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## **AFFIRMATIVE ACTION: IF OR HOW?**

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As an international intern from Italy at the de Klerk Foundation I was given the opportunity to research what most interested me within the realm of South African politics and human rights issues. I decided to focus on a topic I find incredibly interesting and complicated in its very nature - Affirmative Action (AA) legislation. I also chose this topic because I believe that nations around the world will look up to countries like South Africa, the United States, and Malaysia to address their own racial problems related to legislation, which are bound to arise with globalization. I decided to focus on the "unintended" consequences of AA legislation, placing particular attention on the white minority. I find AA fascinating because its effects transcend social, political, and cultural dynamics which ultimately shape the identity of a country - not only to the eyes of its citizens but also in the wider international community.

I would like to start off by stating that AA in South Africa is like nothing I have ever seen before. I have lived and studied in Europe, the United States and China, but I have never encountered a situation where a majority is trying to transform the majority through legislative measures. We must consider that pre-1994 the same majority had their very own existence threatened. However, AA legislation today seems to be endangering all minorities within South Africa that now face issues such as loss of nationalism and dispossession of land. A balance must be reached.

Although the South African Constitution provides for restitution, current AA legislation seems to be spurred by the ANC's National Democratic Revolution (NDR). Through an academic analysis of the NDR, I came to the realization that this movement has its roots in Lenin's theory of imperialism. According to Lenin the living standards of the working classes in industrialized Europe were then improving rather than deteriorating solely because the imperial powers were able to ruthlessly exploit the black masses in their colonies. According to the ANC and SACP this model unfortunately applies to the pre-1994 South Africa. The theory supports the fact that South Africa was effectively an imperialist state and black South Africa was its colony. This idea remains central to the NDR today. The NDR's goals are to liberate black South Africans from political and economic bondage by transforming the state, using policies like cadre deployment.

In 2012 the ANC released "The Second Transition" document in which Black Economic Empowerment (BEE) measures were reinforced and the need to change the Constitution in order to achieve a reduction in wealth and income inequalities



was expressed. According to the ANC the Constitution has proved inadequate for an economic and social transformation. By studying the goals of the NDR it appears that the ANC's emphasis since 1994 has not been on stimulating growth but rather on bringing about the redistribution of existing wealth. This is evident in BEE regulations. In my opinion the NDR will ultimately deter investment, stall economic growth, worsen poverty, and increase centralization. Most importantly it will undermine the South African Constitution.

The new South African Constitution - which became effective in 1997 - is unique, as it was drafted by all parties at the time, including the ANC. The Constitution addresses issues of discrimination in section 9:

*9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

The problem with current BEE legislation is that it takes into consideration section 9(2) of the Constitution but completely throws out the remaining sections. This trend started after the *Minister of Finance v Van Heerden* case in 2004, which essentially dealt with the interpretation of section 9 of the Constitution and the right to equality. The case concerned Van Heerden's claim (member of the pre-1994 Parliament) who believed that the new parliamentary pension scheme discriminated unfairly against him and others in a similar position because employer contributions under the old government were not as generous as those under the post-1994 scheme. This claim was initially upheld by the Cape High Court but subsequently turned down on appeal to the Constitutional Court. Deputy Chief Justice Moseneke's reasoning for the overturning of the Cape High Court judgement lays on the



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foundations that in his opinion "if a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination" and therefore it is useless to ensure it abides with sections 9(3) and 9(5). By doing so Moseneke dispensed sections 9(3) and 9(5) which affirm that "the state may not unfairly discriminate directly against anyone on one or a number of grounds including race..." and that "discrimination is fair unless it is established otherwise". These two sections must be used in conjunction with section 9(2) in order to test the validity of the case. Section 9(5) in particular was adopted as a way to protect against unfair discrimination which is a fundamental value of non-racialism. Albie Sachs, former judge of the Constitutional Court, later released a statement affirming that "without major transformations, we cannot heal the divisions of the past and establish a society based on democratic values and social rights...it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action."

The understanding of this case is not only important for the meaning of the case itself, but because due to Moseneke's decision, legislative measures based solely on section 9(2) have failed to advance the most disadvantaged groups of society. This becomes obvious in BBBEE where an already advantaged black minority benefits from the new policies while the majority of the population keeps getting poorer.

If the reason for AA legislation in South Africa was to foster development and decrease poverty it has failed. Statistically speaking the large majority of the black population has been growing poorer since 1994, and only a very small politically connected elite has been able to benefit from BEE. Additionally, AA has been deterring international investment, forcing white-owned businesses to comply with governmental regulations that go against the natural economic market trends and decreasing the quality of services due to lack of skills. Since 1994, the South African economy has been characterized by low growth, low investment and a 30% increase in unemployment. As Alec Erwin (former Minister of Public Enterprises) stated: "it is pointless having a BEE economy that is growing at 1%".

AA has been causing a number of issues within the white minority. The greatest issue however, has been seen with regards to young adults. According to a report by the South African Institute of Race Relations (SAIRR), 800 000 white South Africans have left the country since 1995. Emigration has resulted in bad news for the nation in the form of loss of skills. According to the SAIRR, white South Africans leave because they do not believe they are safe in their own nation and they do not believe they will have any effect on the future of the nation. Six in 10 varsity students believe they will never be able to obtain the job they want and eight in 10 think the government has done nothing to create jobs for graduates. Nelson



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Mandela stated that the "brain drain" would end if students had a stronger sense of national identity. Current AA legislation is gravely hindering feelings of belonging and nationalism.

The South African Constitution prohibits discrimination but still calls for redressing of the wrongs of the past. Through my time spent here in South Africa, and through the interactions I have had with people from all sorts of backgrounds I have come to the personal conclusion that AA, as it is now implemented, has intensified resentment, demarked racial lines, perverted political ideology, limited the advancement of the economy and hindered nationalism. The only way to live up to that "liberation" dream is to abandon the current path and focus on universal compulsory high quality education. It is only through education that we challenge the frameworks we were born into and racial lines are erased. The secret of change is to build the new, not to fight the old. As President De Klerk stated: "our inability to reach agreement about the past has been one of the greatest failures of our post-conflict society. The past still intervenes like an unseen barrier in virtually all our national discourses and provides the fuel for continuing recrimination, guilt, and polarization".

South Africans must recognize that something must be done in order to redress the wrongs of the past. The nation cannot wait 300 years for natural justice to intervene. They must adopt a system that abides by the Constitution and focuses on restorative justice for all races. The question is not about whether South Africans need or want to effect restorative justice, but how.