
- ii) strong preferences for preferred races, or
- iii) racial set-asides.

Tie-breaker policies apply in situations where two candidates with equal qualifications or ability are contesting for the same position, but the candidate of the preferred race is chosen over the candidate from the non-preferred race.

A 'strong preference' system gives significant extra weight to candidates of a preferred race by actively selecting them for positions over people from other races even if candidates in the former group are not as well qualified as those in the latter. In this approach, the stronger the preference for a particular race, the less qualified the candidate has to be in order to be appointed.

Set-asides, as the term suggests, designate certain positions for candidates of a particular race and actively bar individuals of other races from attaining these positions. Set-asides (also known as quotas) were commonplace in South Africa for much of the apartheid era, as 'whites' had privileged access to the best universities, as well as the most skilled jobs and positions of power.

Set-asides designate certain positions for candidates of a particular race and actively bar individuals from other races from attaining these positions.

Problems with race-based affirmative action

Compensation for past injustice

The stated aim of South Africa's affirmative action project is to provide compensation for the apartheid injustices that exacerbated the socio-economic disadvantage that millions still suffer. However, race is not an accurate proxy for disadvantage. Though the correlation

Race is not an accurate proxy for disadvantage, given the number of upwardly mobile 'black' people who have prospered since 1994.

between race and disadvantage may have generally held true immediately after the political transition in 1994, there are now a number of upwardly mobile 'black' people who can no longer be considered as disadvantaged. While poverty is still endemic in South Africa and is concentrated among 'black' people, there is a vast divergence in the income and social status of individuals within the 'black' group. In addition, a new generation of 'black' so-called 'born frees' are entering the job market and may not necessarily be disadvantaged by virtue of their race.

Using race as a blunt instrument to determine who should be given preferential treatment by employers is now likely to result in privileged people receiving an unnecessary leg-up, while the genuinely disadvantaged are excluded. Since there are a limited number of jobs available in workplaces, individuals who have attended the best schools and universities and who also happen to be 'black' could bar other less fortunate individuals, who also happen to be 'black', from finding work.

In addition, there is a real risk that first-generation 'black' beneficiaries may act as 'gatekeepers' over race-based affirmative action. They may well have the wealth or the influence to ensure that the benefits of this policy go over and over again to themselves or their descendants, thus effectively excluding the majority of 'black' South Africans.

Say, for example, that a 'black' attorney managed to beat the odds in the apartheid era by obtaining an excellent education – and that he now earns a large income. He has no need for preferential 'upliftment', unlike many people among the marginalised 'black' majority. Under a race-based system of affirmative action, he is nonetheless likely to be made a partner in a top law firm because this helps the firm to fill its racial quota. It also, of course, gives him the opportunity to boost his income even more, since he will now share in the profits of the firm as a whole.

Say, further, that this attorney's son receives top-quality private schooling and studies law at one of the country's best universities. When the son applies for a job, the firm he approaches uses a racial quota system. The son is clearly the best candidate across all race groups and would have been appointed anyway, even if no racial policies applied. However, so long as racial policies exist, his appointment ticks a box for the firm, bringing it closer to meeting its racial target. Nonetheless, giving him the job to help fill a racial quota reduces the prospects of other 'black' candidates. Among these may be someone who did not go to a private school but has nevertheless managed to achieve solid (but not outstanding) grades even though he had to work to support himself all through his studies, never had transport of his own, and lived a two-hour commute away from the university. Such a candidate is likely to have numerous desirable qualities, including academic aptitude, perseverance, and the strength of character to prevail over hardship. Unfortunately for this

There is a real risk that first-generation 'black' beneficiaries may act as 'gatekeepers' over race-based affirmative action.

candidate, the quota system creates two separate tracks: one based on merit, the other on race. Neither addresses the disadvantage he has experienced all his life.

Another serious problem with race-based affirmative action is that it may deny the benefit of valuable skills to the people most in need of them. Say, for example, that a municipality uses a racial quota system for the appointment of water and sanitation officials and finds that it has too few 'black' applicants – a situation likely to occur when some 80% of South Africa's public schools are dysfunctional and the skills shortage thus remains acute. The municipality may then decide to leave the posts vacant, rather than appoint 'whites' to them, especially

Race-based affirmative action may deny the benefit of valuable skills to the people most in need of them, so entrenching disadvantage.

if the bonuses of its executives partially depend on their success in filling racial quotas.

This is not simply a theoretical possibility. According to the Public Service Commission, an independent watchdog established under the Constitution to monitor the performance of the public service, this kind of 'job reservation' happens quite often. Said the commission's acting chairperson, Richard Sizani, in mid-November 2014: 'The notion of "job reservation" as part of affirmative action

is not correct. It's not allowed, but it's happening and it's illegal... If there's no qualifying black candidate and there is a white candidate who's there and the post should be filled according to service-delivery requirements, it should be filled. You can't reserve the job while you're searching for a black candidate.'

In such situations, affirmative action stands in the way of its stated purpose of providing redress for the injustices of the past. Instead of helping to eradicate disadvantage, the policy helps to entrench it – for the resulting skills deficit means that indigent people may be denied access to clean water and proper sanitation. This could have disastrous consequences for the individuals affected. In such situations, the needs of the poor majority must surely trump all other considerations.

Set-asides and quotas are also likely to diminish workplace efficiency. The stronger the racial preference that is applied, the smaller is the weight that can be attached to qualifications and experience. Stronger candidates from non-preferred races may then find themselves excluded from appointment, while overall standards of performance may be reduced.

These arguments should not be misconstrued as suggesting that members of particular race groups are inherently less qualified and capable than members of other races. Such claims are racist and obviously false. The point in issue is a simple one: the more emphasis a preference policy places on race, the less weight it can place on merit. The same would apply if preference were applied on the basis of some other physical feature, such as height or hair colour.

Ironically, the main victims of race-based affirmative action are not the 'whites' excluded from jobs but the 'black' and marginalised majority.

Ironically, the main victims of race-based affirmative action are not the 'whites' who might be excluded from job appointments because of their skin colour but the 'black' and marginalised majority. This reality cannot be over-emphasised. The indigent rely almost solely on the State for many basic services – including health care and schooling – because they generally cannot afford private schooling or private hospitals. When the State's services

are less efficient than they should be, the impact falls most heavily on the poor – who find themselves with little choice but to bear the adverse brunt of policies which are supposed to help them. This is why merit-based appointments are so very important in the public service.

When the State's services are less efficient than they should be, the impact falls most heavily on the poor.

Present race-based affirmative action policies in South Africa are also characterised by unrealistic goals, complex requirements, and draconian penalties. Combined with strong state and media support for these policies, the overall effect has been to put enormous pressure on private sector employers to comply with racial targets. Such pressure leads to underqualified (or sometimes even *unqualified*) people being appointed to positions they would otherwise not have gained.

This is also what the Employment Equity Act of 1998 requires, for the statute defines those who are 'suitably qualified' for preferential appointment as including those who currently lack the capacity to do the job, but have the potential to acquire the relevant ability in the future.

This situation undermines efficiency and competitiveness. Combined with a coercive regulatory environment, the consequence is to damage investment. This, in turn, reduces economic growth and limits the number of new jobs that can be generated, making it harder for the poor to find work. Widespread unemployment then worsens and further entrenches poverty – once again demonstrating that South Africa's race-based affirmative action policies are having the opposite effect from their stated intentions.

Further, if justice requires that we treat each person in accordance with what he or she deserves, it is problematic to assume that all 'whites' benefited from or endorsed apartheid and that the entire 'white' group should thus be part of the compensatory justice project. Not all 'white' people supported apartheid. On the contrary, people such as Beyers Naudé and Ruth First strongly resisted the system. So too did Helen Suzman, Colin Eglin, many liberal journalists, and countless other 'white' opponents of statutory racial discrimination. Some were banned or placed under house arrest by the National Party government, while some served prison terms because they actively resisted and fought against the regime.

Racial representation

Some analysts claim that the employees of companies and institutions ought to proportionally represent the racial composition of the rest of the population. Hence, if 80% of the population is made up of those designated as 'black', then the same percentage of 'blacks' should be working in all sectors and levels of the economy. Some commentators also claim that justice requires proportional representation on the basis of race, which means that any under-representation of a particular race also provides evidence of injustice.

The present policy reduces economic growth and limits job creation, making it harder for the poor to find work and so entrenching poverty.

However, there is reason to believe that racial clustering in certain sectors is not necessarily connected to discrimination or injustice. Industries are often dominated by particular racial groups because of particular preferences within those groups or through accidents of history. In California 90% of donut stores are owned by Cambodians, yet the number of Cambodians living in California is significantly lower than 90% of the state's population. Cambodians did not come to dominate the donut selling business because of discrimination against other racial groups and there is nothing unjust in their having a disproportionate share in the industry. However, if

racial quotas were to be applied, then almost all the Cambodians running donut stores would be forced to sell their businesses to members of other race groups.

Cambodians in California did not acquire 90% of donut stores through discrimination and there is nothing unjust in their disproportionate share of the industry.

In South Africa, 'coloured' people working in the Department of Correctional Services in the Western Cape have been deprived of promotions because they are 'over-represented' in the workforce when measured against the small percentage of 'coloureds' living in South Africa as a whole. This type of discrimination on the basis of race smacks of the worst kind of racist social engineering.

Many proponents of racial representation believe that the 'right' racial mix will result in diversity, which is a valuable thing. A racial mix of people self-evidently leads to a diversity of skin colours, but it is unclear how hiring racially diverse staff will lead to a diversity of opinions. The underlying assumption – which is highly problematic – is that all 'black' people think in a particular way and that the opinions they hold by virtue of their race are different from those of people belonging to other racial groups. Yet an individual's height or hair colour has no bearing on his opinions – and his race is equally irrelevant to his views.

A diversity of opinions can generate significant benefits, for it promotes debate and can stimulate fresh insight and innovation. Moreover, being exposed to opinions different from our own makes it possible for us to 'challenge, reconsider and perhaps reaffirm' our own views, as philosopher Jonathan Wolff has written. If employers want to promote diversity, they must find out what opinions people in fact hold, instead of assuming they think in a certain way because of the colour of their skin. Such stereotyping is morally reprehensible. It also stands in the way of racial integration as it encourages people to view others in terms of their racial identity and not as unique individuals.

The burden of racial preferences

Race-based affirmative action fails to produce the good results it promises. Worse still, it undermines the achievements of those who belong to the preferred racial group. As Carl Cohen has written in his book *Naked Racial Preference: The case against affirmative action*: 'It imposes upon every member of the preferred race the demeaning burden of presumed inferiority. Preferences create that burden; it makes a stigma of the race of those who are preferred by race. An ethnic group given special favor by the community is marked as needing special favor – and the mark is borne prominently by every one of its members. Nasty racial stereotypes are reinforced, and the malicious imputation of inferiority is inescapable because it is tied to the color of skin.'

'Black' people are forced to carry the stigma of having been appointed to meet a racial quota.

'Black' people who are employed at prestigious companies because they are the best qualified candidates are forced to carry the stigma of having been chosen to meet a racial quota. Instead of being recognised for their genuine talents and abilities, they are viewed with suspicion by their colleagues, who are encouraged by the system to believe that they were appointed only because they are 'black'.

The following quote from Cohen's book testifies to the anguish that many highly qualified 'blacks' feel as a result of racial preference:

"You always want to believe that you were hired because you were the best... But everything around you is telling you, you were brought in for one reason: because you were a quota...No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome."

A race-based affirmative action policy requires some form of racial classification to determine who counts as 'black'.

Racial classification

A race-based affirmative action policy requires some form of racial classification to determine who counts as 'black' and who as 'white'. But any system of racial classification is deeply undesirable, as it requires a return, at least in part, to the humiliating processes used in Nazi Germany and apartheid South Africa. Classifications are often also arbitrary, as people of mixed racial descent cannot easily be pigeon-holed by race.

A race-based system of preferences requires us to ask a series of disturbing questions so that we can distinguish between those entitled to preferences and those with no such right. One question that arises, for example, is how much 'blood' from a particular race is needed for an individual to be considered a part of that race. Is one 'black' parent, grandparent or great grandparent enough to be considered 'black'? Would the same test be used to determine who is 'white'? In Nazi Germany, a person's status as a Jew was determined by how much Jewish blood they had. Having one Jewish grandparent was enough for an individual to be sent to a concentration camp. In South Africa, should having one 'black' grandparent be enough to help secure a well-paying job?

Who gets to decide what racial group individuals belong to? If people are given the power to assign themselves to a race of their choosing, the results are likely to be inconsistent – especially as preferential policies incentivise people to categorise themselves as members of the preferred racial group. Since the stakes are high, there will be much contestation among those who fall into ambiguous racial categories. In the last resort, the system requires employers to engage in much the same kind of repugnant classification as was used in the apartheid past.

Racial preferences are also at odds with the Constitution's commitment to non-racialism. They make racial identity as important today as it was under the apartheid regime. Instead of regarding individuals simply as fellow human beings, people are encouraged to think of others in terms of their racial identity.

This hinders the vital goal of racial integration and encourages people to separate themselves into distinct racial groups. Instead of creating a pluralist society where everyone can feel proud of their heritage, racial preferences make many citizens feel less worthy. Among those so affected are the supposed beneficiaries of these policies, who often find their achievements undermined. Also affected in a similar way are those who are denied employment because of an accident of birth – the race into which they happen to have been born. The upshot, as Cohen warns, is that 'preference by race yields disharmony, distrust and disintegration'. This is not unique to South Africa but is evident in all countries where affirmative action policies have been applied on the basis of race or ethnic identity.

Racial preferences are also at odds with the Constitution's commitment to non-racialism.

‘Equal opportunity’ affirmative action provides a sound alternative to the present race-based system.

An alternative to race-based affirmative action

Given South Africa’s history of racial discrimination, there is a compelling need for measures that enhance equality of opportunity. However, this must be done without introducing new forms of discrimination. South Africa’s overwhelming priority must surely be to provide quality education and training at all levels, so as to help those who are currently disadvantaged (and prevent disadvantage from being carried forward into succeeding generations). Unfortunately, given the dismal state of public schooling, this is evidently being overlooked as the essential foundation for transformation. What use is affirmative action in the workplace to a young man who has been let down so badly by the schooling system that he cannot adequately read or write?

‘Equal opportunity’ affirmative action provides a sound alternative to the present race-based system. This kind of affirmative action is race-neutral in its approach, but is nevertheless effective in overcoming the lingering consequences of past discrimination and opening up opportunities to those held back in the past. It also has the advantage of being able to tackle present disadvantage.

On this approach, all candidates for jobs must still pass the ‘minimum qualification’ test. After all, one cannot be an attorney without an LLB, or an engineer without an engineering degree. Where tertiary education is needed, fees could be an obstacle to equal opportunity. The State should thus provide financial assistance to qualified applicants who cannot afford the relevant costs. The Government should also do so without regard to the race of applicants, making ‘born-free’ indigent ‘whites’ just as eligible for bursaries as ‘born-free’ indigent ‘blacks’.

‘Equal opportunity’ affirmative action would encourage employers to reach out to marginalised individuals and help them gain access to jobs from which they were previously blocked. Employers should thus advertise job opportunities in strategic places or publications accessible to the disadvantaged. All insidious forms of discrimination should be rooted out of the hiring process and from the way the workplace operates. Overall, employers should put their emphasis on ‘taking positive steps to avoid discrimination, to ensure that opportunities are open and available to all, and that fair standards of selection are used’.

On this approach, race would be irrelevant, while a basket of socio-economic indicators would be taken into account in assessing disadvantage. The focus would fall on the individual circumstances of individual job applicants. Relevant factors would include their income and educational backgrounds, as well as those of their parents. These socio-economic indicators would be far more reliable pointers to disadvantage than race.

Recruitment criteria would need to be carefully reviewed to take account of qualities such as determination and the ability to overcome disadvantage. Hence, if two candidates have both achieved the same qualifications at similar institutions – but the first has done so with the aid of privileged surroundings while the second has done so despite adverse living conditions – the second candidate ought to be selected. This choice would in fact be based on merit, as the second candidate would have demonstrated the additional quality of

This approach would encourage employers to reach out to marginalised groups and to root out all insidious forms of discrimination.

determination in the face of impediment. A strong work ethic and determination to conquer adversity are valuable attributes in potential employees, but are often overlooked in the selection process.

This approach seeks to re-evaluate traditional notions of 'merit' and requires a nuanced understanding of who the 'best' candidate may be.

An approach of this kind uses neither the 'tie-breaker' policy, nor strong racial preferences, nor racial set-asides. Instead, this approach seeks to re-evaluate traditional notions of 'merit' and requires a nuanced understanding of who the 'best' candidate might be.

A shift to equal opportunity affirmative action would make it easier to measure how much transformation has been achieved. Changes in socio-economic circumstances can easily be monitored and measured, making it possible to tell how many people are succeeding in breaking out of disadvantage and moving up the economic ladder. This is also a particularly useful indicator, as it captures what affirmative action policies are supposed to be about.

Important too is the fact that people do not visibly and permanently bear the marks of disadvantage. Hence, no stigma attaches to people who may have been given a leg-up on this basis. By contrast, where race-based affirmative action applies, many 'black' people may be seen as owing their success to racial preference rather than individual ability.

This alternative approach would be morally sound and would have many positive outcomes. It could also be encouraged through incentives and rewards, rather than enforced through severe penalties. This would give business good reason to embrace the policy rather than fear it.

In sum, this type of affirmative action – which emphasises key inputs such as education, employment, and entrepreneurship within a climate of rapid economic growth – would help bring about much greater *equality of opportunity*. It would avoid the socio-economic costs of trying to meet unrealistic quotas based on the flawed criterion of race. It would also promote upward social mobility for the truly disadvantaged, rather than the relative elite. In addition, it would be far more effective than current policies in addressing the key cause of inequality – the high burden of unemployment among the poorly skilled 'black' majority.

Conclusion

Race-based affirmative action in employment may be aimed at correcting past injustices, but it fails to achieve this objective. Instead, it generates both present and future injustice by requiring a host of discriminatory practices. Moreover, it does little to assist the truly disadvantaged, who are the people most in need of redress. In practice, the bulk of its benefits are reserved for a relative elite within the 'black' group, who are able to rely on blanket racial set-asides that overlook their individual circumstances and the wealth and advantage they may already have attained.

Race-based affirmative action does little to assist the truly disadvantaged, who are the people most in need of redress.

Twenty years after the political transition, South Africa should abandon race as a proxy for disadvantage. Instead, the Government should adopt and implement an equal opportunity affirmative action policy that encourages employers to take into account the social and financial circumstances of individuals, on a case-by-case basis.

Classifying people according to the colour of their skin and then allocating benefits to them on this flawed basis are remnants of our history that are best left far behind.

South Africa's constitutional and transformational endeavours require that the country put behind it all that is reprehensible from its apartheid past. Classifying people according to the colour of their skin and then allocating benefits to them on this flawed basis are remnants of our history that are best left far behind. This is all the more so when a race-neutral and much more effective remedy lies readily to hand.

- Mark Oppenheimer and Cecelia Kok

**Oppenheimer is a member of the Johannesburg Bar, while Kok holds a BA LLB (cum laude) from Wits University and works at the Friedrich Naumann Foundation for Freedom. Both Oppenheimer and Kok write in their personal capacities.*

Explanatory Notes

- 1 This paper draws on an article written by Mark Oppenheimer and David Ansara and entitled 'The New Affirmative Action: Abandoning Race as a Proxy for Disadvantage'. This article was published in 2013 in *Focus*, the journal of the Helen Suzman Foundation (Issue 71).
- 2 Throughout this article, the words 'black', 'white', 'indian' and 'coloured' have been placed in inverted commas to draw attention to the problematic meaning and use of these terms. The word 'race' has been similarly flagged in the opening paragraphs of this article.