

AFFIRMATIVE ACTION



A VIEW FROM
THE GLOBAL SOUTH

EDITORS

OCKERT DUPPER
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Affirmative Action: A View from the Global South

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The Stellenbosch Institute for Advanced Study (STIAS) was born from a simple but powerful conviction: in this part of the world special initiatives are required to create and maintain an environment where we can generate and engage with conceptual frameworks and knowledge that may guide us in tracking and co-shaping global academic developments and that will allow us to address the 'big' questions and issues South Africa and the African continent face, also in a global context.

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Hendrik Geyer
STIAS Director
Stellenbosch
June 2011

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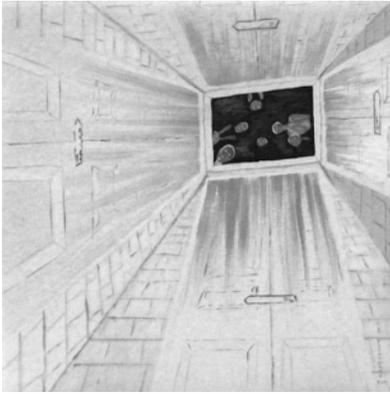
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PREFACE

Ockert Dupper
Kamala Sankaran

This publication has its genesis in a project entitled ‘Affirmative Action: A Comparative Study’ that was funded by the Stellenbosch Institute of Advanced Study (STIAS) at the Stellenbosch University, South Africa. In 2009, STIAS hosted an international workshop on the topic, and invited a number of international scholars to consider a topic that had emerged as one of the most controversial and divisive issues in post-apartheid South Africa. Ten years after affirmative action had become part of the legal landscape in South Africa, it was felt that a range of diverse perspectives and experiences could enrich and contribute to the South African debate on the topic.

The volume examines how countries with diverse populations have grappled with the ideas of equality, discrimination, and particularly, the use of affirmative action measures to achieve equality. Giving preference to particular groups in education, in government jobs, in allocation of government contracts or in provision of basic services are all forms of affirmative action considered in this book. For the purpose of this project, we have placed the focus on a number of countries of the global South,

namely South Africa, Nigeria, India, Malaysia, Brazil, Mexico, and Israel. The choice of jurisdictions was informed by two considerations. The first relates to the dearth of studies on affirmative action in these jurisdictions. Although affirmative action in India, South Africa and Malaysia has been the subject of close study for some time now, the same cannot necessarily be said of Brazil, Mexico and Israel. This alone sets the volume apart from numerous other studies that have focused primarily on the experience of countries of the North (such as the US, Canada and Member States of the EU). In the second place, affirmative action in the countries under review cover a range of different beneficiary groups, namely women (South Africa, Nigeria, India and Israel), disadvantaged groups based on race/colour (South Africa and Brazil), disadvantaged minorities based on religion and nationality (Israel), disadvantaged classes or castes (India) and disadvantaged ethnic groups (Nigeria and Malaysia). This enabled the researchers to study the impact of affirmative action in very different contexts and to determine the advantages and disadvantages of using gender, race, religion, nationality, caste (or class) and ethnicity as the basis of redress measures.

The book consists of two parts. Part 1 considers the topic from a comparative, theoretical and international perspective, and sets the scene for Part 2, which contains all the national perspectives. The introductory chapter by Ockert Dupper critically examines the efficacy of affirmative action as a redistributive strategy and the limits on its transformative capacity. Using examples from multiple jurisdictions, he notes that while some socio-economic benefits have been provided to the disadvantaged, affirmative action may continue to be used in these countries for some time to come. Bob Hepple examines the extent to which democratic participation is present in the decision to adopt affirmative action policies and their design. Stressing the need to tailor affirmative action policies to ensure a good fit with the goals, he points out that developing a 'reflexive' system is part of a broader democratic transformation in some countries.

In their contribution, Ana Alfinito Vieira and Alex Graser identify the critical objections against affirmative action and offer convincing arguments to counter them. In doing so, they contextualise affirmative action policies within the broader spectrum of equality-oriented policies, review the potential objections, and consider these from different disciplinary perspectives. One of the primary objections against affirmative action is that unlike other equality-oriented policies (such as a progressive tax system that finances social benefits to the needy), affirmative action places a disproportionate burden on certain individuals and does not spread it across the entire polity within which the policy operates. This issue also comes under the spotlight in some of the specific country chapters – for example, Malaysia, Mexico and South Africa. Tzehainesh Teklè's chapter provides a comprehensive international perspective on affirmative action (or 'special measures' as the concept is referred to

in international law). She considers the way in which the international human rights system and the international labour law system have approached the topic, and while she acknowledges that the international perspective on affirmative action has evolved and continues to evolve, she argues that more coherence is required both within and between the international human rights and the international labour law systems.

Part 2, which contains the national perspectives, starts with Moshe Cohen-Eliya's contribution on Israel. He argues that there is a duty to provide appropriate representation of women and minorities in public life. Cohen-Eliya analyses the development of case law which indicates that pursuing such a duty for appropriate representation in certain groups does not run counter to Pareto optimality and notions of efficiency in public life. Hwok-Aun Lee traces the development of Malaysia's unique affirmative action programmes for the majority Malay population, the Bumiputeras, that have been in place since the country's independence. His chapter examines the economic and political impact of such programmes on Malays vis-à-vis other groups and the challenges they pose for national unity. Kamala Sankaran's chapter examines the constitutional and legal basis that enables the government to institute affirmative action in public employment and education for 'backward' classes of persons. She analyses the difficulties in identifying beneficiaries for such programmes, particularly when there are intersectionalities of religion, caste and gender.

The contribution on Mexico authored by Mario Santiago Juárez differs somewhat from other contributions in this volume in that it does not describe or discuss a well-developed and entrenched affirmative action programme, but instead provides arguments in favour of bolstering the current weak and underdeveloped efforts to redress the disadvantages suffered by the indigenous population in Mexico. He indicates that centuries of discrimination and exclusion have left an indelible mark on the indigenous population, resulting in distinct disadvantages in all spheres of life, and that affirmative action in favour of indigenous people in Mexico is not only justified, but should be significantly strengthened and expanded. Ingo Wolfgang Sarlet focuses on affirmative action in the form of specific race-based quotas in higher education in Brazil and traces how judicial review has shaped these programmes. He also analyses the outcomes of such programmes to assess how far they have contributed in making higher education more equitable.

In her chapter on Nigeria, Chioma Kanu Agomo argues that while affirmative action measures have to some extent addressed disadvantages based on ethnicity in that country, it has left a critical group – women – out of the process. While affirmative action on the basis of gender takes place under the umbrella of specific legislative programmes, she argues that women as a distinct group ought to be accommodated

under the Federal Character Principle. Since 1994, the Federal Character Principle has based affirmative action on ethnic origin, and has been bolstered by the establishment of the Federal Character Commission (FCC), a body charged with overseeing its implementation.

Finally, Ockert Dupper's chapter on South Africa reflects on the general approach adopted by the Constitutional Court to determine whether an affirmative action measure falls within the constitutional provision that explicitly authorises such measures. He indicates that while the general approach can be described as one of restraint and deference in recognition of the need to redress past social injustices, South African courts have nevertheless retained a role for themselves that draws a careful line between deference to the judgment of the executive (or, in the employment context, the employer) and appropriate judicial supervision.

We would like to thank STIAS and its Director, Prof. Hendrik Geyer. STIAS provided not only generous financial support, but also a unique and serene setting to allow many of the authors in this volume to study, converse and develop the ideas that eventually became the individual chapters contained in this book. We would also like to thank Prof. Gerhard Lubbe, the former Dean of the Faculty of Law of Stellenbosch University, and the current Dean, Prof. Sonia Human, for supporting the project in both financial and other terms. The chapter on Mexico was expertly translated from Spanish into English by Marta Behar, and Helena Janisch provided exceptional editorial and technical assistance. Both deserve our sincere thanks. Thanks are also due to Sumedha Sarkar for helping with the copy-editing of this manuscript. Finally, we owe a debt of gratitude to Johannes Richter from SUN MeDIA Stellenbosch for his patience, persistence and professionalism in seeing the project through to publication.