

CHAPTER 2

THE NATURE AND SCOPE OF AFFIRMATIVE ACTION : A THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

Affirmative Action over the past two decades in the USA, and at least a decade in South Africa (SA), has ranked among the most controversial publicly debated issues. In fact since its inception, as a major part of the strategy for achieving equality of opportunity, Affirmative Action has been fraught with controversy. This controversy has been influenced, to a large extent, by those who oppose state intervention on behalf of the previously disadvantaged. Much of the controversy, however, results from the misunderstanding of Affirmative Action itself (Fleming *et al.*, 1978 : 4; Human, 1991 : 15; Shubane, 1995 : 3). Such misunderstanding emerges from an array of factors, namely the failure to understand the concept Affirmative Action, problems experienced in implementing the strategy and the unrealistic expectations regarding the potential and scope of Affirmative Action strategies to transform the social structure into one which reflects greater equality.

Contributing to this confusion is the inconsistent practices and policies that fall under its rubric (Fullinwider, 1980 : 159; Fleming *et al.*, 1978 : 7). Human (1995 : 51) corroborates this viewpoint by stating that the exponential increase in interest in Affirmative Action in South Africa in the recent past has led to **“a quagmire of muddled debate”**.

2.2 THE MEANING OF AFFIRMATIVE ACTION

The broad scope and apparent flexibility of the term Affirmative Action is clearly evident in the following set of ten definitions :

Definition 1

“... includes any measure which goes beyond the simple terminology of discriminatory practice and which is adopted to correct or compensate for past or present discrimination from recurring in the future” (Soni, *The Daily News*, 13 May 1991);

Definition 2

“... includes those actions appropriate to overcome the effects of past or present practices, policies or other barriers to equal opportunity” (Lester, 1980 : 169);

Definition 3

“... is a phrase that refers to attempts to bring members of unrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial programme. Some Affirmative Action efforts include preferential treatment” (Greenawalt, 1983 : 17);

Definition 4

“... is a planned and positive process and strategy aimed at transforming socio-economic environments which have excluded individuals from disadvantaged groups, in order for such disadvantaged individuals to gain access to opportunities, based on suitability” (Ramphela, 1994 : 9);

Definition 5

“... is an instrument of national reconstruction or even transformation, which is required to eliminate or reduce all inequalities emanating from past discrimination” (Maphai, 1993 : 6);

Definition 6

“... refers to a selective group of policies and programmes by government and non-governmental agencies to redress the inequalities that exist within societies (mainly) along racial, gender, ethnic, caste and class groupings” (Weiner, 1993

: 2);

Definition 7

“... is a set of procedures aimed at proactively addressing the disadvantages experienced by sections of the community in the past” (Innes, 1993(a) : 4);

Definition 8

“... refers to racial preferential treatment for good reasons. It could mean redistribution of resources and opportunities or preferential financial assistance” (Sonn, 1993(a) : 1);

Definition 9

“... is a generic term for programmes which take some kind of initiative either voluntary or under the compulsion of law, to increase, maintain or rearrange the number or status of certain group members usually defined by race or gender within a large group” (Johnson, 1980 : 77); and,

Definition 10

“... can be defined as the laws, programmes, or activities designed to redress past imbalances and to ameliorate the conditions of individuals and groups who have been disadvantaged on the grounds of race, gender, and disability” (Department of Public Service and Administration, 1998: 8).

In the aforementioned ten definitions the following key words and phrases are noteworthy :

- **“... includes any measure ...”** in definition 1;
- **“... includes those actions appropriate ...”** in definition 2;
- **“... participation in some beneficial programme ...”** in definition 3;
- **“... aimed at transforming socio-economic environments ...”** in definition 4;
- **“... instrument of national reconstruction or even transformation ...”** in

definition 5;

- “... **redress the inequalities that exist within societies ...**” in definition 6;
- “... **addressing the disadvantages experienced by sections of the community in the past ...**” in definition 7;
- “... **mean redistribution of resources preferential financial assistance ...**” in definition 8;
- “... **rearrange the number or status of certain group members ...**” in definition 9; and,
- “... **redress past imbalances ... individuals and groups ...**” in definition 10.

These key words and phrases highlight and point to the applicability of Affirmative Action in various aspects of social life. The Reconstruction and Development Programme (ANC, 1994 : 16-17) also extols this perception in the belief that Affirmative Action would address a variety of issues including marginalisation from economic, political and social power of Black people, women, rural communities, the elderly, the youth and so on.

Singh (1996 : 45) corroborates this viewpoint. She describes this broad use of the concept as the “**maximalist**” version of Affirmative Action which she claims :

- must be viewed as part of a comprehensive set of restructuring strategies contributing to the altering of power relations in the political and economic sphere;
- must effect the majority of South Africans on issues ranging from land redistribution to skills training;
- must generate large scale educational opportunity and skills training; and,
- must contribute to overall democratisation and transformation of institutional and organizational culture.

This apothegm is further extended tellingly in the words of Albie Sachs (1993(b) : 14-15). He defines Affirmative Action as follows :

“Affirmative Action in the South African context has extremely ‘broad’ connotations, touching, as apartheid did and still does, on every area of life ... Affirmative Action covers all purposive activity designed to eliminate the effects of apartheid and to create a society where everyone has the same chance to get on in life. In terms of the ANC draft Bill of Rights, all anti-discrimination measures, as well as anti-poverty ones, may be regarded as constituting a form of Affirmative Action.”

Similarly, Thomas (1992 : 3) argues that Affirmative Action **“... can be viewed as a pro-active development tool to overcome ... constraints and more effectively mobilize latent resources in order to stimulate overall development”**. He also presents different dimensions of Affirmative Action to illustrate further the broadness of the concept as follows :

- the political sphere and decision-making process;
- education and culture;
- breakdown of segregation in social life;
- housing and residential infrastructure;
- welfare services;
- Black business advancement;
- job/employee advancement and training; and,
- symbolism and the historical perspective.

Other definitions of Affirmative Action (numbers 11 - 17 below) reveal that it may also be used in the narrow context as well. Singh (1996 : 45) describes this as the **“minimalist”** position on Affirmative Action. In such a case Affirmative Action **“...**

involves the widening of opportunities for individuals from disadvantaged groups rather than a process which requires fundamental social restructuring” (Singh, 1996 : 45-46). Minimalists accept the need for social and political change as much as maximalists. They differ, however, in that they set different parameters to the change that is necessary, e.g., in areas of employment, education, health, etc.

Definition 11

- **“... is a tool to accelerate equal access to employment.”** (Strachan, 1993: 140);

Definition 12

- **“... is a process designed to achieve equal employment opportunities ...”** (IDASA, 1995 : 12);

Definition 13

- **“... is a deliberate undertaking of positive steps to design and implement employment procedures so as to ensure that the employment system provides equal opportunity to all”** (Fleming *et al.*, 1978 : 5);

Definition 14

- **“... Is the additional corrective steps which must be taken in order that those who have been historically disadvantaged by unfair discrimination are able to derive full benefit from an equitable employment environment”** (Department of Public Service and Administration, 1998 : 3);

Definition 15

- **“... refers to specific actions which an institution takes to eliminate the effects of past discrimination in regard to admission of students, special programmes for disadvantaged students, as well as recruitment, hiring or promotion of employees”** (VanderWaerdt, 1982 : 209);

Definition 16

- “... refers to a set of specific and result-oriented procedures that are utilized to ensure that non-whites and women are not disadvantaged in efforts to seek employment” (Combs and Gruhl, 1986 : 1); and,

Definition 17

- “... is adopting management styles in the workplace conducive to racial integration and developing attitudes that enhance racial tolerance and racial acceptance” (Njuguna, 1992 : 1).

A review of the above definitions of Affirmative Action (numbers 11 to 17), particularly the underlined key words and phrases, confirms the perception that a narrow conception of Affirmative Action also exists. They also indicate that the concept Affirmative Action may be confined specifically to employment and the contracting sphere. According to Blumrosen (1985 : 423-440), when confined to employment, it refers to the elimination of the effects of past or current barriers to equal employment and contracting opportunity through a broad variety of activities relating to, *inter alia*, selection and recruitment, development and training and promotion practices in large organizations.

Other definitions (18 to 23 below) tend to narrow the scope of Affirmative Action even further depending on the purpose for which they were intended, hence, their apparent flexibility. Each of these perceive Affirmative Action as follows :

Definition 18

- “... is no more than a code phrase for quotas and other numerical rules such as set-asides” (Human, 1993 : 22);



Definition 19

- “... is normally associated with recruitment of individuals from groups historically discriminated against and includes quotas as well” (Peacock, 1993 : 3);

Definition 20

- “... is aimed at results and means that schedules and goals must be set in place ...” (Trade Union Educational Authority, New Zealand, cited by Ramphela, 1994 : 9);

Definition 21

- “... is associated with reverse discrimination ...” (Crosby and Blanchard, 1989 : 4; Young 1986 : 10; Sasseen, 1979 : 173-190);

Definition 22

- “... does not mean entitlements to proportional representation. It means actions to eliminate discrimination, creation of more adequate pools of talent, active searches for talent wherever it exists, revision of policies and practices that permitted or abetted discrimination ...” (Carnegie Council on Policy Studies in Higher Education, 1975 : 1-2); and,

Definition 23

- “... will not mean retribution but, upliftment; it will not necessarily involve establishing a culture of entitlement, in which Black people look for an easy ride and for sheltered employment” (Meintjies, *The Weekly Mail*, 8 November 1991).

Evident in the definitions above (numbers 18 - 23) is the association of Affirmative Action, rather narrowly, with quotas, numerical targets and goals. Also by implication it is associated with reverse discrimination and entitlement.

Analytical and tactical work would have been much easier if there were a single conceptualisation of Affirmative Action. In reality, as the aforementioned review reveals, there are contending versions located along a spectrum that extends from minimalist (narrow) to maximalist (wide) understanding and application. These versions presuppose different philosophical frameworks and theories of social change and are supported by different kinds of arguments.

Maphai (1993 : 6) takes a minimalist position on Affirmative Action. He argues in favour of a narrow version of Affirmative Action as temporary preferential treatment for women and Blacks. He views the narrow conception as involving the recruitment of groups, previously discriminated against, into positions of common, though not exclusive sites of Affirmative Action. He maintains further that this narrow conception of Affirmative Action seldom rises beyond tinkering and is primarily, though not exclusively, the domain of the private sector. In his view the wider meaning of Affirmative Action, as encompassing reconstruction and the eradication of overall inequality and poverty, should be jettisoned since these activities in any case constitute **“an ordinary permanent feature of a responsible government”** (Maphai, 1993 : 7). This contention as indicated later, is underscored and also postulated by Blumrosen, *et al.* (1994 : 217-49).

It also emerges from the above review that Affirmative Action involves a set of measures that are multi-dimensional in character. This is so because, *inter alia*, it is regarded as necessary, positive, special, temporary, public, private or government driven, preferential, result-orientated and correctional. The measures are generally aimed at individuals from specified target groups, who were previously or are presently disadvantaged by being discriminated against in terms of either race, sex, colour, creed, class or status. Such measures are introduced in order to achieve certain outcomes.

Such outcomes are to identify and redress the injustices of the past or the present by introducing compensatory acts, preferential treatment, redistribution of wealth/

opportunities, elimination of discriminatory measures, elimination of human rights infringements and the promotion of upgrading, training, access and development. The ultimate is societal reconstruction and development.

The interpretation of the nature of Affirmative Action is so vast that it can be claimed to impact on all spheres of life, namely the moral, political and constitutional spheres:

- Morally, it is regarded as an instrument of justice insofar as it calls for a systematic programme for creating social opportunities and bringing material benefits to a target group who would otherwise be deprived.
- Politically, it suggests a programme of upliftment by providing employment, services and welfare through a reallocation of state and private resources.
- Constitutionally, it calls for a set of legal requirements, which allows the preferred group to attain social benefits according to legal rights which can be enforced through the judicial system of the state.

It is, therefore, evident from the entire review thus far that the term Affirmative Action has been used in the broad sense, especially in South Africa, where it tantamounts to making policy decisions, which should actually be the task that ought to have been taken by any government to address broader issues concerning the majority of the population. Human (1995 : 53) corroborates this view, made earlier by Maphai (1993: 6-8), by also arguing that such programmes do not constitute a special form of Affirmative Action **“but are surely the responses of a democratic government to the problems of the electorate and fall within the range of normal legislation”**.

It is clear from the aforementioned review that the concept of Affirmative Action can be confined to employment. The literature reveals that this is how the concept Affirmative Action has been predominantly used abroad.



Arising from the review of the various perceptions of Affirmative Action and claims by Maphai, Human and Blumrosen, the researcher intends using the concept Affirmative Action in its narrow sense, viz., relating it to Employment Equity in institutions of Higher Education in South Africa. It is evident from the review that the tendency to treat the concept, Affirmative Action, as a substitute for transformation obfuscates the implementation of specific strategies to eliminate discrimination in the workplace. **“It is for this reason that the tendency to use Affirmative Action as a broad concept should be resisted”** (Human, 1995 : 54). In view of the wide and diverse range of practices that may be associated with Affirmative Action, Maphai (1992 : 1) endorses Human’s viewpoint that **“It is necessary to narrow down the concept of Affirmative Action if any useful analysis is to be taken”**. Therefore the researcher has focused specifically on Affirmative Action and Employment Equity in Higher Education institutions in KwaZulu-Natal in the present study.

Misinterpretation, however, has also been prevalent among those using the narrower definition of Affirmative Action as well. Contrary to popular belief, Affirmative Action related to Employment Equity, as revealed in many of the aforementioned definitions, is generally viewed as a means of overcoming constraints to equal opportunity rather than as a strategy for granting preferential treatment to the previously disadvantaged (designated groups) over others. If there were no preferential treatment, as discussed in Chapter 1, the plight of those who were previously disadvantaged will remain almost unaltered. Such a strategy invokes Equity or substantive equality (discussed later) as part of a true definition of Affirmative Action.

Non-discrimination, equal opportunity, preferential treatment, goals, quotas, compensatory and distributive justice appear to be key terms that epitomize Affirmative Action. Clarity of such concepts, in the context of this study, is necessary for an understanding of the principles governing Affirmative Action. These are discussed hereunder.

2.3 DISCRIMINATION AND NON-DISCRIMINATION

An analysis of the definitions of Affirmative Action overwhelmingly reveals that discrimination and its opposite, non-discrimination or anti-discrimination, are two important concepts related to it. This is so since one of the major aims of Affirmative Action is to eradicate any form of discrimination against people by introducing anti-discriminatory measures. It is for this reason that these terms merit discussion when developing a conceptual and theoretical framework of Affirmative Action. Also many opponents of Affirmative Action associate the concept with discrimination. As a starting point it is, therefore, vital to clarify the meaning of the concept discrimination and, thereafter, evaluate its relationship with Affirmative Action.

Discrimination is viewed in an extremely serious light by the world community. There is widespread agreement that it is **“morally wrong, fundamentally unjust, and an evil which ought to be eradicated”** (Robertson, 1991 : 26). According to the Gender Equity Task Team (GETT), established by the S A government, discrimination in employment **“occurs when a person is treated less favourably than another would be because of a characteristic that is irrelevant to his or her capacity to do a job”** (Wolpe *et al.*, 1997 : 195). Such characteristics include membership of a group, sex, marital status, parenthood, race, disability or sexual orientation (Wolpe *et al.*, 1997 : 199).

In response to the allegation that Affirmative Action is synonymous with discrimination, Asmal (1993 : 33) recalls the claim by the International Convention on Elimination of all forms of Discrimination that explicitly recognized the difference between Affirmative Action and discrimination stating that, while Affirmative Action equalizes, discrimination elevates the status of one group over the other.

Non-discrimination, a vital characteristic of Affirmative Action, is generally aimed at the elimination of any form of discrimination against employees within an organization, especially with regard to their being :

- denied services, financial aid, and other such benefits;
- provided with benefits that are different from those which others receive;
- provided with benefits in a different manner;
- subjected to segregation;
- restricted from full enjoyment of benefits while others are treated differently when determining whether they satisfy admission, enrolment, membership or quota requirements; and,
- subjected to discrimination by criteria or methods of administration that accomplish indirectly what is prohibited directly.

(Boulle, 1986 : 20)

Young (1986 : 9-10) suggests four approaches to the problem of discrimination that have been described as acts of Affirmative Action :

- *Passive non-discrimination* : Such an approach means that the employer refrains from sexual or racial discrimination in a passive manner, when choosing an applicant for a position.
- *Active non-discrimination* : This term implies that the employer will aggressively recruit Black, Brown, female and other minority applicants (previously disadvantaged in the USA) before making an employment decision on the basis of merit.
- *Restitutive non-discrimination* : In this instance the employer has been guilty of racial, ethnic or sexual discrimination in the past; in the future, preference will be given to applicants from groups previously discriminated against in order to compensate for past actions.
- *Reverse discrimination* : Here, the employer may not have been guilty of past discriminatory practice but, as a matter of policy, gives preference to hiring

members of targeted groups who have experienced discrimination in the past.

Clearly evident from the aforementioned and, contrary to the allegations of opponents Affirmative Action is strongly associated with non-discrimination. This is the view held by the researcher in the present study.

2.4 REVERSE DISCRIMINATION

Also evident in the aforementioned definitions of Affirmative Action is the association of reverse discrimination with it. Lack of understanding, poor interpretation of this term and, by implication, Affirmative Action has led to a great deal of confusion. This has created a great deal of negativity towards Affirmative Action. It is also a term that the opponents of Affirmative Action tend to capitalize on for support against it. Therefore, it calls for clarification. The present researcher proposes to clarify the term by commencing with a definition of reverse discrimination by Greenawalt (1983 : 16) :

“Reverse discrimination means a difference in treatment that reverses the patterns of earlier discrimination.”

This view is endorsed by proponents of Affirmative Action. Similar to the term discrimination or first-order discrimination which is described by Rosenfeld (1991 : 4) as **“discrimination against Blacks or women on the grounds that they are inferior or different”**, the term reverse discrimination is not only erroneously or ignorantly given a negative connotation but it is also viewed as being synonymous with Affirmative Action and that has given Affirmative Action a negative connotation.

The opponents of Affirmative Action argue that preference based on race or gender is a form of reverse discrimination. They claim that if past discrimination against those from the designated groups was wrong any present discrimination in their favour must also be construed as wrong. Both forms, they believe, are wrong because they are based on the supposed irrelevant criteria of race, gender or ethnicity. These criteria

are regarded as being irrelevant because they have little to do with the individual's ability to perform a job or with the individual's qualities as a moral human being.

This argument is unsound since preferential treatment, unlike the past discrimination, is not based on the assumption that one group of people is inherently less worthy than another because of race, gender or ethnicity. Thus, preferential treatment lacks the crucial negative element of prejudice towards a group that typified past discrimination and is, therefore, morally in a different category.

Past discrimination was based on the contemptible idea that one race or gender group was inherently inferior to another. Preferential treatment advocated by Affirmative Action in favour of members of the formerly discriminated group has no such basis. They are, therefore, fundamentally different.

Affirmative Action is simply a means of increasing the social and economic strength of formerly disadvantaged groups and does not stigmatize others. Dworkin (1977 : 15) underscores this contention by arguing that White males disadvantaged by preferential treatment are **“being excluded not by prejudice but because of rational calculation about the socially most beneficial use of limited resources”** given the immoral and unfair treatment of the past.

It is, therefore, understandable why the proponents of Affirmative Action steer away from the term reverse discrimination. They fear that the label will tag such programmes with the assumption of unjustifiability that accompanies other practices which are described as discriminatory. Further, in view of the fact that reverse discrimination may be and is often construed as being much the same as first-order discrimination with a change only in the victims, it will also be morally objectionable.

The postulate of equality embraced by Modern Liberal theory maintains that all individuals are morally equal (Rosenfeld, 1991 : 20). Therefore, it precludes disadvantaging Whites because of the colour of their skin just as much as it forbids

disadvantaging Blacks on that basis.

The difficulties involved in disassociating the term reverse discrimination from its often misconstrued negative connotation are clear from the above discussion. For that reason it will not be used as a synonym for Affirmative Action in the present study.

2.5 PREFERENTIAL TREATMENT

Implicit in the definitions of Affirmative Action reviewed is the need for some sort of preferential treatment which is often regarded as being synonymous with Affirmative Action in the literature. Preferential treatment in general **“connotes the granting of preference to one or several persons among group of competitors”** (Rosenfeld, 1991 : 43). It is important in order that the ‘playing fields are levelled’, given the injustices that the disadvantaged were forced to succumb to in the past. If there were no preferential treatment for the previously disadvantaged they would be unable to compete with others in a so-called equality-of-opportunity situation because of their already disadvantaged background. It would seem, therefore, **“that if we are to eliminate all the effects of discrimination some form of preferential treatment is also required”** (Sterba, 1993 : 287).

Rosenfeld endorses the view that preferential treatment is associated with Affirmative Action. He maintains that it is justified on the grounds of Distributive Justice and Compensatory Justice (discussed later in this chapter).

As the present study of Affirmative Action is largely confined to the context of Employment Equity in Higher Education, the researcher will focus on the meaning of preferential treatment in this specific context. To this effect the researcher draws strongly on Sterba’s (1993 : 286) definition that :

“... preferential treatment is a policy of preferring qualified women and minority candidates [previously disadvantaged group in USA]

who have been disadvantaged by discrimination and prejudice over equally or more qualified white male candidates who have not been similarly disadvantaged.”

Sterba (1993 : 286-7) argues that White male candidates who were passed over by a policy of preferential treatment had benefitted in the past from the discrimination and prejudice that were applied to women and minority candidates through unequal educational opportunities, etc., as was the case with the designated groups in South Africa. He cautions, however, that, in order to be justified, such a policy of preferential treatment should favour those candidates whose qualifications are such that, when their appointment is followed by a suitably designed educational enhancement programme, within a reasonable period of time, they will become as qualified or even better qualified than their peers or those who were passed over.

Such potential of candidates would have been lost to society because of the discrimination and prejudice of the past. Preferential treatment accompanied by suitably designed educational enhancement programme purports to actualize that very potential.

Preferential treatment, therefore, is a policy that is directed at those who qualify, but because of past discrimination and prejudice, are less qualified than they would have otherwise been. It seeks, therefore, to provide such candidates with a benefit that will nullify the effects of past discrimination and prejudice and thus allow them to progress. Sterba (1993 : 287) underscores this contention with an analogy of runners in a race:

“... who for a time are forced to compete at a disadvantage with other runners, e.g., by having weights tied to their legs, but then later are allowed to transfer those weights to the runners in the race who had previously benefitted from the unfair competitive advantage so that the results of the race will now be fair.”

Given the above, there appears to be a strong case for preferential treatment in tandem with Affirmative Action programmes. In fact Arneson (1993 : 164) is of the opinion **“that preferential treatment is morally mandatory, not merely permissible”**. The present study would, therefore, adopt this view in the study of Affirmative Action and Employment Equity in Higher Education.

2.6 GOALS AND QUOTAS

Goals and quotas, as the review of the definitions reveal, appear to be intrinsically linked to the concept of Affirmative Action. In fact, one narrow conception of Affirmative Action by Human (1993 : 22) categorically states that **“it is no more than a code phrase for quotas and other numerical rules such as set-asides”**.

The vociferous debate on rigid quotas and goals has led to a great deal of controversy. The unfortunate aspect of this saga is that, apart from creating confusion, the debate on quotas and the negativity associated with them has obscured many positive aspects of Affirmative Action. It is imperative that this review clarifies the meaning of these concepts and determines which concept will be more suitable to be included as part of the theoretical construct of Affirmative Action in the present study.

As mentioned earlier when associated with Affirmative Action there is confusion and disagreement surrounding the terms goals and quotas. Bunzel (1972)(a) : 8; 1972(c): 10-14) was one of the most vociferous critics of goals and timetables in the USA. Like other critics he too equated Affirmative Action with quotas. The word quota evokes in many an educator bitter memories of ethnic exclusions from institutions of Higher Education in the past, both abroad and in South Africa. **“It is no wonder that the very word has acquired a bad smell”** (Rachels, 1993 : 217). He maintains that, of all the policies which have been designed to combat discrimination, quotas are the most despised.

This equating of goals with quotas has also served to further intensify the emotional

level of debates over Affirmative Action. According to Pottinger (1972(b) : 29) the word quota has become “a ... **bogey man, a rallying cry**”. Such sentiments have been echoed by other proponents of Affirmative Action who relegate the goal-quota argument to a “**red herring**” or “**a phony issue**” (Leonard, 1974 : 233).

The continued equation of goals with quotas by critics hamper the successful implementation of Affirmative Action as they continue to vehemently reject the distinction between them. In fact Fleming *et al.* (1978 : 88) pointedly remark that they have to a large extent “**so poisoned the intellectual atmosphere that Affirmative Action is immediately likened to quota hiring**”. It is, therefore, evident that the continued misuse of the term quota by critics appears to be a deliberate attempt to undermine Affirmative Action by skewing public opinion and the opinions of policy makers against it.

Others contend that goals and timetables are euphemisms for rigid quotas. Beauchamp (1993 : 213) extends this concept by stating that :

“... one can tone down the language of quotas by speaking of hopes, objectives, guidelines and the like; but cosmetic changes of wording only thinly obscures any policy established to recruit minorities and women [the previously disadvantaged] in which goals are made explicit by numbers.”

Fleming *et al.* (1978 : 86) contend that goals and quotas are not the same and cautions that goals should not be confused with quotas, “**which by their very nature establish hiring ceilings**”. Supporters of Affirmative Action as well as the representatives of government agencies in the USA have repeatedly stressed the difference between goals and quotas. Like Fleming *et al.* (1978 : 80), Pottinger (1972(a) : 29) argues that quotas are “**rigid numerical ceilings**” that deliberately attempt to limit or to establish a maximum. It appears that quotas may impose a floor for one group and automatically a ceiling for the other.

Pottinger (1972(b) : 24), Faundez (1994 : 60) and other proponents on the other hand regard goals, as non-rigid and flexible objectives. They maintain that it is a deliberate attempt to include those previously disadvantaged who were historically excluded from teaching positions. Pottinger's successor, Holmes (1974 : 4) at the USA Department of Health, Education and Welfare (HEW), Office for Civil Rights (OCR) reaffirmed this distinction by stating that goals **“are not rigid and inflexible quotas which must be met”** while Bell, as cited by Navasky (1977 : 44), also alludes to the view that a quota is a fixed position. In endorsing numerically based remedies, supporters of goals assert that such remedies have not been treated as fixed quotas but rather as tools to remove past and present obstacles to equal-employment opportunity.

The Higher Education Guidelines, Executive Order 11246 (USA Department of Health, Education and Welfare, 1972 : 3) define goals as **“projected levels of achievement resulting from the analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women”**. They assert that goals should not be rigid and inflexible quotas that must be met but must be targets, reasonably attainable by means of applying every good-faith effort, to make all aspects of the entire Affirmative Action programme work.

Ramphele (1994 : 28) endorses the viewpoint that goals are not quotas. She, however, argues :

“... that the setting of goals does not refer only to numerical targets with regard to staff, but includes strategies that individual units and departments within organisations can adopt to address questions of institutional culture, staff development, training and mentoring programmes.”

Fleming *et al.* (1978 : 87) add that goals are management tools to assist employers to assess their rate of progress in providing equal opportunity. They also claim that the

argument of the critics, that goals and quotas are the same, is often done through juxtaposition and faulty analogy.

The concept quota is taken to imply that relative qualifications of the candidates will be set aside and the mandatory requirements or fixed percentages will lead to preferential selection (Drennan, 1986 : 28). The quota strategy also mandates bottom line results by instituting hiring and promotion restrictions (Naidoo, 1995 : 182). This implies that a specific number or proportion of disadvantaged persons **must** be hired.

In South Africa the introduction of legal quotas is not a strategy favoured by the ANC or the Congress of South African Trade Unions (COSATU) (Innes, 1993(b) : 44-45). The ANC is concerned with the impact such quotas will have on business efficiency while COSATU fears that the legal quotas would force companies, and by inference other institutions like Higher Education, to recruit from outside rather than train and develop its own employees. Innes (1993(a) : 12) contends further that the quota system is not necessarily the best means of encouraging Affirmative Action policies for the previously disadvantaged since quotas tend to reduce standards. He maintains that as long as an institution is legally bound to advance individuals from particular groups without due regard to their level of skills, standards will inevitably suffer. Sachs (1993(b) : 141), a prominent ANC stalwart and presently a judge of the Constitutional Court in South Africa, also agrees that **“quotas should never be the main means of redressing the injustices and inequalities created by apartheid”**.

In view of the confusion and disagreement that surround the concepts goals and quotas, it seems advisable, in the context of Affirmative Action, to agree on a particular definition of each for the present study. Given the antagonism towards the concept quotas by opponents and the general consensus emerging from the review of the literature on the subject in this study, each of the terms goals and quotas will be treated as being different.

Simply put quotas, apart from being regarded as a separate concept, will be viewed in

this study as a rigid, inflexible, mandatory requirement of institutions of Higher Education to meet fixed numbers in the hiring of faculty, irrespective of whether they adequately qualify for the respective positions. This would be viewed as a programme that would possibly reduce standards and impose a floor to hiring with respect to one group and a ceiling with respect to the other.

On the other hand, in this study, goals and timetables will be defined as realistically attainable, visionary, flexible, numerical targets or objectives. Such a definition will also incorporate goals as strategies and as targets introduced to expedite Employment Equity in Higher Education. It would be viewed and used as a management tool or mechanism by Higher Education institutions to enable them to assess their rate of progress in attaining Employment Equity.

On the basis of the claim by Human (1995 : 55) that **“The setting of numerical targets is indispensable to any Affirmative Action programme”** and the crystallizing of the entire argument by Fullinwider (1980 : 162) that, in the context of Affirmative Action, **“goals are good but quotas are bad”**, the goals and timetable approach will be pursued in this study.

2.7. THE POSTULATE OF EQUALITY

It is overwhelmingly evident in the preceding definitions of Affirmative Action that the principle of equality is the central element in Affirmative Action. In fact it provides the nexus between Affirmative Action, the equal protection clause of the Constitution and the philosophical conception of justice. This link between equal opportunity and Affirmative Action is reaffirmed by Rosenfeld (1991 : 29) who poetically describes equality as a concept on which **“Affirmative Action is parasitic”**.

A consideration of the question of equality immediately brings to the fore two central goals namely, racial-equality and gender-equality, moreso in the South African context. The issue of equality is, thus, at the centre of the attempt to reconcile Affirmative Action

with these goals in a way that is theoretically coherent, politically necessary and morally defensible.

In the definition of Affirmative Action, equality is viewed as a crucial mechanism to overcome inequalities experienced by those who were discriminated against in the past. Any attempt at achieving this would entail substituting the legal or formal equality with proactive intervention directed at achieving substantive equality.

A major challenge in this regard, especially in South Africa, would be to reconcile the new constitutional and legal commitments to equality of all citizens with Affirmative Action. This would inevitably involve forms of preferential treatment for some citizens and not for others. A moral and political rationale has to be established to explain the necessity for differentiated treatment in a society that has signalled its wish to depart from any form of discrimination in the future. Equality in this context would, therefore, no longer be seen as a simple undifferentiated concept applicable to all in the same way but one which has to be reviewed in its different dimensions and applications. The starting point would be to discuss the meaning of pure equality in its legal and philosophical context.

As early as Graecian times justice has been equated with equality (Ross, 1958 : 268). By the eighteenth century almost all social systems regarded equality as a positive value (Feher and Heller, 1980 : 152). Gutmann (1980 : 9-10) observed that the extensive use of equality as a positive value over the years has led to various dilutions of its meaning. Rosenfeld (1991 : 11) also, noted that the concept equality has become increasingly elusive as its growing prescriptive role tended to obscure the nature and scope of its descriptive uses. Gutmann (1980: 8-10), however, rectifies this concern, by arguing that once the context, purpose and conceptual framework are specified, the range of relevant meanings of equality becomes narrowed down.

Based on this assertion, the researcher in the present study, intends the context to be contemporary society in Higher Education institutions in South Africa and the purpose

is to assess the legitimacy of Affirmative Action and Employment Equity against the rejection of first-order discrimination in accordance with the constitutional right to equal protection. It, therefore, follows that, in order to enable a systematic assessment of the justification of Affirmative Action, a clear understanding of the concept equality, the various ways of interpreting it and its relevance to and impact on Affirmative Action, must be undertaken.

The postulate of equality embraces the philosophy **“that individuals are entitled to equal autonomy and equal respect, as subjects of moral choice, capable of devising and pursuing their own respective life plans”** (Rosenfeld, 1991 : 22). To Gutmann (1980 : 10) it is an idea that :

“... is basic to modern doctrine of individualism, equal respect for human dignity of all people being essential to the realisation of individual autonomy, the protection of privacy and the opportunity for self development.”

In accordance with the above definition, if the postulate of equality were to be satisfied completely, enough goods (jobs, places, etc. at institutions) must be made available for distribution so that each and every individual would realize fully the goals of his/her own life plan. Reality, however, dictates otherwise. An abundance of such goods is not always available. The question that arises is that, in the event of an absence of such abundance required to fulfil each and everyone’s life plan, could there be a just distribution of scarce resources which the postulate of equality in its pure form desires?

In offering a possible solution to the above dilemma, Rosenfeld (1991 : 23) draws a distinction between equality of result and equality of opportunity. He interprets equality of result to mean that each member of a class designated as a subject of equality ends up with an equal lot (of the goods being allocated). Ramphela (1994 : 8) adds more specificity to this view of equality of result. To her equality of result is equality which is measured on the basis of the staff profile of an organization, viz., the levels at which

people in different racial or gender categories are employed, the rewards they receive and the speed at which they experience upward mobility within the organization, etc.

On the other hand equality of opportunity is defined by Rosenfeld (1991 : 23-24) to mean that each member of a class has the same opportunity as every other member to obtain some scarce goods, but that all members will not necessarily end up with an equal lot as some and not all will succeed in acquiring the scarce goods. Rescher (1966 : 94) adds that justice requires the implementation of equality of opportunity whenever equality of result is not possible to achieve.

Fullinwider (1980 : 101) clarifies the concept equality of opportunity by using examples. He maintains that formal equality of opportunity is when X and Y have equal opportunity in regard to A so long as neither faces a legal or quasi-legal barrier to achieving A. In other words formal equality of opportunity requires that laws or other quasi-legal devices, as was the case in South Africa in the past, should not be used to deprive subjects of the means already in their possession or within their capacity to obtain jobs in the future. Thus, for example, a law that forbade Blacks or women from competing for certain scarce jobs or positions would be depriving them of formal equality of opportunity. Similarly legislation that makes it illegal for Blacks to obtain the necessary education that would make them eligible for certain scarce jobs would also deprive them of formal equality of opportunity.

Gutmann's (1980 : 8-10) view of the concept equality of opportunity (mentioned earlier), will be viewed in the context of contemporary Higher Education society in South Africa since the present study will be focusing on it. The institutionalisation of political, legal, economic and moral inequalities typified the South Africa of the past. No meaningful equality of opportunity was granted to the majority of the population. It afforded excessive advantage and opportunities to the minority White group and denied even basic provisions to the majority of people of colour. Under the present new egalitarian system equal treatment of those who were **included** and those **excluded** within such a system can hardly be described as rational or fair since the one group was previously

advantaged while the other was disadvantaged.

In view of the fact that the 'playing fields were so uneven' then, social justice now demands some sort of differentiation of treatment. The agent for such differentiation would be Affirmative Action since it does not treat those who are unequal as though they were equal. The International Convention on Racial Discrimination of the United Nations Organization (UNO) cited by Van Dyke (1990 : 22) supports this viewpoint and states that :

“Differentiation that imposes short term burdens on some for the benefit of others is permissible so long as the purpose or effect is to promote the equal employment of human rights.”

When considering the relationship between equality, equality of opportunity and Affirmative Action many proponents are usually sceptical about whether equality of opportunity generates meaningful or real equality. They claim that, in a society ridden with discriminatory legacies, formal equality of opportunity may only be a necessary condition of equality but **not a sufficient condition**. It is there that Affirmative Action can play a major role in establishing a connection between formal and actual or real equality of opportunity. It is felt that, given the experiences of the previously disadvantaged, this type of equality, referred to as **substantive equality** in the literature, would put citizens on an equal footing in socially relevant areas of life. This is supported by many proponents of Affirmative Action. Among them, for example, Singh (1996 : 55-56), argues that :

“In a society ridden with every kind of inequality, the establishment of formal equality of opportunity and the facilitation of substantive equality of opportunity are giant steps on the road to equality.”

Extending this notion, but introducing different terminology, Subotsky (1998(a) : 3) draws a vital distinction between equality which he describes as **simple equality** and

equity which he refers to as **complex equality**. He argues that :

“Equity is not just a matter of equalizing employment. It also crucially entails ensuring retention and development through providing ‘enabling’ conditions, opportunities and institutional practices which address the obstacles and barriers experienced by marginalized groups. This implies recognizing ... and addressing relevant differences with the aim of reducing inequalities (through interventions which provide such enabling conditions). Pursuing justice therefore implies the conceptualization of a ‘complex’ notion of equality which accommodates both equality and difference.”

Burton (1997 : 180) underscores Subotsky’s view by interpreting the difference between Equity and Equality in a similar manner. She describes Equity as meaning “... **appropriately different treatment and minimal, unreasonable differential impact ...**” and Equality as “... **identical treatment and the application of the same rules to everyone regardless of any disparate effect ...**”. What is also significant is that this definition of Equity guides employment practices in Australia.

On the basis of the above definitions, indirect discrimination occurs when rules or practices are applied to all citizens equally although they may appear to be neutral. In actual fact they will have an adverse effect on specific groups of disadvantaged people who are covered by the equality of opportunity legislation. By this is meant that indirect discrimination results from practices which might appear fair in form and intention but which are discriminatory in impact and outcomes and are not reasonable under the specific circumstances.

The principle underlying this provision was first articulated by the Supreme Court of the USA in the case of *Griggs v Duke Power Company* (1971 : 424). The court was of the view that the criterion for recruitment or promotion, although appearing equal on face value, need not necessarily provide equality of opportunity *per se*. This is tantamount

to offering an equal amount of milk as food for the fabled stork and the fox alike in an equally sized shallow plate which underscores the view that practices can be fair in form but discriminatory in its implementation.

Ramphele (1994 : 8) alludes to the argument presented by Subotsky and Burton by also introducing and accepting the term Equity as being “... **fairness; recourse to principles of justice to correct or supplement the law**”. Others in the literature on the subject refer to Equity as real/true/fair/actual equality of opportunity or substantive equality.

A necessary supplement to the above understanding is provided by Young (1990 : 26) who also adds crucial dimension of enablement to the idea of equal opportunity. He suggests that opportunities are :

“... states of affairs that combine the absence of insuperable obstacles with the presence of means - internal and external - that gave one the chance of overcoming the obstacles that remain. Opportunity in this sense is a condition of enablement ...

A person has opportunities if he or she is not constrained from doing things, and lives under enabling conditions for doing them.”

It is clearly evident from the above that the idea of enablement focuses on the positive and special measures necessary for equality of opportunity to be real. Such measures would not only include availability of material resources but would also comprise greater emancipatory possibilities in other spheres of life. Only under these conditions could one legitimately argue that prospects, especially for the previously disadvantaged, are truly equal.

The aforementioned discussion on the definitions and interpretation of the concepts equality and equality of opportunity in relation to Affirmative Action provide a rationale

for differential treatment in a society where the majority were subjected to a history plagued by political, legal, economic and moral inequalities. From the discussion it is clearly apparent that equal treatment of both those who were excluded and those who were included within such a dispensation would be unfair. Hence, formal equality of opportunity on its own, whilst it is a necessary condition, is not a sufficient one. Formal equality of opportunity before the law, if administered in its pure form, will, therefore, become an engine of oppression and will contribute to entrenching inequalities in the political, economic, social, cultural and other fields of public life rather than obviating it.

A means by which the unreasonableness of formal equality of opportunity could be reduced or avoided is to apply **special measures**. Such special measures (enabling conditions) call for a broadening of the domain of equality of opportunity, for which many of the proponents of Affirmative Action clamour. This incorporates the concept of Equity or fairness. This will be the interpretation in the present study. The special measures, while it may be described as *ex hypothesi* and discriminatory in character, deny formal equality to all before the law in order to achieve effective genuine equality. Vierdag (1973) in the Concepts of Discrimination in International Law, (cited by Ronalds, 1988 : 15) makes a case for Equity so eloquently that the researcher decided to sum up the argument in his words :

“The seeming, formal equality that in a way may appear as equal treatment is replaced by an apparent inequality of treatment that is aimed at achieving ‘real’ material equality - somewhere in the future. And this inequality of treatment is accorded precisely on the basis of characteristics that made it necessary to grant it : race, religion, social origin and so on.”

2.8 AFFIRMATIVE ACTION AND JUSTICE

In a society, such as South Africa, in which discrimination and exclusion have left a legacy of political, social and economic injustice, is Affirmative Action as a method of redress just? Therefore, the researcher sought to investigate the type of justice that may form part of the theoretical framework of Affirmative Action.

Political theorists, taking their cue from Aristotle, identify two kinds of justice : Distributive and Compensatory Justice. Distributive Justice involves the fair distribution of goods, offices, honours and burdens among citizens of the state. Vlastos (1984 : 44) lists the following principles of Distributive Justice :

- to each according to his need;
- to each according to his worth;
- to each according to his merit;
- to each according to his work; and,
- to each according to the agreement he has made.

Compensatory (corrective) Justice concerns the rectification of past wrongs or compensatory transaction between individuals. Under Compensatory Justice the person who commits an injury to another is obligated to compensate the injured party with the objective of restoring the equality that existed prior to the wrongful injury.

Coleman (1983 : 7) believes that Compensatory Justice may be regarded as an independent principle of justice. This is so since it may be used legitimately to reinstate distribution of holdings by acts which would themselves fail the test of Distributive Justice.

Assuming, for the sake of argument, that justice requires the institution of formal equality of opportunity, the implication for the state would be that it should not impose legal or quasi-legal obstacles in the competition for jobs. Hence, if a government is

confronted with claims for redress of injustices suffered as a result of past violation of the right to formal equality of opportunity, the apparently obvious and simple solution to the problem would be to remove the unjust legal or quasi-legal obstacles of the past and to introduce the legal equality of opportunity. While on the one hand such an act may lead to the restoration of the kind of compensation envisaged initially, it may however, also be that a mere removal of such obstacles would not suffice to restore the kind of conditions that would have existed prior to their imposition.

It becomes apparent, therefore, that long established and severe obstacles imposed on some (e.g., Blacks or women South Africans) but not on others (e.g., White South Africans) had placed the former at such a disadvantage that the removal of obstacles would not improve their prospects of success in the relevant arenas of competition to more than a mere possibility. This proves that even if there were unanimous agreement on a single principle of justice its proper application would more likely differ from one situation to another.

In analysing the principle of Compensatory and Distributive Justice in the context of Affirmative Action, Goldman (1979 : 65-67) argues that when the need for compensation arises out of a violation of a distributive norm there is a solution to the dilemma, posed by the fact that distributive and compensatory aims could be mutually contradictory. The solution he proposes holds that compensation for past violations of the principle of distribution should take precedence over distributive considerations even though it may entail temporarily suspending the application of the distributive principles. For example, violation of equal opportunity rights in the case of job allocation might have to be compensated by awarding the victim a subsequently available job even at the sacrifice of depriving a non-victim of his/her right to equal opportunity related to the latter job. He justifies this by stating that unless compensatory claims are given precedence over distributive claims those who originally violated the victim's rights could continue to undermine the legitimate distributive principle. To prevent this, and ultimately to preserve the integrity of a violated distributive principle, one may have to set the distributive principle temporarily aside.

From the aforementioned it is apparent that the notion of Compensatory Justice should be incorporated in the application of Affirmative Action. This indicates that Affirmative Action under the above circumstances is just.

Goldman's analysis related to the above example would present little or no long term conflict between Compensatory and Distributive Justice. Hence, in the light of the aforementioned discussion the function of Compensatory Justice would be to contribute to the long term realization of just distributive norms. All that Compensatory Justice requires of perpetrators is for them to surrender their illicit gain, which is one of the major aims of Affirmative Action.

2.9 AFFIRMATIVE ACTION AND THE QUESTION OF MERIT AND QUALIFICATIONS

Critics of Affirmative Action often claim that it violates the merit system. They allege that Affirmative Action and merit are antithetical (Fleming *et al.*, 1978 : 89). These claims have been repeated so often by the opponents of Affirmative Action that they have almost assumed the semblance of fact. Critics consistently expose a general fear that hordes of (less qualified) women and minorities (disadvantaged in the USA) will be displacing (more qualified) White men (Benokraitis and Feagin, 1978 : 151). They also claim that it has led to the lowering of appointment and promotion standards at institutions of Higher Education. In this way they managed to keep alive a heated debate that has tended to obfuscate the real intent of Affirmative Action programmes.

In the light of the above it becomes necessary to discuss Affirmative Action and merit. This will provide clarity as to whether merit forms or should form an intrinsic part of the theoretical construct of Affirmative Action. As a starting point the traditional requirements of merit postulated mainly by opponents of Affirmative Action will be discussed. The mechanisms by which scarce resources such as jobs, positions and so on are allocated in society are typically understood through reference to the twin concepts of merit and qualifications. Basing rewards such as job appointments,

promotion, admission and so forth on individual merit and appropriate qualifications are generally accepted as the procedure that best realizes the value of justice. Generally, the terms merit and qualifications are used interchangeably and are also treated synonymously.

Both merit and qualifications are accepted as attributes of an individual that the rewarding institution assesses. They are regarded as essential elements of a commitment to meritocracy. It follows, therefore, that jobs/positions would generally be offered to those individuals who are best qualified. Further, if merit stands as an essential attribute of the individual it will be hierarchically distributed from one individual to the next through time. Thus, to suggest that the criteria for hiring be redefined to accommodate the previously disadvantaged Blacks or women, immediately produces a charge of reverse discrimination from the opponents of Affirmative Action.

The proponents of Affirmative Action assert that existing criteria are culturally biased and should, therefore, be reviewed to cater for the changed circumstances. An example of such bias is provided by IDASA, (1995 : 6) that maintains that **“people prefer to give jobs to people like themselves”** which results in a bias in favour of people similar to the selectors who are more commonly White males or often those from the previously advantaged group. Such cultural bias also reveals itself in the perception of stereotypes associated with White men on the one hand and women and Blacks on the other.

The proponents of Affirmative Action also criticize the application of universally-based standards applied to all individuals equally. They maintain that it is a mechanism designed to ensure that the racially privileged remain as the privileged caste. The vocabulary of meritocracy, proponents claim, is employed to oppose any measure that seeks to stifle the development of the élite whose privileged position is often the consequence of unfair access to social rewards in the past.

For Affirmative Action to be successful, the proponents challenge the traditional view

of meritocracy with the aim of a reconceptualisation of its meaning. Proponents of Affirmative Action insist that the above should be based on an appreciation of the structural limits to opportunity that mitigated against and still mitigates against those individuals from the previously disadvantaged race and gender groups.

Opponents of Affirmative Action argue that, by choosing the allegedly best candidate for a job on the basis of supposedly irrelevant criteria such as gender and race, Affirmative Action violates the merit principle. As indicated earlier on by Justice Blackmun and others, proponents of Affirmative Action claim that gender and race were indeed the most obvious criteria that limited career opportunities for members of the designated groups in the past. On the basis of this, consideration of race and gender is necessarily warranted as means to rectify this injustice. Proponents, however, caution that it should not necessarily be the only means of qualifying for a job.

Opponents of Affirmative Action maintain that the outcome of the strategy of redefining or reconceptualising criteria for appointment or promotion leads to the compromising or lowering of standards. Praeger (1986 : 32) makes a similar observation by stating that opponents confuse the changing of standards with lowering them. The question then arises : Whose standards? Proponents argue that the so-called standards are no more than social constructs reflecting society's subjective preference of what qualifications are appropriate for a given position. They argue that Affirmative Action does not call for a lowering of standards but rather that they be redefined. They maintain that often traditional standards required are not totally relevant to performance or efficiency in the job. In fact it is found that requirements such as advanced degrees and extensive work experience are often used to exclude women and Blacks from certain positions of privilege and power. Glickstein concurs with this and states that :

“If there were some foolproof lithmus test for determining merit, perhaps I would be fearful of tampering with the system. But the rules have been so rubbery in the past that I become a bit

suspicious when a new rigidity is demanded as women and minorities [disadvantaged in USA] appear at the gates.”

(Cited by Maguire, 1977 : 651-652)

Past criteria for hiring have generally limited the supply pool to White males who were part of the **old boy** network. Affirmative Action seeks to correct this exclusionary practice by increasing the supply pool to include more Blacks and women. Affirmative Action, therefore, does not violate the principle of merit. Instead it provides an opportunity for more qualified candidates, regardless of race or sex, to compete on an equal basis.

IDASA (1995 : 7) enunciates the above view by stating that Affirmative Action policies which contain measures to over-ride the conventional criteria for appointment **“enshrine rather than displace the merit principle”**. Such measures, they claim, would ensure that only relevant and appropriate criteria are used for appointments and promotions and that proper consideration would be given to all qualified candidates regardless of gender or race. Ezorsky (1991 : 88) extends this perception in the belief that since traditional qualifications **“have an exclusionary racial impact”** they must be redefined by pinpointing the specific abilities needed for a certain job performance. When enforced, she claims, these measures would ensure that such job requirements would really measure the ability to do that job. In order to achieve the above Burton (1988 : Monograph 2) suggests that the merit principle should be redefined as the :

“Revision of standards and practices and selection criteria to ensure that they do not exclude qualified people from consideration for positions and employment benefits. This involves not only removing arbitrary, artificial and unnecessary barriers to employment opportunities, but a re-assessment of current standards so that a more realistic interpretation of what merit actually involves for particular jobs or benefits is applied.”



In summary, proponents of Affirmative Action request that employers look beyond traditional criteria and reflect on those characteristics that directly impact on job performance. This would enable employers to spot members from previously disadvantaged groups who have the ability and potential to succeed. Finally, Mandela's statement at a conference at University of Cape Town (UCT) in 1991 supports the viewpoint of the proponents and refutes the criticisms of the opponents in the South African context. He said :

“... it is not the aim to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now and that those who have been qualified all along, but overlooked because of past discrimination, are at last given a chance.”

(Mandela, 1991 : Conference at UCT)

Given the aforementioned discussion on Affirmative Action and merit, in the present study, Affirmative Action would be based on the individual's potential to succeed in a particular job and not on academic merit alone. This will be accepted against the background that the job requirements of the Higher Education institution must be related to job performance.

2.10 AFFIRMATIVE ACTION AND EMPLOYMENT EQUITY

Affirmative Action and Employment Equity, as indicated by the review thus far, are complex terms with varied meanings depending to a large extent on the context in which they are used. Proponents generally regard Affirmative Action (and Employment Equity) as positive measures or tools which empower people who have been discriminated against in the past (particularly in the workplace), while opponents consider Affirmative Action and efforts towards Employment Equity to be discrimination in reverse (Potts, 2000 : 13). Potts (2000 : 13-14) extends this perception further with

the following:

- **“... Affirmative Action and Employment Equity are two distinct but related terms;**
- **... employment equity is a desired goal for employers and is a situation in which discrimination does not occur and the workforce is adequately trained and representative of the population;**
- **... Affirmative Action is a strategy geared towards achieving employment equity; and,**
- **In most employment equity legislation, two main elements are present :**
 - ❖ **removing discriminatory legislation, policies and practices**
 - ❖ **Affirmative Action measures.”**

Human (1995 : 62-63) concurs with Potts (2000 :13-14) that the confining of Affirmative Action to the employment and contracting sphere is what Employment Equity is about. Blumrosen (1985 : 423-440) extends this perception further; he refers to it as the measure that would eliminate the effects of past or current barriers to equal employment and to contract opportunity through a broad variety of activities relating to, *inter alia*, selection and recruitment, development and training and promotion practices in large organizations.

Employment Equity also gives effect to the South African constitution's commitment to equality as applied to employment and it also fulfills South Africa's obligation in terms

of the requirements of Convention No. 111. Convention No. 111 of the Convention Concerning Discrimination in respect of Employment and Occupation requires member states to declare and pursue a national policy designed to promote “... **by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof**”. Article 5 of Convention 111 specifically includes “... **special measures which are designed to meet the particular requirements of persons who, for reasons such as sex, age, disability, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance**”. Employment Equity, therefore, is premised on the goals of equity and justice on the one hand and efficiency and economic growth on the other.

It is evident from the above that Affirmative Action and Employment Equity are so closely related that they are almost interchangeable. In view of the fact that this study specifically deals with the employment of academic staff at institutions of Higher Education in a kind of minimalist way, Affirmative Action and Employment Equity will be used in an interchangeable manner. Employment Equity forms a part of the theoretical framework of Affirmative Action in the present study.

2.11 AFFIRMATIVE ACTION AND TOKENISM

Some of the practices, especially with regard to hiring and promotion of people of colour from the designated group abroad and more especially in South Africa, (although described as Affirmative Action by the employer) are, in actual fact, a semblance of tokenism. Much of such practices arise from the failure to understand the concept Affirmative Action and its implementation. Other practices are undertaken deliberately for reasons best known to the practitioner.

The need for this review under the theoretical and conceptual framework of Affirmative Action is imperative because tokenism is often associated by opponents with

Affirmative Action. It needs to be clarified so that tokenism, leading to, *inter alia*, inefficiency and a drop in standards, does not form an intrinsic part of the concept of Affirmative Action (Sarakinsky, 1993 : 7). Unfortunately, it is deliberately construed to be so by opponents in order to justify their own claims and agendas.

Ramphela (1994 : 12) identifies two different types of tokenism. The first concerns the appointment of individuals from the previously disadvantaged groups to specific positions in order to create a better staff profile. Innes (1993(a) : 15) describes this as **“window-dressing - to look good in the eyes of either the international community or Black consumers”**. Sarakinsky (1993 : 6) describes this as an attempt to darken the complexion of the institution. The second concerns Affirmative Action programmes that are introduced for socio-political expediency rather than a genuine attempt to transform the human resource practices within an institution. In other words an institution engages in a practice in an attempt to appear politically correct rather than for the common good of the workforce and ultimately the nation.

The first type can take on any of two forms. In the first form, positions are created for the sole purpose of being filled by a member of the previously disadvantaged group. Generally such positions have little or no important function within the organization. The second form includes promotion or appointment of individuals to positions that are beyond their level of competence for the explicit purpose of creating a better staff profile.

Apart from being unproductive to the organization both these practices can be very damaging to the individual beneficiary, in that they make it difficult for the individual concerned to assume a meaningful and productive role in the organization. Under-performance, at whatever tasks assigned to them, becomes the norm. This is generally due to the lack of necessary skills or experience which in turn results in further undervaluing and negative feedback. This culminates in a vicious cycle of failure which serves to reinforce existing and past prejudices against those from the designated group.



An example of the first form is presented by Innes (1993(a) : 15). Essentially what the institution does is promote or appoint members of the previously disadvantaged group into very visible positions, without ensuring that they have the requisite skills to take responsible decisions in their new posts. In such appointments membership of the designated group, irrespective of qualifications and experience, is turned into an advantage in the selection process. In order to reduce the damage that could possibly ensue, the institution devalues the post. Thus, although the post still carries a grand-sounding title it is stripped of its decision-making powers to ensure that the **"... token Black or women cannot inflict too much damage on the organisation"** (Sarakinsky, 1993 : 6). This form of Affirmative Action, if it can be labelled as such, is particularly pernicious in that it denigrates the designate Black incumbent in the eyes of his/her colleagues and subordinates. This is more so if colleagues are aware of the changes that the post has undergone since the new incumbent was appointed.

An example of the second form of tokenism in South Africa was the appointment by multi-national corporations during the 1980s of token Black managers with little authority or responsibility. This was done in order to meet the requirements of what was then called the Sullivan Code of Conduct demanded by USA investors/companies in South Africa. The Black managers so appointed were painfully aware of their token positions and came to refer to their job cynically and bitterly as Sullivan jobs. In addition, such tokenism undermined genuine Affirmative Action initiatives either through its association with the failures of token appointees or through members of designated groups being unwilling to participate in the programme for fear of being labelled a token.

Tokenism is also seen in situations where institutions develop an Affirmative Action policy with the intention of appointing a number of people from the previously disadvantaged group but without any intention of creating a truly equitable employment environment. This has a negative effect on both the individual beneficiary and the institution. Although the individual gains access to a position in the institution, without the necessary support and the removal of informal barriers to performance, he/she is

unlikely to excel. The institution suffers the same fate, having employed or promoted a person who is not as productive as he/she should be, increases the risk of entrenching old prejudices and tensions.

Tokenism also arises when there is a replacement of certain social groups into positions of power, authority and privilege, in line with some or other political programme or ideology. The rapid Africanisation of the civil service in the then newly independent African states and the Afrikaanerisation of the South African civil service during the apartheid regime are examples of this.

Tokenism is also evident when institutions employ Blacks or women purely to fill some kind of quota system. The tragedy of such a practice is that the Blacks or women are promoted to positions but are not empowered to perform the duties (Maphai, 1992: 7). Human (1991 : 16) agrees with this, stating that emphasis is placed on meeting quotas in recruitment rather than concentrating on the development and promotion of Blacks and women in organizations. This tantamounts to setting the employee up for failure.

In the researcher's view the sad and disappointing factor is when the general public interprets the token appointment as part of a genuine Affirmative Action plan, for not knowing better. This results in the development of a negative attitude resulting in opposition to the introduction of such programmes on the basis of the non-performance of token Blacks or women.

On the basis of the aforementioned, tokenism will be divorced from the concept Affirmative Action. The present study will neither condone nor recommend or accept any such attempts as a means of Affirmative Action when analysing its contribution in attaining Employment Equity in Higher Education.

2.12 AFFIRMATIVE ACTION AND THE QUESTION OF ENTITLEMENT

Entitlement is yet another concept associated with Affirmative Action again mainly by opponents in an attempt to discredit the concept. The purpose of including the concept of entitlement under the discussion of the theoretical and conceptional framework of Affirmative Action is to dispel any doubts or illusions that it forms an intrinsic part of the concept of Affirmative Action. This will be done by highlighting the negatives associated with it and its incompatibility with Affirmative Action. As a starting point one needs to refer to the view of the Carnegie Council on Policy Studies in Higher Education in the USA (CCPSHE) (1975 : 1-2) and that of Meintjies (1991 : 8) locally who categorically declare that Affirmative Action **“does not mean entitlement to proportional representation”**.

Sowell (1990 : 123-124) maintains that this **“sense of entitlement ... independent of skills or performance ... has long been an accompaniment of preferential policies”**. He cited the following examples in order to substantiate his claim :

- The poor performance of school-going children in Virgin Islands was attributed to their being aware that, as USA citizens, jobs will be easily available to them irrespective of their performance.
- Malaysian students, sensing that their future was secure through Affirmative Action, showed a lack of interest in their own performance.
- A supporter of preferential policies for those described as untouchables in India had to urge medical and engineering students from this very caste to abandon their indifferent attitude towards their studies.

De Villiers (1997 : 144) maintains that the so-called entitled beneficiaries appointed under the guise of Affirmative Action often find themselves in a position which should in actual fact be one of strength if based on personal ability but which rather culminates in their reaching a state of powerlessness. The implication of this statement is that beneficiaries did not have at least the necessary minimum ability for the job which runs

counter to true Affirmative Action. He/she was probably appointed on the basis of the fact that he/she belonged to the designated group and, therefore, felt entitled to the job.

Andrews (1992 : 38), referring to the Carter Report (1991), found that such entitled beneficiaries felt a sense of powerlessness in the long run because they had to live under the burden of the constant scrutiny and suspicion that their appointment was based on favouritism. Their personal dissatisfaction, uncertainty, lack of self-confidence and feelings of injured honour was due, in the main, to being hired on the basis of group membership rather than on the basis of their skills and ability (Kleiman and Farley, 1988 : 494-495). Other contributory disempowering influences are job dissatisfaction, stress and the potential conflict between themselves and non-beneficiaries as well as fellow beneficiaries who are often suspicious of the extent of the benefit enjoyed by others (Weiner, 1993 : 13).

A further problem is the strong possibility of a growing dependence of the so-called entitled beneficiaries that results in their assuming a weak and disempowered position. Stern (1993 : 46) maintains that, since they entered the job on an entitlement ticket rather than on the basis of genuine Affirmative Action, which is based on potential and merit, they are always being done a favour by being allowed to take soft options and to avoid conflicting realities. Sachs (1993(b) : 129) criticizes this paternalistic or patronising behaviour which entitlement conjures. He describes it as a **“re-division of the spoils in order to appease consciences on the one hand and buy peace on the other”** but not to promote the Equity that is central to the whole enterprise of Affirmative Action.

De Villiers (1997 : 143) extends this argument further by stating that during the early years of the apartheid regime in South Africa, the aspirations for efficiency among Whites were weakened because they were ‘feather bedded’. This resulted in their neglecting to qualify themselves for promotion but, rather, relied on being White instead, a qualifying characteristic for preferential treatment then. Given this background (Nkhuhlu, 1993 : 15) urges members from the designated group to discard

the culture of entitlement and to be willing and motivated to work hard and to make sacrifices that are necessary for success in order not to share the same fate as the abovementioned Whites.

2.13 AFFIRMATIVE ACTION : TOWARDS A DEFINITION FOR THE PRESENT STUDY

In the present study Affirmative Action is defined against the background of the following principles :

- It will be regarded as a strategy geared towards achieving Employment Equity.
- It will not give credence to the principles associated with rigid quotas, reverse discrimination, entitlement and tokenism in its application.
- Its objective will be to eliminate all forms of discrimination in Higher Education employment practices by setting up and attempting to achieve flexible goals and timetables as well as other objectives and strategies to eliminate such discriminatory practices.
- It will be temporary and flexible.
- It will be based on the broader domain of equality of opportunity, viz., Equity/substantive equality.
- It will be based on merit redefined as the individual's potential to succeed in a particular job and not on academic qualifications alone.
- The target group will be the previously disadvantaged groups made up of Africans, Indians, Coloureds and women referred to as the designated group in the Employment Equity Act.

Against the background of the above principles and for the purpose of the present study Affirmative Action will be defined :

“As the additional corrective steps which must be taken in order that those who have been historically disadvantaged by unfair

discrimination are able to derive full benefit from an equitable employment environment.”

(Department of Public Service and Administration, 1998 : 3)

2.14 CONCLUSION

In summary the mind map (Figure 1) illustrates the concepts related to the nature and scope of Affirmative Action in general. Included in this summary are also those concepts which opponents of Affirmative Action perceive as being part of it. Figure 2 summarizes the concepts related to Affirmative Action as viewed by the proponents. It includes the broad approach (the maximalist version) as well as the narrow approach (the minimalist version). Figure 3 summarizes the view of Affirmative Action as proposed in the present study. This is the minimalist version and is, therefore, restricted specifically to Employment Equity in Higher Education.

In attempting to arrive at a theoretical and conceptual framework of Affirmative Action in the present study a number of perceptions, attitudes and challenges emerged. The next chapter deals more specifically with them.

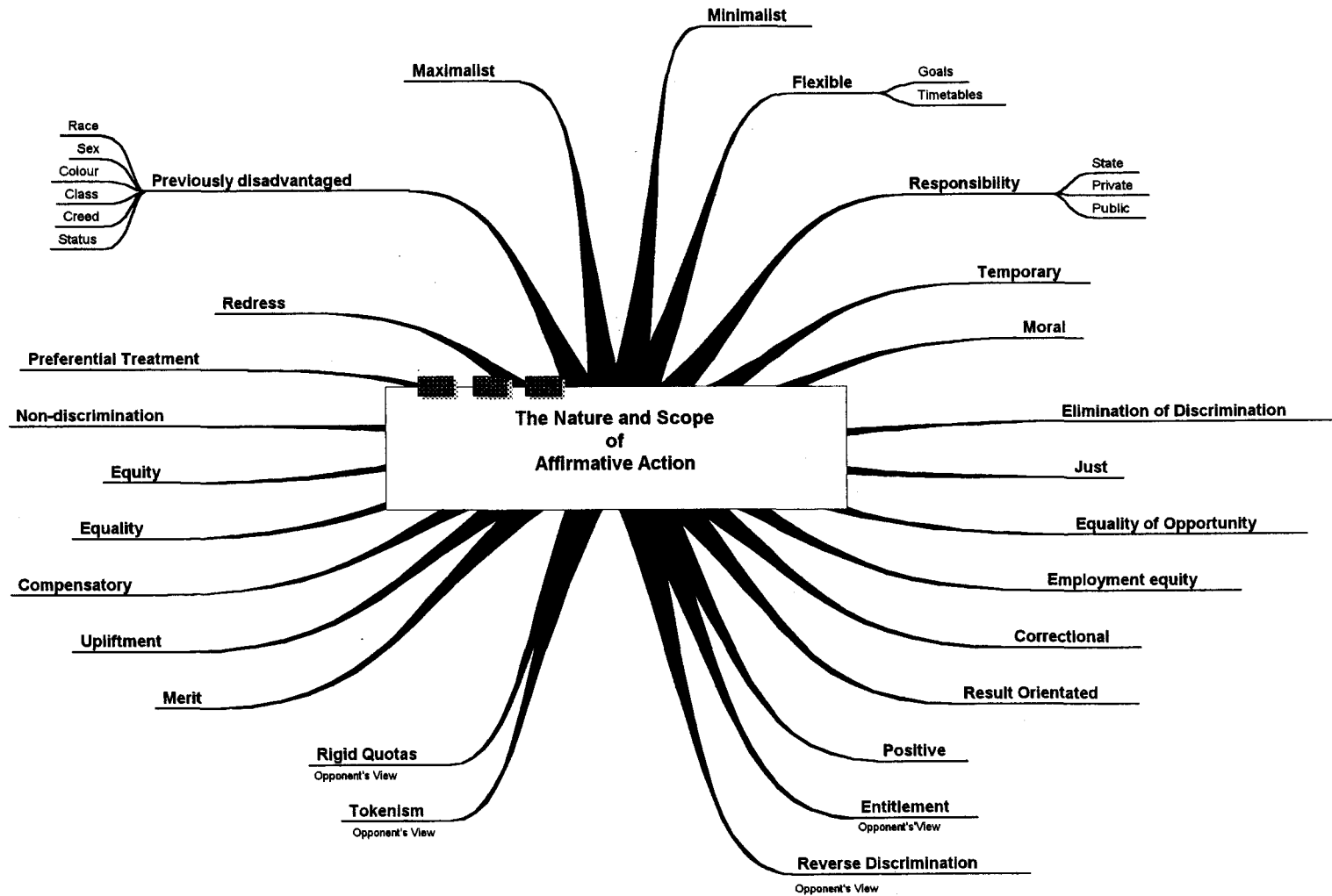


FIGURE 1: SUMMARY OF THE NATURE AND SCOPE OF AFFIRMATIVE ACTION

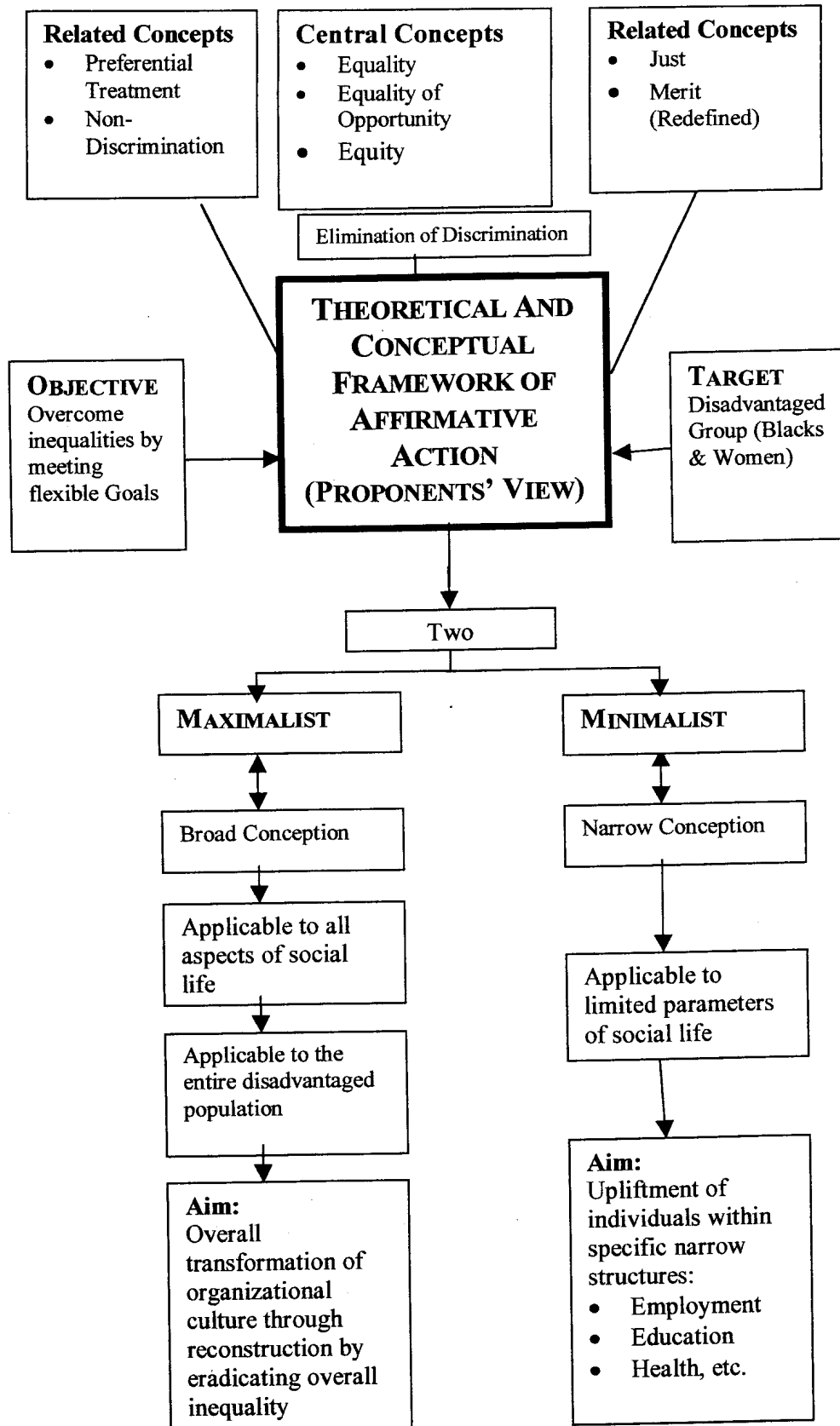


FIGURE 2: ORGANOGRAM ILLUSTRATING THE GENERAL THEORETICAL FRAMEWORK OF AFFIRMATIVE ACTION

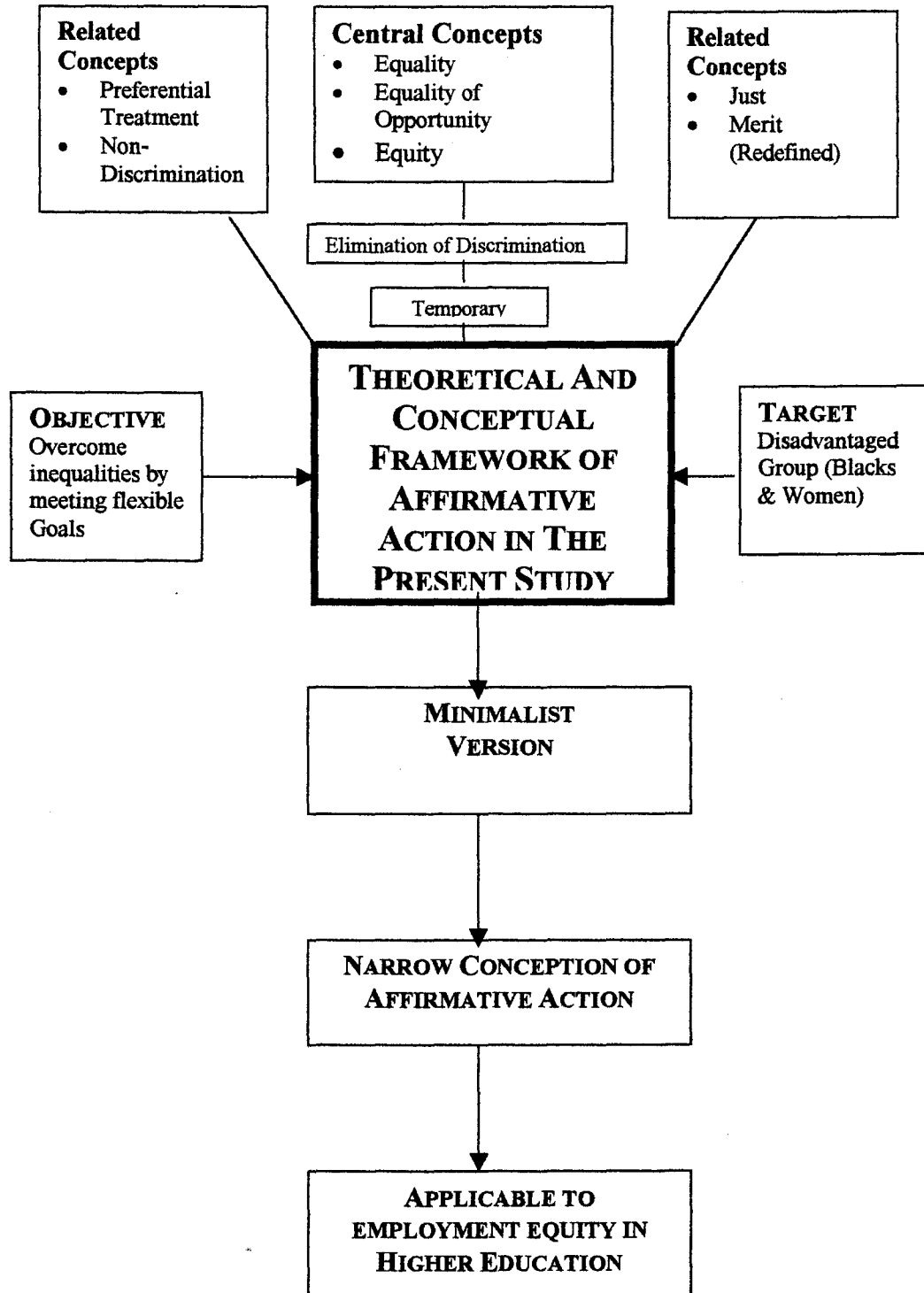


FIGURE 3: ORGANOGRAM ILLUSTRATING A THEORETICAL AND CONCEPTUAL FRAMEWORK OF AFFIRMATIVE ACTION FOR THE PRESENT STUDY