Edited by
Narciso Leandro Xavier Baez (Brazil)
Elvira Domínguez-Redondo (UK)

THE EXISTENCE AND EFFICACY OF AFFIRMATIVE ACTION MEASURES IN *UK, SOUTH AFRICA, INDIA, CHINA, LATIN AMERICA & BRAZIL*

Authors

Joshua Castellino (UK)

Ingo Wolfgang Sarlet (Brazil)
Gabrielle Bezerra Sales Sarlet (Brazil)
Iván Obando Camino (Chile)
Gustavo Rayo Urrutia (Chile)
Rodrigo Hernández Fernández (Chile)
Alberto Olivares Gallardo (Chile)
Amalia Patricia Cobos Campos (Mexico)
Erica Howard (UK)

Editora Unoesc

Fone: (49) 3551-2000 - Fax: (49) 3551-2004 - www.unoesc.edu.br - editora@unoesc.edu.br

Editora Unoesc

Coordenador: Tiago de Matia
Revisão metodológica: Bianca Regina Paganini
Projeto Gráfico: Daniely A. Terao Guedes

Dados Internacionais de Catalogação-na-Publicação (CIP)

E96 The existence and efficacy of affirmative action measures in UK, South Africa, India, China, Latin America & Brazil / Edited by Narciso Leandro Xavier Baez, Elvira Domínguez-Redondo. – Joaçaba: Editora Unoesc, 2018.
250 p. ; 23 cm

ISBN 978-85-8422-170-7

1. Human rights. 2. Affirmative action. 3. Dignity. I. Baez, Narciso Leandro Xaviers. II. Domínguez-Redondo, Elvira.

Doris 341.27

SUMMARY

INTRODUCTION

This book results from an international research project named: *The existence and efficacy of affirmative action measures in the UK, South Africa, China, India, Latin America, and Brazil*, developed by the Research group on International Network, Theories of Justice to Achieve Fundamental Rights, a group focused on international research at the LLM Program in Law, offered by the *Universidade do Oeste de Santa Catarina* (Brazil), in partnership with *Pontificia Universidade Católica do Rio Grande do Sul* (Brazil), Middlesex University (United Kingdom), *Universidad Autónoma de Chihuahua* (Mexico), and *Universidad de Talca* (Chile).

The project's first phase started in 2016, and it finished at the workshop hosted by UNOESC, in 2017 second semester. It has made significant progress towards understanding the evolution of affirmative action measures in the target countries, resulting in its first output: a book gathering different visions about the historical evolution and challenges of affirmative action measures.

The book consists of three chapters containing historical data and statistics about the affirmative action measures origin and development in Latin America, the United Kingdom, India, South Africa, and China.

The first chapter, written by researchers from Brazil, Chile, and Mexico, consists of theoretical and controversial aspects regarding the affirmative action measures' concept and the main theories that aim to fundament and justify these actions, as social justice achievement. There is a special part of the study regarding how to fight historical inequalities happening in Brazil and the other South American and Central American countries, with the main measures taken so far to achieve full equality.

Its second chapter, written by researchers from Middlesex University, aims an understanding the historical development of affirmative action measures in the United Kingdom, India, South Africa and China, focusing on contemporary debates regarding the topic.

Finally, the third chapter is a study about the United Nations (UN) and its bodies' roles in addressing special measures to redress structural

inequalities to designated groups, by increasing the number of their members in relevant positions of labour, academic studies, governamental or non-governamental institutions, where they are usually underrepresented.

CHAPTER I
AFFIRMATIVE ACTIONS IN LATIN AMERICA

AFFIRMATIVE ACTION – CONCEPT, THEORIES, AND MEASURES' HISTORICAL DEVELOPMENT IN BRAZIL[1]

Narciso Leandro Xavier Baez[2]

Introduction

Brazilian history contains social inequality since its beginning. From former centuries to nowadays, inequality appears in all social levels through reiterated discriminatory acts regarding race, gender, ethnic groups, and sexual orientation, explicit or not, among other aspects that Brazilian culture entrenches.

However, Brazil has a low rate of issues related to formal equality in legal aspects, since it is a signatory of international treaties on human rights and its current constitution contains premises of dignity and worth of the human person, as well it focuses on the elimination of all forms of discrimination.

Nevertheless, the pattern established in its legal order is far from the corresponding to its population daily life. If on the one hand, there are rules that prohibit unequal treatment, on the other hand, as time goes by, it is more difficult to observe Brazilian society following the rules regarding full

[1] This article results from an international research project named: "The existence and efficacy of affirmative action measures in the UK, South Africa, China, India, Latin America, and Brazil", developed by "Grupo de Pesquisa em Rede Internacional Teorias da Justiça no Âmbito da Efetivação dos Direitos Fundamentais" (Research group on International Network, Theories of Justice to Achieve Fundamental Rights), a group focused on international research at the Graduate Education Program in Law offered by "Universidade do Oeste de Santa Catarina", in partnership with "Pontificia Universidade Católica do Rio Grande do Sul", Middlesex University (United Kingdom), "Universidad Autónoma de Chihuahua" (Mexico), and "Universidad de Talca" (Chile).

[2] Chief Academic Officer at the "Centre for Excellence in Law" and the LL.M Degree in Law at "Universidade do Oeste de Santa Catarina". Holds a Ph.D. in Fundamental Rights' Effectiveness Mechanisms from "Universidade Federal de Santa Catatina". Holds a doctorate degree in Fundamental Rights and Contemporary Rights with a foreign trainee scholarship (PDEE Capes) at the Centre for Civil and Human Rights at Notre Dame University (Indiana, USA, from February 2011 to July 2011). Holds a LL.M degree in Public Law (UNESA), a graduation degree in Civil Procedure and has been working as a Federal Judge (4th Region) since 1996.

equality. It is challenging to understand the paradox of why a country consisting of so many cultures, religions, and races miscegenation, a signatory of an expressive number of treaties on equality and ruled by a constitution that contains an absolute prohibition against discrimination, is currently known by the biased actions of its population.

Examples are abundant. Afro-Brazilian people represent 54% of the population, but their rate among the 10% poorest ones is extremely greater, representing 75%.[3] Regarding school students, 96,5% of them show bias against disabled people, 94,2% show ethnic and race bias, 93,5% are with gender bias, 87,5% mention socioeconomic bias, 87,3% show bias toward sexual orientation, and 75,95% show territorial bias.[4]

During its brief history (a little more than five hundred years), Brazil has been timidly fighting inequality through state public policies and even through private initiative, the so-called "affirmative action measures," which have been gradually changing the reality.

This study aims to discuss the aspects regarding the affirmative action measures' historical development in Brazil, focusing on their governmental means of effectiveness. It intends to understand which aspects are precise and imprecise in Brazil, by analysing the Brazilian public policies developed so far and how effectively they have regarded full equality.

The study starts by one of its objectives, which is to analyse the theoretical and controversial aspects of the affirmative action measures' concept so that it is possible to delimit their name's range in this study. Also, there is the study of the main theories that aim to fundament and justify these actions as social justice achievement. Furthermore, it shows how Brazilian constitutions have treated the affirmative action measures, the country's legal order evolution and its importance to Brazilian constitutional theory.

---

[3] CALEIRO, João Pedro. *O tamanho da desigualdade racial no Brasil em um gráfico*. Available at: <https://exame.abril.com.br/economia/o-tamanho-da-desigualdade-racial-no-brasil-em-um-grafico/>. Access on: Sept. 2, 2017.

[4] BROWN, José Afonso Mazzon (Org.). *Projeto de Estudo sobre Ações discriminatórias no Âmbito Escolar*. Available at: <http://portal.mec.gov.br/dmdocuments/relatoriofinal.pdf>. Access on: Sept. 2, 2017.

Afterward, there is the historical context of affirmative action measures in Brazil, from the social impact to the groups that have received special attention concerning the topic. In this respect, this study faces the discrimination against Afro-Brazilian people to understand the root of the issue and the government reaction to solve it. Moreover, there is a review of the Brazilian women historical affirmation concerning isonomy, considering the cultural difficulties in appraising female gender in Brazil. Besides, there is an inquiry into the main public policies aimed at gender equality and their current context.

Likewise, there is the study of historical discrimination acts toward Indians, the ones related to sexual orientation, and those concerning disabled people. The research focuses on discerning the biases' historical sources and the main affirmative action measures developed to protect these mentioned groups.

Finally, there is the discussion about the obtained results from the affirmative action, focusing on the recent dichotomy of its use to ensure full equality (constitutional law) versus its disproportion or even some kind of abuse of use, commenced by it.

It bases on the quantitative research approach, through national and international books and studies, as books, articles, and statistic data provided by the United Nations (UN), the Organization of American States (OAS) and the Brazilian Institute of Geography and Statistics (BIGS). Besides, it considers the main leading cases on the Supreme Court of Justice on affirmative action measures implementation.

1 Theoretical and controversial aspects regarding the affirmative action measures' concept

When studying affirmative action measures, firstly it is important to consider they are tools of achieving full equality among people, whenever society shows itself incapable of achieving cultural maturity to attend social equity, free of discrimination.

Affirmative action measures are necessary since occidental societies have adopted the Rule of Law system, in which the fundamental right to freedom is greater than the rights to equality and fraternity.[5] Therefore, there is the concept of formal equality before the law,[6] which does not take into consideration the existing inequalities, idealises the premise everyone is equal under the law, and it should be neutral when applied.[7]

This system, however, has contradicted itself since it does not solve discriminatory situations over time. The natural inequalities (physical, psychological, social, and economic inequalities, among others) prove it is materially impossible to provide equal opportunities to people.

Merely formal equality before the law does not ensure full equality, considering it does not perceive individuals' limiting aspects; it only serves a specific group of people to the detriment of other groups.

After perceiving this distortion, at the beginning of the 20th Century, there was the creation of a new concept of equality, substantive equality, adopted in the Social Rule of Law system. The new concept contained affirmative equality rules, providing unequal treatment to unequal people,[8] aiming to achieve full equality.

Regarding the concept, the affirmative action measures' historical and dynamic characteristics do not permit the creation of a closed concept, because it has been developing through occidental history.[9] Even the titles represent an open concept; in Brazil, it is possible to find the expressions

[5] BESTER, Gisela Maria. Principiologia constitucional e ações afirmativas: em prol da inclusão das pessoas idosas no Brasil - de Chronos a Kairos. *Espaço Jurídico Journal of Law*, Joaçaba, v. 7, n. 2, p. 116, jul./dez. 2016.

[6] MELLO, Celso Antônio Bandeira de. *O conteúdo jurídico do princípio da igualdade*. 3. ed., 4. tir. São Paulo: Malheiros, 1998. p. 10.

[7] GOMES, Joaquim Benedito Barbosa. *Ação afirmativa e princípio constitucional da igualdade. O direito como instrumento de transformação social. A experiência dos EUA*. Rio de Janeiro: Renovar, 2001. p. 2.

[8] HELLER, Agnes. *Além da justiça*. Rio de Janeiro: Civilização Brasileira, 1998. p. 17-18.

[9] BREST, Paul et al. *Processes of Constitutional decisionmaking*. 4 ed. Gaithersburg: Aspen, 2000. p. 899.

as "first order discrimination," "benign discrimination," "preferential treatment" among others.[10]

Affirmative action measures' notion commonly associates to public or private policies' promotion, coercive or voluntary, aimed at certain discriminated social groups[11] due to their peculiarities (concrete or fictional), purposing to correct the existing inequality among those groups, and the other society members, through economic, social or legal inclusion.[12]

The first controversy lays on whether or not considering private actions as affirmative action measures. The ones, who understand only public policies may enforce affirmative action measures, denying any private initiative, assert that, historically, the law is the main instrument of imposing affirmative action measures.[13] The state creates temporary rules that privilege some discriminated groups. Regarding this initiative, affirmative action measures cannot derive from private initiative or any other means but the law. In this sense, an affirmative action measure is a government response to situations civil society is not capable of solving. Therefore, whenever civil society creates mechanisms of reducing or extinguishing social inequality, what truly happens is a collective change in social behaviour, instead of an affirmative action measure itself.

However, the majority of authors consider affirmative action measures can derive from private initiative actions aimed at achieving full equality and diminishing all kinds of discrimination.[14] Thus, they declare these actions may raise from a businessperson that might invent a plan or an action intended to diminish social inequality and benefit historically excluded

[10] RIOS, Roger Raupp. *Direito da Antidiscriminação*: discriminação direta, indireta e ações afirmativas. Porto Alegre: Livraria do Advogado, 2008. p. 157-158.

[11] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 164.

[12] PISCITELLI, Rui Magalhães. *O Estado como promotor de ações afirmativas e a política de quotas para o Accesso dos negros à universidade*. Curitiba: Juruá, 2009. p. 64-65.

[13] RIBEIRO, Rafael de Freitas Schultz. Estudo Sobre as Ações Afirmativas. *Revista SJRS*, Rio de Janeiro, v. 18, n. 31. p. 170, ago. 2011.

[14] GOMES, Joaquim B. Barbosa. *Ações Afirmativas e Princípio Constitucional da Igualdade*: o direito como instrumento de transformação social - A experiência dos EUA. Rio de Janeiro: Renovar, 2001. p. 6.

groups of people.[15] However, it would not arise from a cultural change in society, but it would come from private initiative, a portion of society, steering to fight discrimination through affirmative action measures.

Achieving affirmative action measures is another polemic aspect. Some authors sustain these measures only represent a definite and effective solution when imposed by the law.[16] They explain the awareness campaigns, tax credits, and other non-coercive measures usually cannot achieve the same results as legal measures can.

The idea of affirmative action measures being effective only when imposed by law is not true in Brazil, because the creation of a large number of affirmative action measures in its territory occurred due to civil rights movements, for instance, those developed by groups that have been discriminated by their sexual orientation.[17] Those groups have promoted not only awareness initiative actions, but also have fought for their rights, until they had legal provision of their rights, definitely solving their discrimination issues. For instance, there is the acknowledgment of civil partnership (and its inheritance rights), established not under the law, but as the Federal Supreme Court has upheld.[18]

On the other hand, there are other affirmative action measures under the law, aimed at disabled people, as the right to a proper education system, adapted to their needs. Nevertheless, their rights are not effective, considering most schools in Brazil do not show conditions to implement the regulation.[19]

Therefore, affirmative action measures aim at achieving freedom and equality among the people in society, but the discussion of those prin-

---

[15] BERGMANN, Barbara. *In defense of affirmative actions*. New York: BasicBooks, 1996. p. 7.

[16] RIBEIRO, Rafael de Freitas Schultz. Estudo Sobre as Ações Afirmativas. *Revista SJRS*, Rio de Janeiro, v. 18, n. 31, p. 170, ago. 2011.

[17] ALVAREZ, Sonia. A globalização dos feminismos latino-americanos. In: ALVAREZ; DAGNINO; ESCOBAR (Org.). *Cultura e política nos movimentos sociais latino-americanos*. Belo Horizonte: Editora UFMG, 2000. p. 385.

[18] BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade (ADI) 4277 e Arguição de Descumprimento de Preceito Fundamental (ADPF) 132*. 2011.

[19] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 215.

ciples shall observe fraternity aspects, as Peter Häberle assesses.[20] The fraternal optics represents the goal of affirmative action measures, considering they develop tolerance, altruism, and diversity respect, even if imposed by law.

These measures shall be provisional, considering they serve to implement exceptional protection, giving privileges to a group of people affected by discrimination, aiming to prevent these actions from getting undesirable and developing fraternity gradually. Whenever the groups of people overcome that social aspect, the measures must disappear, so that society's maturity can take its place. Not observing the temporary aspect might create discrimination, the action's purpose opposite.[21] Thus, every affirmative action measure must establish its final term (or a further analysis regarding its maintenance period) by its implementation.

Brazilian courts of law also recognise the actions' temporary aspect as a fundamental tool in achieving their effectiveness, according to what they have upheld.[22] Case law assesses the maintenance of unequal rights to a specific group of people, after achieving their purpose, should create a situation of unjustified discrimination towards the other society members.

Ferreira Filho[23] illustrates the affirmative action measures must fulfil five basic requirements to adjust to Brazilian constitutional system: 1) to clearly identify the favored group; 2) to offer a proportional and reasonable advantage, capable of neutralizing the inequality perceived; 3) to aim only at correcting the social inequality situations; 4) their effectiveness shall be at the lower possible level of onerosity to the other members of society; 5) at last, they must be temporary actions, immediately repealed once they achieve their results.

---

[20] HÄBERLE, Peter. *Libertad, igualdad, fraternidad*: 1789 como historia, actualidad y futuro del Estado constitucional. Madrid: Trotta, 1998.

[21] MÈLIN-SOUCRAMANIEN, Ferdinand. *Le Principle d'égalité dans la Jurisprudence du Conseil Constitucionnel*. Paris: Economica, 1997. p. 206-207.

[22] BRASIL. Recurso Especial n. 1.132.476/PR. Relator: Ministro Humberto Martins. *RSTJ*, v. 18, p. 751. Upheld in October, 13th, 2009.

[23] FERREIRA FILHO, Manoel Gonçalves. Aspectos jurídicos das ações afirmativas. *Revista do Tribunal Superior do Trabalho*, Porto Alegre, v. 69, n. 2, p. 74, jul./dez. 2003.

Moreover, affirmative action measures may arise from judicial activism, which is the Judicial Branch response to the social claims, acting proactively to interfere in the other Branches' political decisions.[24] In this case, judicial measures that determine positive discriminatory actions work as redistributive, repairing or restoring policies.[25] The security rights to same-gender couple civil partnerships, upheld at the highest level, the Federal Supreme Court, was the leading case.

After these considerations regarding positive discriminations in Brazil, in this paper, the expression "affirmative action measures" shall represent the temporary tools to promote social inclusion,[26] whether from the private or public initiative, to compensate those in unequal situations by providing them unequal and even preferential treatment, to guarantee full equality among all.

1.1 Theories of Justice about affirmative action

The philosophical fundaments regarding affirmative action measures focus mainly on three theories: 1) utilitarianism, 2) compensatory justice, and 3) distributive justice.

Based on utilitarian ideas of Jeremy Bentham and John Stuart Mill,[27] Richard Wasserstrom[28] observes affirmative action measures are means of creating a new reality that enables an equal society development. In this re-

[24] MELLO, Marco Aurélio Mendes de Farias. Ótica Constitucional - a Igualdade e as Ações Afirmativas. In: SEMINÁRIO NACIONAL EM COMEMORAÇÃO DO DIA DO ZUMBI DOS PALMARES, 2001, Brasília, DF. *Anais*... Tribunal Superior do Trabalho: Brasília, DF, 2001. p. 27-28.

[25] GOMES, Joaquim Benedito Barbosa. *Ação afirmativa e princípio constitucional da igualdade. O direito como instrumento de transformação social. A experiência dos EUA*. Rio de Janeiro: Renovar, 2001. p. 32.

[26] PIOVESAN, Flávia. Ações Afirmativas da Perspectiva dos Direitos Humanos. *Cadernos de Pesquisa*, v. 35, n. 124, p. 49, jan./abr. 2005.

[27] Utilitarianism may be philosophically described as "general welfare", which means always acting in a way to achieve the maximum degree of welfare. See: BENTHAM, Jeremy. *The Principles of Morals and Legislation*. New York: Prometheus Book, 1988; also MILL, John Stuart. *Utilitarianism*. Corby: Oxford University Press, 1998.

[28] WASSERSTROM, Richard. *Philosophy and social issues*: five studies. Notre Dame: University of Notre Dame Press, 1980.

gard, the state would be responsible for creating measures to provide onus and benefit redistribution, to privilege discriminated groups in detriment of other members of society. Doing that should lead to welfare (recovering minorities' self-respect) and, consequently, resentment would disappear, and a peaceful and fraternal atmosphere should arise and diminish society's rejection degree.

Critics of utilitarian position consider it may lead to subjectivism in its justification arguments and the rules that shall implement some affirmative action.[29] How is it possible to infer if a redistributive measure, as university quota, shall implement general welfare? Conversely, although necessary, implementing this policy may cause resentment among other members of a group. Thus, it is not possible to conclude affirmative action measures shall provide general welfare and resentment diminishing because they might even cause the opposite and increase clashes.

Thus, the utilitarian idea of affirmative action measures always achieving cost-benefit is impossible to sustain, because, in this theory, the decision for a specific affirmative action measure is discretionary and subjective, related to the one who implements the measure, which can lead to arbitrary decisions.

Concerning the compensatory justice theory, it uses affirmative action measures to repair past injustice against specific social groups, whether from the government or other citizens.[30] The affirmative action measures taken in favour of these groups represent some compensation for a historical debit.

The main critics of this theory as fundament to affirmative action measures lay on the current generation being obliged to pay for their ancestors' mistakes, without taking part of the harm they have caused. Besides, it would also be difficult to delimitate the beneficiaries, considering the current social groups were not direct victims of similar past behaviour, so the

[29] SOWELL, Thomas. *Civil Rights*: Reality or Rheatoric. New York: Morrow, 1984.
[30] GREENE, Kathanne W. *Affirmative Action and Principles of Justice*. London: Greenwood Press, 1989. p. 3.

beneficiaries would not be the offended and harmed ones.[31] In this sense, compensatory justice imposes compensation regarding former injustice to current groups, compounded by people who have not caused any harm and to which they might oppose.

Contrariwise, there is the distributive justice theory to which affirmative action measures are responses to present acts of discrimination, by redistributing obligations and rights among members of society.[32] Thus, the state compensates inequalities caused by social discrimination, prioritising and redirecting rights and opportunities to prejudice victims.[33] This theory's main argument is the minority groups only achieve full equality through affirmative action measures. The biased acts they have suffered prevent them from naturally achieving equality.[34]

Distributive justice measures usually lead to reverse discrimination, as the quota system in education to some ethnic groups illustrates. They ensure privilege to prejudice groups in detriment of the other members.

Reverse discrimination, also known as positive discrimination, is controversial, as the major social group feels harmed by the state action, sustaining some affirmative action measures violate the principles of equality and proportionality. That has happened in Brazil with the university quota system implement, favouring Afro-Brazilians, brown-skinned people and Indians.[35] Although the system increased the number of Afro-Brazilians, brown-skinned people and Indians in universities, there is a raising number of people, from different social groups, claiming that thousands of

[31] FISCUS, Ronald J. *The Constitutional Logic of Affirmative Action*. Durham and London: Duke University Press, 1992. p. 9.

[32] KAUFMANN, Roberta Fragoso Menezes. *Ações Afirmativas à brasileira*: necessidade ou mito? uma análise histórico-jurídico-comparativa do negro nos Estados Unidos da América e no Brasil. Porto Alegre: Livraria do advogado, 2007. p. 222.

[33] FRASER, Nancy. Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation. In: PETERSON, Grethe B. (Ed.). *The Tanner Lectures on Human Values*. Salt Lake City: Stanford University, 1996. v. 1. p. 3.

[34] FISCUS, Ronald J. *The Constitutional Logic of Affirmative Action*. Durham and London: Duke University Press, 1992. p. 8.

[35] SILVA, Nelson do Valle. Morenidade: Modo de Usar. In: HASENBALG, Carlos A.; SILVA, Nelson do Valle; LIMA, Márcia. *Cor e Estratificação Social*. Rio de Janeiro: Contra Capa Livraria, 1992. p. 16.

lower-class Caucasians have a smaller number of opportunities to study in universities, due to the quota system.

1.2 **Affirmative Action Measures in Brazil's Constitutionalism**

Brazilian constitutionalism has always focused on formal equality,[36] which is possible to perceive by briefly reading the seven constitutions in its history.

The monarchic constitution of 1824, granted by a slavery society, has established the Civil Code and the Criminal Code both based on equality.[37] The 1981 Constitution (the one that has established a Republic in Brazil) assured *everyone is equal before the law*,[38] due to the bourgeois revolution idea, but did not add elements in this sense.[39]

The 1934 Constitution allowed women to vote and changed the democratic system, by substituting liberal democracy for social democracy, an important advance regarding equality. Legislators kept the equality before the law, but inserted in the legal text there would be no distinction or privileges in treatment caused by birth, race, gender, people's profession or their parents' occupation, social position, wealth, religious belief or political preferences.[40]

---

[36] KAUFMANN, Roberta Fragoso Menezes. *Ações Afirmativas à brasileira*: necessidade ou mito? uma análise histórico-jurídico-comparativa do negro nos Estados Unidos da América e no Brasil. Porto Alegre: Livraria do advogado, 2007, p. 233.

[37] *Article 179*. The Brazilian citizens' civil and political rights' inviolability, based on freedom, individual security and property, is guaranteed by the Imperial Constitution as follows: XVIII: It shall be organized the Civil and Criminal Codes, both based on justice and equality. In: BRASIL. *Constituição Federal de 1824*. Manda observar a Constituição Politica do Imperio, offerecida e jurada por Sua Magestade o Imperador. Rio de Janeiro, 22 abr. 1824. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm>. Access on: Sept. 3, 2017.

[38] ISHAY, Micheline. *The history of human rights*: from ancient times to the globalization era. California: University of California Press, 2004. p. 114.

[39] *Article 72*. The Constitution assures all Brazilians and foreign residents the inviolability of the rights of freedom, individual security and property, as follows: Paragraph 2. Everyone is equal under the law. In: BRASIL. *Constituição Federal de 1824*. Manda observar a Constituição Politica do Imperio, offerecida e jurada por Sua Magestade o Imperador. Rio de Janeiro, 22 abr. 1824. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm>. Access on: Sept. 3, 2017.

[40] *Article 113*. The Constitution assures all Brazilians and foreign residents the inviolability of the rights of freedom, subsistence, individual security and property, as follows: 1) everyone

However, this historical progress lasted until 1937, when President Getúlio Vargas staged a coup d'état (supported by militaries) arguing a communist infiltration was about to take place in Brazil and granted the new Constitution, a fascist one. Therefore, there was a constitutional setback, and again, there was only formal equality under the law in Brazil.[41]

In 1934, Brazil created the first infra-constitutional law regarding labour (the Consolidation of Labour Laws), an important contribution to diminishing social inequalities in labour relations, guaranteeing a series of unprecedented rights to Brazilian workers. Among those, the workers' entitlements included working regular hours, minimum wage, and statutory leave; therefore, they were important tools to achieve equality in labour relations.

In 1945, when Brazilian soldiers returned from the World War II, after defeating the "Axis" and their fascist and Nazi ideas, a new national movement arose in Brazil, aiming at creating a National Constituent Assembly to legislate a new constitution. Thus, Brazil promulgated its fifth constitution in 1946, containing formal equality under the law, which represented a slight contribution to equality, considering the prohibition of any advertisement containing biased ideas against race or social status.[42]

---

is equal under the law. There shall not be privileges or distinctions based on birth, gender, race, profession (own or the parents') social class, wealth, religious creed or political views. In: BRASIL. *Constituição Federal de 1824*. Manda observar a Constituição Politica do Imperio, offerecida e jurada por Sua Magestade o Imperador. Rio de Janeiro, 22 abr. 1824. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm>. Access on: Sept. 3, 2017.

41 *Article 122*. The Constitution assures all Brazilians and foreign residents the rights of freedom, individual security and property, as follows: Paragraph 2. Everyone is equal under the law. In: BRASIL. Constituição Federal de 1937. *Diário Oficial da União*, 10 nov. 1967. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm>. Access on: Sept. 3, 2017.

42 *Article 141*. The Constitution assures all Brazilians and foreign residents the inviolability of rights of life, freedom, individual security and property, as follows: Paragraph *1. Everyone is equal under the law*. [...] Paragraph 5. *It shall not be tolerated propaganda* involving war, violent acts to subvert the social and the political order, *or of discrimination against race or social class*. In: BRASIL. *Constituição Federal de 1946*. Rio de Janeiro, 18 set. 1946. Available at: **<**http://www.planalto.gov.br/ccivil_03/constituicao/constituicao46.htm>. Access on: Sept. 3, 2017.

Brazil signed the United Nations Universal Declaration of Human Rights in 1948, committed to joining freedom and equality, prohibiting any discrimination. That same year, Brazil ratified the Convention on the Prevention and Punishment of the Crime of Genocide, compromised at fighting intolerance regarding origin, ethnicity, race, or religion.[43]

An intense social and political collapse happened in Brazil at the beginning of the 60's, resulting in the 1964 military coup that revoked the current constitution. Military dictatorship installed in Brazil and lasted for a long period, marked by repression, censorship and human rights violation. Paradoxically, that same year Brazil signed the "C111 - Discrimination (Employment and Occupation) Convention", by the International Labour Organization, aimed at combating against all types of labour discrimination.

The sixth Brazilian constitution dates from 1967, after three years of military government, containing power centralisation to the Military President. It diminished one self's autonomy and permitted the suspension of the constitutional rights. However, it reassured formal equality under the law,[44] banning discrimination concerning gender, race, labour, religious creed and political views; it also established constitutional punishment against prejudice. Regarding infra-constitutional laws, the Press Law came into effect in 1967 and remained so until 2009. It established intolerance against advertisement with race or social status biased content and established racism as a crime in Brazil.[45]

---

[43] PIOVESAN, Flávia. Ações Afirmativas da Perspectiva dos Direitos Humanos. *Cadernos de Pesquisa*, v. 35, n. 124, p. 45, jan./abr. 2005.

[44] *Article 150*. The Constitution assures all Brazilians and foreign residents the inviolability of rights of life, freedom, security and property, as follows: Paragraph 1. Everyone is equal under the law without distinction of gender, race, occupation, religious creed and political views. Prejudice shall be punished by the law. In: BRASIL. Constituição Federal de 1967. *Diário Oficial da União*, 24 jan. 1967. Available at: <http://www.planalto.gov.br/ccivil_03 /constituicao/constituicao67.htm>. Access on: Sept. 3, 2017.

[45] Article 1. Paragraph 1. *It shall not be tolerated* propaganda involving war, violent acts to subvert the social and the political order, *or of discrimination against race or social class*. Article 13. *It is a felony* to explore or use communication tools to the following articles. Article 14: To *do propaganda* of war or processes to subvert the political ans social order *or of discrimination against race or social class*. In: BRASIL. Constituição Federal de 1967. *Diário Oficial da União*, 24 jan. 1967. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm>. Access on: Sept. 3, 2017.

In 1969, the "International Convention on the elimination of all forms of racial discrimination" came into effect in Brazil, then "positive discrimination"[46] had legal provision. From that historical moment on, the state was obliged to create special and temporary measures to ensure specific race and ethnic groups could equally enjoy their human and fundamental rights.

There was only formal equality in Brazil until its sixth constitution. There was no material or real legal essence to equality and no initiatives regarding affirmative action measures.

Nonetheless, in 1988 the current constitution started a new and important moment that, on the one hand, brought the Rule of Law State and, on the other, a series of rules containing immediate and programmatic objectives to bring full equality to society. The contemporary constitutional rules consist of a complex system, imposing obligations to the state and the society, aiming at promoting equally orientated policies,[47] without discriminatory actions related to origin, race, gender, skin colour, age and any other forms of discrimination.

The major advance in this constitution is the fact it has gone over the formal equality dogma of simply prohibiting discrimination, and imposed the state and the society an active role in finding solutions to eradicate inequalities and promote the general welfare.[48] The constitution aims not only at banishing discrimination, it goes beyond, setting a new affirmative ideal,

[46] BRASIL. *Decreto n. 65.810*, de 8 de dezembro de 1969. Artigo I, parágrafo 4. Available at: <http://legis.senado.gov.br/legislacao/ListaTextoIntegral.action?id=94836>. Access on: Sept. 4, 2017.

[47] SARLET, Ingo Wolfgang. Affirmative Action and The Fight Against Inequalities in Brazil: The case of race and equal access to higher education. In: DUPPER, Ockert; KAMALA, Sankaran (Ed.). *Affirmative Action*: A View from the Global South. South Africa: Sun Press, 2014. p. 202.

[48] This is how the current Constitution regulates full equality among people through affirmative action measures: Article 3. The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, just and solidary society; [...] III – to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 3, 2017.

with objectives Brazil must achieve to build a fraternal, pluralist and unbiased society.

There are affirmative policies regarding special treatment and inclusion of disabled people. For instance, from differentiated access to health services to express legal provision of quota system to apply for public service.[49]

Women and men are now equal regarding rights and obligations, with articles that contain protection to women's labour market, through specific incentives regulated by infra-constitutional laws. Furthermore, there is a clear positive discrimination rule regarding women's retirement in the 1988 Constitution: in public or private labour market, they retire five years earlier than men do, and their contribution period is shorter than the one to men.[50]

Regarding Afro-Brazilians, the Constitution sets their right of property in lands occupied by the quilombolas (or runaway slaves) descendants.[51] Those groups represent African slaves or their descendants, who have escaped slavery in farms. The settlement of freed slaves' name in Portuguese is "quilombo."[52]

Concerning Indians, their constitutional protection involves the lands they have traditionally occupied, their traditions, social organisation,

[49] The articles 23, II; 24, XIV; 37, VIII; 203, IV; 227, §1º, II, §2º, and 244, all inserted in the 1988 Constitution determine forms of inclusion to disabled people. All of them are available at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/Constitution _2013.pdf>. Access on: Sept. 2, 2017.

[50] The articles 5, I; 7, XX; 40, III, *a* and *b,* and 201, §7º, I and II, all from 1988 Constitution, contain different equality forms between men and women, with a new system of positive discrimination toward women. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 3, 2017.

[51] The articles 68 and 216, paragraph 5, both from the 1988 Constitution, contain quilombolas' protection rules and oblige the state to provide them their properties titles. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 3, 2017.

[52] GOMES, Flávio dos Santos. *A hidra e os pântanos*: mocambos, quilombos e comunidades de fugitivos no Brasil, (Séculos XVII-XIX). São Paulo: Ed. UNESP, 2005. p. 39.

customs, languages, and creeds. In the 1988 Constitution, the state must demarcate the lands they traditionally occupy and set the lands as inalienable and indispensable, and the rights to them are not subject to limitation.[53]

2 Affirmative action measures' historical contextualization in Brazil

To understand the development of the first affirmative action measures in Brazil it is necessary to know some peculiar aspects regarding the reality in Brazil compared to other countries. The most discriminated groups in Brazil are Afro-Brazilians and brown-skinned people, Indians, women and lesbians, gays, bisexuals, Cross-dressed and Trans groups (the LGBT group) the reason why there are so many public policies aimed at protecting them. Likewise, disabled people receive special attention regarding positive discrimination, in attempts to provide them accessibility and social inclusion.

The measures to protect these groups and achieve full equality are not easy to implement, even though the 1988 Constitution created actions to build a fair and equal society.

According to the Brazilian Institute of Geography and Statistics, in 2014, Brazil was the second country in Afro-descendants (45% of its population). Nigeria was the first one. Afro-Brazilian and brown-skinned people together represent 54% of the Brazilian population. However, among the richest, they are only 17,4%, and regarding the poorest, they represent 76%.[54]

Indians demand special attention as well. From the report from the United Nations, issued in September 2016, Indians suffer more risk than the other groups, since the 1988 Constitution promulgation.[55] Although Brazil

[53] The articles 20, XI and 231, both from 1988 Constitution, set protection rules to Indians rights fulfilling. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 3, 2017.

[54] Negros representam 54% da população do país, mas são só 17% dos mais ricos. *UOL Economia*, São Paulo, 04 dez. 2015. Available at: <https://economia.uol.com.br/noticias/redacao/2015/12 /04/negros-representam-54-da-populacao-do-pais-mas-sao-so-17-dos-mais-ricos.htm>. Access on: Sept. 2, 2017.

[55] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Relatório da missão ao Brasil da Relatora Especial sobre os direitos dos povos indígenas*. Available at: <http://unsr.vtaulicorpuz.org/site/index.

has an exemplary constitutional law concerning Indians, their lands demarcation processes are stuck, and the rate of Indians murders in land disputes has increased noticeably, to the number of 138 deaths in 2014.[56]

Concerning women, a study published in 2011,[57] supported by UN Women, showed they are 44% of workers in Brazil. However, they still receive a lower salary than men do, regardless their qualification or work hours. Numbers are astonishing. For example, in 2008, Afro-Brazilian women income was R$ 383,00; Afro-men gained R$ 583,00; white women received R$742, and white men made R$1.181.[58]

Even women in high positions suffer from biased actions, especially in politics.[59] Even though the country had its first female president, in 2011, it does not mean gender equality is not a problem in Brazil. Statistics show that, between the years 2006 and 2009, only 29% of women got leadership positions in organisations. Regarding politics, the Legislative Branch has the most visible difference between men and women. In 2010, the Senate had 85,19% of men, and they were 91,23% of the Chamber of Deputies. Brazil's Supreme Court also shows discrimination, because only three women have been the Ministers in the Judiciary Branch's history.

Regarding the LGBT community, in 2016 the federal government published a report on homophobia in Brazil, containing numbers until 2013, in an attempt to promote their rights and protect this group.[60] The report contains worrying information, as in 2013, there were 3.398 discrimination

php/es/ documentos/country-reports/154-report-brazil-2016>. Access on: Aug. 12, 2017.

[56] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Relatório da missão ao Brasil da Relatora Especial sobre os direitos dos povos indígenas*. Available at: <http://unsr.vtaulicorpuz.org/site/index.php/es/ documentos/country-reports/154-report-brazil-2016>. Access on: Aug. 12, 2017.

[57] BRASTED, Leila Linhares; PITANGUY, Jacqueline (Org.). *O Progresso das Mulheres no Brasil 2003–2010*. Rio de Janeiro: CEPIA; Brasília: ONU Mulheres, 2011.

[58] BRUSCHINI, Cristina et al. Trabalho, Renda e Políticas Sociais: Avanços e Desafios. In: BRASTED, Leila Linhares; PITANGUY, Jacqueline (Org.). *O Progresso das Mulheres no Brasil 2003–2010*. Rio de Janeiro: CEPIA; Brasília: ONU Mulheres, 2011. p. 165-166.

[59] ARAÚJO. Clara. As Mulheres e o Poder Político - Desafios para a Democracia nas Próximas Décadas. In: BRASTED, Leila Linhares; PITANGUY, Jacqueline (Org.). *O Progresso das Mulheres no Brasil 2003–2010*. Rio de Janeiro: CEPIA; Brasília: ONU Mulheres, 2011, p. 91-92.

[60] BRASIL. Secretaria Especial de Direitos Humanos. *Relatório de Violência Homofóbica no Brasil*: ano 2013. Brasília, DF, 2016. p. 77. Available at: <http://www.sdh.gov.br/assuntos/lgbt/dados-estatisticos/Relatorio2013.pdf>. Access on: Aug 12, 2017.

acts against the LGBT community. Besides, 9,31 of daily human rights violations in Brazil are homophobic acts.[61] Victims' profiles also worsen the scenario: 54,9% are young, 39,9% are Afro and brown-skinned, 73% are biologically male, 24,5% are gay, and 17,8% are Trans.

After specifying the five main bias groups of victims, it is to study the historical development of the first affirmative action measures in Brazil.

2.1 **Discrimination against Afro-Brazilians**

Brazil became an independent nation in 1822, but the slavery system using African people continued after the independence. England promoted an intense pressure, and it was possible to banish transatlantic slave trade in 1850. Slave children's freedom happened in 1871. The "Sexagenarian Law" freed slaves over sixty years old in 1885. The Golden Law (named "Aurea Law" in Brazil) freed all Brazilian slaves in 1888.[62]

A severe problem of social inequality raised (and it remains) in the country as Brazil had not created a national policy to promote social integration between freed Afro-Brazilians and the rest of the population. The freed Afro-people had not had access to education, home or labour. Because Brazilian government stimulated immigration between the 19th and the 20th centuries, the job slaves used to do then belonged to white immigrants, as paid jobs.[63]

The first records of positive discrimination policies implementing took more than a hundred years to arise. Technicians from the Brazilian Ministry of Labour and the Superior Labour Court helped creating policies to es-

[61] BRASIL. Secretaria Especial de Direitos Humanos. *Relatório de Violência Homofóbica no Brasil*: ano 2013. Brasília, DF, 2016. p. 11. Available at: <http://www.sdh.gov.br/assuntos/lgbt/dados-estatisticos/Relatorio2013.pdf>. Access on: Aug 12, 2017.

[62] SILVA, Paulo Vinicius Baptista da; ROSEMBERG, Fúlvia. Brasil: lugares de negros e brancos na mídia. In: VAN DIJK, Teun A. van. *Racismo e discurso na América Latina*. São Paulo: Contexto, 2008. p. 75.

[63] RIBEIRO, Matilde; PIOVESAN, Flávia. Dossiê 120 anos de abolição. *Revista de Estudos Feministas*, Florianópolis , v. 16, n. 3, p. 881, dez. 2008.

tablish quota system (20%, 15% or 10%) to Afro-descendants in companies in Brazil, in 1968.[64] However, the idea has never turned into law.

Early in the 80's, the National Congress analysed the law project n. 1.332/1983, aimed at implementing positive discrimination measures to favour Brazilian Afro-descendants' population. It contained the creation of quotas to Afro-descendants in public offices, incentives to private companies, and scholarships as well. Nonetheless, the National Congress did not validate it, extinguishing the hopes on public policies to affirmative action measures in Brazil.[65]

Brazil only admitted discrimination issues towards race and gender and faced the disabled people difficulties in its 1988 Constitution, when the country started fighting them through affirmative action measures.

The country only created its first Secretariat of State for Human Rights in 1996, with the "National Program for Human Rights" (NPHR), despite the clear constitutional text. Its purpose was developing affirmative action measures in favor of vulnerable groups, especially compensatory ones to Afro-descendants, as access to higher education and vocational courses. Besides, the program contained support to private initiative measures of positive discrimination.[66]

Quota system projects aimed at diminishing social inequalities in public offices and production field in Brazil, related to Afro-Brazilians considering they are one of the most discriminated groups in the country's history.[67]

The ideas in the NPHR only took place from 2001 and on. The National Institute for Colonisation and Agrarian Reform edited an ordinance that established 20% quotas to Afro-Brazilians among the employees, demanding the same regulation from the third party companies connected

[64] SANTOS, Hélio. Políticas públicas para a população negra no Brasil. *Observatório da cidadania*, Rio de Janeiro: Ibase, 1999. p. 222.
[65] MOEHLECKE, Sabrina. Ação Afirmativa: história e debates no Brasil. *Cadernos de Pesquisa*, n. 117, p. 204, nov. 2002.
[66] PIOVESAN, Flávia. Ações afirmativas no Brasil: desafios e perspectivas. *Revista de Estudos Feministas*, Florianópolis, v. 16, n. 3, p. 892, dez. 2008.
[67] GOMES, Joaquim Benedito Barbosa. O debate constitucional sobre as ações afirmativas. In: SANTOS, Renato Emerson dos; LOBATO, Fátima (Org.). *Ações afirmativas*: políticas públicas contra as desigualdades raciais. Rio de Janeiro: DP&A, 2003. p. 15-16.

to it. The Brazilian Ministry of Justice edited an ordinance to establish 20% quotas in its advisory staff reserved to Afro-Brazilians and women (both at the same rate), and 5% quotes to disabled people.

The Brazilian Ministry of Foreign Affairs did the same to social inclusion in 2002 when it offered twenty scholarships to Afro-descendants so they could prepare to apply for a Diplomat career at the "Rio Branco Institute", the federal organ responsible for Brazilian Diplomats' recruitment.

Also in 2002, Brazil created the "National Programme of Affirmative Action Measures" containing public policies of positive discrimination favouring women, afro-descendants and disabled people that benefitted suppliers to develop social inclusion policies, rating them in public biddings for the inclusion.[68]

Concerning the Brazilian States, Rio de Janeiro was the first one to legally establish 40% of quotas in state universities to Afro-Brazilian and brown-skinned people, in 2002. Almost all state and federal universities followed its example and, nowadays, they have settled quotas to Afro-descendants in their applying procedures.[69]

Brazilian government published a law regarding the subject in 2012 and expanded quota system to all federal public education.[70] The positive discrimination in this law is flexible, and there shall be a review every ten years, therefore, in 2022. There are three mandatory aspects of applying for federal universities: to have attended high school in public schools; low level of family income (*per capita*), and, finally, preference to Afro-Brazilians, brown-skinned and Indians.[71]

---

[68] BRASIL. *Decreto Federal 4.228/02*. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/2002 /d4228.htm>. Access on: Sept. 2, 2017.

[69] MOEHLECKE, Sabrina. Ação Afirmativa: história e debates no Brasil. *Cadernos de Pesquisa*, n. 117, p. 209, nov. 2002.

[70] BRASIL. Lei n. 12.711, de 29 de agosto de 2012. Dispõe sobre o ingresso nas universidades federais e nas instituições federais de ensino técnico de nível médio e dá outras providências. *Diário Oficial da União*, Brasília, DF, 30 ago. 2012. Available at: <http://www.planalto.gov.br / ccivil_03/_ato2011-2014/2012/lei/l12711.htm>. Access on: Sept. 2, 2017.

[71] LOBO, Bárbara Natália Lages. *O Direito à Igualdade na Constituição Brasileira*: comentários ao Estatuto da Igualdade Racial e a Constitucionalidade das Ações Afirmativas na Educação. Belo Horizonte: Forum, 2013. p. 175.

There is still discrimination in Brazil despite the effort and advance related to the main affirmative action measures carried out to favour Afro-descendants, so there is a long path ahead. It is common to listen to Brazilians saying they are not biased, but they hardly criticise the quota system in universities. Besides, some sayings denote the population's prejudice, as some say they are "Afros with white souls", "Afros only in the outside", and "they do not seem Afro".[72]

2.2 **Brazilian Women's equality historical affirmation**

Brazilian women are discriminated not only in social aspects but also in politics and legal aspects. They occupy less important jobs and secondary functions, compared to the ones men receive, since the beginning of the nation's history. The fact their constitutional political rights arose in 1934 when they started voting, shows the biased culture.

Another biased rule was in Brazilian Civil Code, from 1916, which considered the man as the head of the conjugal society, the responsible for managing the wife's private goods and authorising her to work.[73] He could also decide whether the woman could live in another home and could claim the marriage annulment in case of finding out his wife was not virgin anymore, within 10 (ten) days.[74]

Moreover, law considered women to lack capacity to make decisions regarding civil life; therefore, they depended on their husbands to do any civil act until 1962. Also, until the end of the 70's they could not work in a

[72] FERNANDES, Florestan. *O negro no mundo dos brancos*. 2. ed. São Paulo: Global, 2007. p. l23.

[73] Article 233. The husband is the head of the conjugal society. It is on his duty: I to represent the family legally. II to administer the wife's common and private goods in his obligation according to the prenuptial agreement or the system of marriage. IV the right to authorise the wife to work and live out of home. In: BRASIL. *Lei n. 3.071*, de 01 de janeiro de 1916. Available at: <http://www.planalto.gov.br/Ccivil_03/leis/L3071.htm>. Access on: Sept. 2, 2017.

[74] *Article 178*. It expires. *Paragraph 1*: in ten days, counted from the wedding, the husband's claim to annul the marriage in case the wife had not been virgin. In: BRASIL. *Lei n. 3.071*, de 01 de janeiro de 1916. Available at: <http://www.planalto.gov.br/Ccivil_03/leis/L3071.htm>. Access on: Sept. 2, 2017.

series of jobs, for being considered not fully able to do so, due to their supposed lack of capacity.[75]

Brazil signed the International Labour Organisation Convention n. 111 in 1968 and committed to fight discrimination and promote equality in labour conditions. However, the government has not implemented measures to assure equality of women regarding labour market.[76]

The first aim to achieve equality only took place in Brazil in 1984, when the National Congress ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but there was a change in the text, regarding family law, specifically conserving the man as the head of conjugal society. It was only in 1994, six years after the 1988 Constitution promulgation, that the legal text removed the topic.

Some private associations had established quota systems to women in their organisations even before the state did it. The "Workers Party" established a quota system for 30% of women in leading positions, in 1991.[77] In 1993, the "Unified Workers' Central" did likewise over the feminist movement pressure.[78]

Even though the 1988 Constitution has established equality for men and women regarding rights and obligations, the first affirmative action measure to favour women only happened in 1995, almost seven years after its promulgation. The creation of the quota system in politics determined a minimum rate of 20% of women in all the parties' candidatures. It rose to 30% in 1997, due to the federal law 9.504.[79]

---

[75] CAVALCANTI, Stela Valéria. Igualdade, Discriminação Positiva e Políticas Públicas para Mulheres no Brasil. *Revista do Mestrado em Direito da Universidade Federal de Alagoas*, a. 2, n. 2, p. 354, 2006.

[76] MOEHLECKE, Sabrina. Ação Afirmativa: história e debates no Brasil. *Cadernos de Pesquisa*, n. 117, p. 206, nov. 2002.

[77] GODINHO, T. Ação afirmativa no Partido dos Trabalhadores. *Estudos Feministas*, Rio de Janeiro: IFCS/UFRJ-PPCIS/Uerj, v. 4, n. 1, p. 150, 1996.

[78] DELGADO, M. B. G. Mais mulheres na direção da CUT. *Estudos Feministas*, Rio de Janeiro: IFCS/UFRJ-PPCIS/Uerj, v. 4, n. 1, p. 140, 1996.

[79] BRASIL. Lei n. 9.100, de 29 de setembro de 1995. Estabelece normas para a realização das eleições municipais de 3 de outubro de 1996, e dá outras providências. *Diário Oficial da União*, Brasília, DF, 02 out. 1995. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9100.htm>. Access on: Sept. 3, 2017.

Brazil signed an international agreement to enforce affirmative action measures to set quota system, legal measures, and tax credits, all to reduce gender inequality, during the Fourth World Conference on Women, in Beijing, in 1995.[80]

Brazil prohibited requiring pregnancy certificates, sterilisation exams, and other discriminatory acts when hiring or maintaining women in their jobs also in 1995, by the law 9.029/95.[81] There are no major advances in women insertion in labour market, even though there is special protection, through specific incentive actions, in the 1988 Constitution.[82] That is so because Brazilian government does not consider gender issues to create and implement public policies.[83]

An extremely important advance to protect Brazilian women is the "Maria da Penha Law", containing severe punishment and prohibition to assault, sexual abuse or psychological violence against women in any intimate relationship. Its promulgation was in 2006, eleven years after the Organization of American States' Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the United Nation's Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), exactly to promote their policies in Brazil.[84]

---

[80] DIAS, Maria Berenice. Ações Afirmativas: uma solução para a desigualdade. *Revista Del Rey*, n. 4, p. 24, dez. 1998.

[81] CAVALCANTI, Stela Valéria. Igualdade, Discriminação Positiva e Políticas Públicas para Mulheres no Brasil. *Revista do Mestrado em Direito da Universidade Federal de Alagoas*, a. 2, n. 2, p. 368, 2006.

[82] *Article 7*. The following are rights of urban and rural workers, among others that aim to improve their social conditions: (CA No. 20, 1998; CA No. 28, 2000; CA No. 53, 2006; CA No. 72, 2013) [...] XX protection of the labour market for women through specific incentives, as provided by law. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/ Constitution_2013.pdf>). Access on: Sept. 2, 2017.

[83] CAVALCANTI, Stela Valéria. Igualdade, Discriminação Positiva e Políticas Públicas para Mulheres no Brasil. *Revista do Mestrado em Direito da Universidade Federal de Alagoas*, a. 2, n. 2, p. 369, 2006.

[84] The law 11.340/2006 has created tools to fight domestic violence against women as determines the article 226, paragraph 8 of the 1988 Constitution and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. In: BRASIL.

At the mid 80's the Brazilian states created their Women Police Departments, to deal with issues affecting women and provide them proper attention regarding sexual assault and domestic violence.[85] The police departments spread over the country after the "Maria da Penha Law" and nowadays they are in every Brazilian city, to accomplish the punishment to violence against women.

The Brazilian National Council of Justice recommended the creation of special courts specifically designed to deal with domestic violence against women in 2006, an attempt to investigate these cases more effectively.[86]

The law 11.770, created in 2010, extended maternity leave to 180 days (it was one hundred and twenty), assured them the right to their incomes while taking care of their new-born children (even if adopted ones).

The mentioned actions show the government is aware of the gender discrimination in the country and reveal the rise of an important movement towards women protection through affirmative action measures.

2.3 **Affirmative Action Measures and Brazilian Indians**

Brazilian Indians were 896.000 people in 2010, according to the last demographic questionnaire.[87] There were 305 ethnic groups, each of them with their customs, traditions, and languages, among which only 17% spoke Portuguese. Also, 57,7% lived in lands officially demarcated as Indians', while 42,3% lived in rural places. Finally, the study shows there are other 60 ethnic groups in isolation and uncontacted.

Lei n. 11.340, de 07 de agosto de 2006. Cria mecanismos para coibir a violência doméstica e familiar contra a mulher, [...] e dá outras providências. *Diário Oficial da União*, Brasília, DF, 08 ago. 2006. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm>. Access on: Sept. 3, 2017.

[85] RIFIOTIS, Theophilos. As delegacias especiais de proteção à mulher no Brasil e a «judiciarização» dos conflitos conjugais. *Sociedade e Estado*, Brasília, DF, v. 19, n. 1, p. 90, jun. 2004.

[86] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 189.

[87] FUNDAÇÃO NACIONAL DO ÍNDIO. *Os índios*. Brasília, DF, 2013. Available at: <http://www.funai.gov.br/arquivos/conteudo/ascom/2013/img/12-Dez/pdf-brasil-ind.pdf>. Access on: Aug. 1, 2017.

Based on the above numbers, it is important to keep in mind Indians precede Brazil's history, and their social insertion is a result of arbitrary and colonialist actions.[88] History shows their colonisation process has been compulsory, first by the Portuguese people, and it has continued even after Brazil declared itself independent.[89]

Pre-Columbian Indians are a nation, unlikely the Afro-Brazilians and European immigrants, and they are in a minority position compared to Brazilian hegemonic and powerful society.[90] Therefore, Indians and Brazilians legally compound a singular society, in which a native is someone who was born in Brazil.

Affirmative action measures must take into consideration Indians' peculiarities, so they do not become a new instrument of oppression. Creating simple social inclusion policies to them does not solve the issue, considering they could detract from their ethnicities, and affirmative action measures to Indians must preserve their culture and customs.

Brazilian Indians' colonisation process started in 1500 when Portuguese arrived in Brazil, and it remained for many centuries. It took Brazil more than five hundred years of oppression to give Indians some attention. The law only established their rights to the lands they had already occupied with the 1934 Constitution.[91]

More than fifty years later, the 1988 Constitution expanded Indians' rights and acknowledged their social organisation, customs, languages, creeds, tradition, and their right to the lands in which they have settled.[92]

---

[88] COELHO, Elizabeteh Maria Beserra. Ações Afirmativas e Povos Indígenas: o princípio da diversidade em questão. *Revista Políticas Públicas*, v. 10, n. 2, p. 87, 2006.

[89] MIGNOLO, Walter. *Histórias locais, projetos globais*: colonialidade, saberes subalternos e pensamento liminar. Belo Horizonte: UFMG, 2003, p. 40-41.

[90] KYMLICKA, Will. *Ciudadania multicultural*. Barcelona: Paidós, 1996. p. 26.

[91] MONTANARI JUNIOR, Isaias. Terra Indígena e a Constituição Federal: pressupostos constitucionais para a caracterização das terras indígenas. In: CONGRESSO NACIONAL DO CONPEDI, 15., 2006, Manaus . *Anais*... Manaus, 2006. p. 6.

[92] *Article 231*. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/

Besides, it also acknowledged them as subjects of rights, so they could legally claim their rights without others assistance or representation.[93]

Perplexingly, Brazilian constitution has acknowledged Indians in different organisations, languages, customs and traditions, but at the same time, it has included them in the National Education System, in which Indian children learn Portuguese in First and Middle Schools, to get them prepared for future professions.[94] In this education system, there is no difference among the ethnic values of each group, even though the law establishes Indians must receive the minimum amount of knowledge to get basic education and respect Brazilian cultural, artistic and national values. According to this legal aspect, Indians are obliged to study a pattern that does not correspond to their ethnic peculiarities. It is an acculturation process.

The situation worsens considering the national policy to Indians bases on a generic notion of Indians, not considering some ethnicities share secular existence with Brazilian society, while others share some decades, not even considering the uncontacted tribes.

Therefore, affirmative action to Indians is a paradox between acknowledging them their organisation and, at the same time, connecting them to national parameters that do not take their differences and peculiarities into consideration. For instance, the Brazilian government has established the "Guidelines to a National Policy for Indigenous Education"[95] in 1993, the "National guidelines to Indigenous Schools",[96] in 1999, and the "National Policy for Indigenous Health",[97] in 2002.

---

constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 2, 2017.

93 SANTOS FILHO, Roberto Lemos dos. *Apontamentos sobre o direito indigenista*. 1. ed. Curitiba: Juruá, 2006. p. 47.

94 COELHO, Elizabeteh Maria Beserra. Ações Afirmativas e Povos Indígenas: o princípio da diversidade em questão. *Revista Políticas Públicas*, v. 10, n. 2, p. 90, 2006.

95 BRASIL. Ministério da Educação e da Cultura. *Diretrizes para a Política Nacional de Educação Escolar Indígena*. Brasília, DF, 1993.

96 BRASIL. Ministério da Educação e da Cultura. CEB. *Diretrizes Nacionais Para o Funcionamento das Escolas Indígenas*. Brasília, DF, 1999.

97 BRASIL. Ministério da Saúde. *Política Nacional de Atenção à Saúde dos povos Indígenas*. Brasília, DF, 2002.

All the mentioned actions work as acculturation processes to Indians and do more harm than good to their cultural diversity, as Brazilian government has suggested solutions that did not involve the Indians participation, and did not observed previous studies on the topic.

Things have been more difficult since 2012 when the government extended the university quota system (designed to Afro-Brazilians) to Indians as if there were no historical differences between these two groups.

Thus, the Constitutional guarantee regarding Brazilian Indians' organisation, language and customs does not exactly exist regarding affirmative action measures, despite the authorities' speeches; considering they are arbitrary and colonialist, deprive them of their culture, and aim Indians as a whole, without taking into consideration the specificities of each ethnicity.

Their lands demarcation has not fully occurred so far, due to a great number of political and cultural aspects that impede the demarcation process to flow, even though the 1988 Constitution had established five years to the total demarcation in the country. However, the number of current demarcations is over 355, counting from the 1988 Constitution promulgation, according to the Ministry of Justice.[98]

2.4 Sexual orientation bias and Affirmative Action Measures aimed at the LGBT Community (Lesbians, Gays, Bisexuals, Cross-Dressers, Transsexuals, and Transgenders)

Brazilian society registers the highest level of biased actions against human dignity concerning sexual orientation[99] because sexual orientation was at first a mental disease, according to the World Health Organisation. Therefore, people who did not have sexual orientation according to the patterns, would be isolated, embarrassed and discriminated. That is so, the only

[98] ANJOS FILHO, Robério Nunes dos. Breve balanço dos direitos das comunidades indígenas: alguns avanços e obstáculos desde a Constituição de 1988. *Revista Brasileira de Estudos Constitucionais*, Belo Horizonte, v. 2, n. 8, p. 10, out. 2008.

[99] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 92.

policies aimed at those in the group, in the 80's, related only to HIV prevention and families' support.[100]

Therefore, this group had no access to civil and social rights in Brazil, as their union did not represent a family union according to the law, until the 1988 Constitution promulgation. For instance, their civil partnership was not acknowledged, they had no rights to maintenance payments or pensions for death, nor to any security rights, and not even inheritance rights.

A significant aspect to mention is the government has not created the affirmative action measures aiming this group, considering its constant omission regarding the topic. They derived from civil rights movements that, with parades and protests for their rights' acknowledgement,[101] started claiming in courts, which lead Brazilian courts of law to discuss biased actions of sexual orientation.

Since the 1988 Constitution promulgation (that established defeating discrimination), facing the prejudice became more intense in Brazil. The leading cases culminated in proactive actions from the Judiciary Branch that started interfering in the Executive and Legislative Branches political choices, to acknowledge civil and social rights to the LGBT community.[102]

The first judicial decisions date from the 90's, when civil partnerships had the rights to social rights in the Brazilian General Social Welfare Policy, which stimulate the States and Municipals Social Policies to do likewise, offering same-gender couples the same rights heterosexuals did.[103] The repeated number of sentences led the National Institute of Social Security to acknowledge the o right of pension to same-gender couples, whenever

[100] MELLO, Luiz; AVELAR, Rezende Bruno de; MAROJA, Daniela. Por onde andam as Políticas Públicas para a População LGBT no Brasil. *Revista Sociedade e Estado*, v. 27, n. 2, p. 295, maio/ago. 2012.

[101] ALVAREZ, Sonia. A globalização dos feminismos latino-americanos. In: ALVAREZ, Sonia; DAGNINO, Evelina; ESCOBAR, Arturo (Org.). *Cultura e política nos movimentos sociais latino-americanos*. Belo Horizonte: Editora UFMG, 2000. p. 385.

[102] RAMOS, Silvia; CARRARA, Sérgio. A constituição da problemática da violência contra homossexuais: a articulação entre ativismo e academia na elaboração de políticas públicas. *Physis - Revista de Saúde Coletiva*, v. 16, n. 2, p. 189, ago./dez. 2006.

[103] RAMOS, Silvia; CARRARA, Sérgio. A constituição da problemática da violência contra homossexuais: a articulação entre ativismo e academia na elaboração de políticas públicas. *Physis - Revista de Saúde Coletiva*, v. 16, n. 2, p. 189, ago./dez. 2006.

their partners died, in an administrative decision published on December, 12th, 2010.[104]

The Superior Court of Justice declared same-gender couples could adopt children at the beginning of 2010[105] and it guaranteed civil partners appliance in the adoption register, whatever the children's age or gender, that same year.[106]

The Supreme Federal Court also acknowledged the civil partnership with its property effects to same-gender couples, in 2011.[107] The National Council of Justice implemented the Resolution 175 to determine register offices to promote civil marriage (civil partnership) to same-gender couples.[108]

The Superior Court of Justice decided, in 2017, all transgender people, including those who have not undergone gender confirmation surgery (GCS), have the right to change the gender at register offices. That bases on the fact psychosocial identity must prevail over biological identity; therefore, surgical intervention cannot be a requisite to change gender in public documents.[109]

The Judiciary Branch actions represent considerable advances regarding rights to this minority group because there was the recognition of maintenance payments, health insurance plans, income tax deductions and even inheritance rights to same-gender civil partners.

The civil rights movements were fundamental to press Brazilian government to act in cases of discriminatory acts against the LGBT community. They made it possible to include five actions in the National Human Rights Programme, all of them regarding *sexual orientation* as a way to promote the fundamental rights to freedom, opinion and expression, and ten actions

[104] MARTINS, Sergio Pinto. *Direito da Seguridade Social*. 30. ed. São Paulo: Atlas, 2010. p. 366.
[105] BRASIL. Superior Tribunal de Justiça. *Recurso Especial 889.852-RS*. 2010.
[106] BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 615.264*. 2010.
[107] BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade (ADI) 4277 e Arguição de Descumprimento de Preceito Fundamental (ADPF) 132*. 2011.
[108] BRASIL. Conselho Nacional de Justiça. *Resolução 175*, de 14 maio 2013. Available at: <http://www.cnj.jus.br/atos-normativos?documento=1754>. Access on: Sept. 3, 2017.
[109] BRASIL. Superior Tribunal de Justiça. *Recurso Especial 1.626.739/RS*. 2017.

aimed at promoting equal rights to *Gays, Lesbians, Cross-Dressers, Transsexuals and Bisexuals*.[110]

Their pressure also led the Human Rights Department, in the Brazilian Presidency, to create the programme "Brazil without homophobia" in 2004, aimed at combating violence and discrimination against the LGBT community and promoting their citizenship. Consequently, in 2005 and 2006 Brazil created the "Human Rights And Same-Gender Citizenship Reference Centres" in every capital of the Brazilian States, to promote the LGBT group psychological, legal and social assistance. Besides, eight public universities implemented the "National Reference Centres of Human Rights and Same-Gender Citizenship" in 2006. However, most of them no longer exist due to lack of financial resources and investments.[111]

Brazilian government issued an Administrative Ruling, in 2008, to establish the Unified Health System promotes gender confirmation surgery (GCS) in public hospitals; anyone can require it in health centres along the country. Later, in 2010, the National Treasury Attorney's Office acknowledged same-gender spouses as dependants to income tax deductions.

All the mentioned measures show Brazil is about to break cultural discrimination barriers regarding sexual orientation. The 1998 Constitution made it possible to build affirmative action measures since it determines the state obligation to promote general welfare without discrimination.

Still, there is a lot to do to prevent violence against the LGBT community until Brazil completely extinguishes homophobia. According to the "Gay Group in Bahia" 117 people died in 2017 from homophobic violence, a worrying rate of a murder every twenty-five hours.[112] Among the victims, most are cross-dressed and Transgenders, the most socially stalked victims in Brazil.

---

[110] RAMOS, Silvia; CARRARA, Sérgio. A constituição da problemática da violência contra homossexuais: a articulação entre ativismo e academia na elaboração de políticas públicas. *Physis - Revista de Saúde Coletiva*, v. 16, n. 2, p. 185-205, ago./dez. 2006.

[111] MELLO, Luiz; AVELAR, Rezende Bruno de; MAROJA, Daniela. Por onde andam as Políticas Públicas para a População LGBT no Brasil. *Revista Sociedade e Estado*, v. 27, n. 2, p. 297, maio/ago. 2012.

[112] VINHAL, Gabriela. A cada 25 horas, uma pessoa LGBT é assassinada no Brasil, aponta ONG. *Correio Brasiliense*, 17 maio 2017. Available at: <http://www.correiobraziliense.com.br/

The LGBT community has conquered important social and civil rights regarding human dignity; at the same time, they still face social bias. Therefore, it is necessary to create new ideas of public policies aimed at this minority group, able to address the complex issue regarding sexual orientation bias.

2.5 Building positive discrimination measures in favour of disabled people in Brazil

Disabled people did not have basic rights assured in Brazil for an expressive amount of time, i.e., access to public or private offices and free locomotion outdoors. Pejorative expressions were common before the 1988 Constitution promulgation, as "lame", "cripple", and "retard", not to mention more, and there was no perspective of creating accessible conditions to them.[113]

This historical exclusion explains why, in 2010, only 403,2 thousand, from the 45 millions of disabled people in Brazil had jobs, according to the Brazilian Institute of Geography and Statistics.[114] Besides, some Indigenous tribes still kill disabled babies, by burying them alive, in the belief the "evil" they possess shall die with them in their grave.[115]

Although Brazil is a signatory of the Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1982), both from the United Nations, their real inclusion only happened with the 1988 Constitution.[116]

---

app/noticia/brasil/ 2017/05/17/internas_polbraeco,595532/a-cada-25-horas-uma-pessoa-lgbt-e-assassinada-no-brasil.shtml>. Access on: Sept. 3, 2017.

[113] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 104.

[114] INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICAS. *Censo 2010*. Available at: <https://censo2010.ibge.gov.br/resultados.html>. Access on: Sept. 3, 2017.

[115] SANTOS-GRANERO, Fernando. Hakani e a campanha contra o infanticídio indígena: percepções contrastantes de humanidade e pessoa na Amazônia brasileira. *Mana*, Rio de Janeiro, v. 17, n. 1, p. 131-159, Apr. 2011.

[116] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 112.

The constitution legally assures the quota system for disabled people in the civil service (public contests)[117] and ensures their access to public buildings and public transportation.[118] It also implements the "Continuous Cash Benefit Programme" for the payment of a minimum wage to disabled people who are unable to take care of themselves, nor by their families.[119] From that moment on, there has been an expressive number of affirmative action measures to favour this group regarding social inclusion.

The Brazilian Government implemented "the National Plan for the Rights of Persons with Disabilities" in 1989, by the Law 7.853 and the Decree 3.298, with measures to integrate disabled people, through actions in education, health, labour market and accessibility.[120]

Therefore, Brazilian law assured disable people the right to a public and free education, in a system adapted to their needs.[121] However, there is

[117] *Article 37*. The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and also the following: [...] *VIII* – the law shall reserve a percentage of public offices and positions for handicapped persons and shall define the criteria for their admittance. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 3, 2017.

[118] *Article 227. [...] Paragraph 2*. The law shall regulate construction standards for public sites and buildings and for the manufacturing of public transportation vehicles, in order to ensure adequate access to the handicapped. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 2, 2017.

[119] *Article 203*. Social assistance shall be rendered to whomever may need it, regardless of contribution to social welfare and shall have as objectives: [...] *V* – the guarantee of a monthly benefit of one minimum wage to the handicapped and to the elderly who prove their incapability of providing for their own support or having it provided for by their families, as set forth by law. In: BRASIL. *Constituição*. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo /Constitution_2013.pdf>). Access on: Sept. 2, 2017.

[120] BRASIL. *Lei n. 7.853*, de 24 de outubro de 1989. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7853.htm>. Access on: Sept. 3, 2017.

[121] Article 2. the Government shall guarantee disabled people all basic rights, including the rights to education, health, labour, leisure, social security, childhood and motherhood as-

a small number of institutions following the rules to inclusion; most of them argue there are no resources to implement the imposition, a low number of trained teachers and lack of adapted courseware.[122]

A reinforcement of Brazilian law regarding disabled people happened in 2014, by the law n. 13.005 that sets strategies and goals for the year 2024, aiming at guaranteeing access and quality in education, in an equal and democratic way.[123] The plan's goal number 4 is the universalisation of basic inclusive education, preferentially in regular schools, to disabled people, aged between 04 to 17 years old.[124]

Regarding health, the mentioned law has permitted disable people to freely access public and private health centres and the benefits of early diagnosis of disabling diseases.[125] Law determines the state must offer free vaccines through immunisation campaigns.[126]

Likewise, the state must offer free medication to disabled people,[127] including prosthetics and orthotics (whether physical, visual disability or hearing impairment) to favour their functional suitability. However, the Uni-

---

sistance, among others on the 1988 Constitution that provide them welfare in society and economy. In: BRASIL. Lei n. 7.853, de 24 de outubro de 1989. Dispõe sobre o apoio às pessoas portadoras de deficiência [...] e dá outras providências. *Diário Oficial da União*, Brasília, DF, 25 out. 1989. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7853.htm>. Access on: Sept. 3, 2017.

[122] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 215.

[123] BRASIL. *Lei n. 13.005*, de 25 de junho de 2014. Available at: <http://www.planalto.gov.br/ccivil_03 /_ato2011-2014/2014/lei/l13005.htm>. Access on: Sept. 3, 2017.

[124] BRASIL. Instituto Nacional de Estudos e Pesquisas Educacionais (Inep). *Plano Nacional de Educação*: PNE 2014-2024: linha de base. Brasília: Inep, 2015. Available at: <http://www.publicacoes.inep.gov.br /portal/download/1362>. Access on: Sept. 3, 2017.

[125] BRASIL. Lei 8.080, de 19 de setembro de 1990. Dispõe sobre as condições para a promoção, proteção e recuperação da saúde, a organização e o funcionamento dos serviços correspondentes e dá outras providência. *Diário Oficial da União*, Brasília, DF, 20 set. 1990. Available at: <http://www.planalto.gov.br/ccivil_03 /leis/L8080.htm>. Access on: Sept. 3, 2017.

[126] BRASIL. Lei 8.080, de 19 de setembro de 1990. Dispõe sobre as condições para a promoção, proteção e recuperação da saúde, a organização e o funcionamento dos serviços correspondentes e dá outras providência. *Diário Oficial da União*, Brasília, DF, 20 set. 1990. Available at: <http://www.planalto.gov.br/ccivil_03 /leis/L8080.htm>. Access on: Sept. 3, 2017.

[127] BRASIL. Lei 8.080, de 19 de setembro de 1990. Dispõe sobre as condições para a promoção, proteção e recuperação da saúde, a organização e o funcionamento dos serviços correspondentes e dá outras providência. *Diário Oficial da União*, Brasília, DF, 20 set. 1990. Available at: <http://www.planalto.gov.br/ccivil_03 /leis/L8080.htm>. Access on: Sept. 3, 2017.

fied Health System does not fulfil their needs, due to lack of funding, which made it impossible to continue a large number of treatments offered.[128]

Also, private health insurance plans must accept disabled people as contracting parties; imposing them restrictions or banishment is illegal.[129]

Besides the important innovations in Law 7.853, another important advance was the law 8.112 (also known as Federal Civil Servant Statute), from 1990, which established a 20% quota system to Union's servants with disabilities.[130] Private initiative adopted the quota system in 1991; companies with more than a hundred employees should have 2% to 5% of their staff formed by recovered people or skilled disabled people.[131]

Even though the law established quotas for disabled people are mandatory to private companies, there is an expressive number of illegal practices in Brazil.[132] The Ministry of Labour and the Federal Public Prosecution Service constantly intervene to reinforce the law, whether by extrajudicial means, as Conduct Adjustments Declarations, or judicially, with the proper law suits.

Accessibility, the major difficulty to disabled people, showed important advances from 2000 and on. The law 10.098 obliged the state to

[128] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 216.

[129] *Article 14*. Due to the consumer's age, or the disabled person's condition, no impediment shall be opposed to anyone to participate in private social insurance plans. In: BRASIL. Lei n. 9.656, de 03 de junho de 1998. Dispõe sobre os planos e seguros privados de assistência à saúde. *Diário Oficial da União*, Brasília, DF, 04 jun. 1998. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9656.htm>. Access on: Sept. 3, 2017.

[130] *Article 5*, Paragraph *2* - It is assured the right to apply for public contests for disabled people, to positions compatible to their needs, with a quota system of 20% of the vacancies offered. In: BRASIL. Lei n. 8.112 de 11 de dezembro de 1990. Dispõe sobre o regime jurídico dos servidores públicos civis da União, das autarquias e das fundações públicas federais. *Diário Oficial da União*, Brasília, DF, 19 abr. 1990. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L8112cons.htm>. Access on: Sept. 3, 2017.

[131] *Article 93*. The companies with a hundred or more employees shall have from 2% to 5% of their staff formed by recovered people or skilled disabled people. In: BRASIL. Lei n. 8.213 de 24 de julho de 1991. Dispõe sobre os Planos de Benefícios da Previdência Social e dá outras providências. *Diário Oficial da União*, Brasília, DF, 25 jul. 1991. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L8213cons.htm>. Access on: Sept. 3, 2017.

[132] BARROS, Maria Magdala Sette de. Portadores de deficiência e o concurso público. *Boletim dos Procuradores da República*, a. IV, n. 45, p. 22-24, jan. 2002.

promote accessibility to disabled people by removing obstacles from public buildings and streets, urban furniture, buildings constructions and rebuilding processes, transport and communication. Besides, it extended the rules to private buildings, commuter transport and communication and public signs systems.[133]

The Law 12.008 (2009), represents another important advance to favour this minority group. It establishes all the administrative proceedings at Federal Administration Offices, as well the judicial proceedings regarding interests of disabled people (physically or mentally disabled) shall be fast-track cases.[134] That benefitted them with agility regarding their claims in public offices or the Judiciary Branch.

The Brazilian law named "The Inclusion of People with Disabilities Act" (also known as The Disabled People Statute), came into effect on January 3rd, 2016. It aims to promote them their rights and fundamental freedoms with equal conditions, to include and provide them citizenship.[135] A new system to support disabled people's making their decisions is one of this law's major accomplishments regarding autonomy and legal capacity.

Despite the progress the affirmative action measures have achieved to disabled people, there is still a lot to do. Even though Brazilian law establishes significant protection to the minority groups, the public initiative does not accomplish them, claiming there is not enough financial fund to do so; neither does the society, by the argument those measures are merely assistant ones.

---

[133] BRASIL. *Lei n. 10.098*, de 19 de dezembro de 2000. Available at: <http://www.planalto.gov.br/ ccivil_03/leis/L10098.htm>. Access on: Sept. 3, 2017.

[134] *Article 69-A*: The suits involving the following claimers shall be treated as fast track, in every instance or organ: II - disabled people (physically or mentally disabled). In: BRASIL. Lei 12.008, de 29 de julho de 2009. Altera os arts. 1.211-A, 1.211-B e 1.211-C da Lei nº 5.869, de 11 de janeiro de 1973 [...] e dá outras providências. *Diário Oficial da União*, 30 jul. 2009. Available at: <http://www.planalto.gov.br/Ccivil_03/_Ato2007-2010/2009/Lei/L12008.htm>. Access on: Sept. 3, 2017.

[135] BRASIL. *Lei n. 13.146*, de 6 de julho de 2015. Available at: <http://www.planalto.gov.br/ccivil_03/_ ato2015-2018/2015/lei/l13146.htm>. Access on: Sept. 3, 2017.

3 Affirmative action measures' results in Brazil: rights' effectiveness or privileges?

The amount of affirmative action measures the Brazilian government has adopted so far, mainly those after the 1988 Constitution promulgation, indicate the country has acknowledged there are discriminatory acts regarding race, ethnicity, gender, and restriction acts toward disabled people.

However, the affirmative action measures implementation has led to controversial aspects, since many people consider those measures are unreasonable to the country's reality.[136] Some claim public policies to favour separate races, ethnicities and cultures do not correspond the country situation, considering its mixed-culture diversity.[137] They also sustain it is impossible to identify the actions recipients since dividing the country into races would mean denying the mixed-culture and the racial democracy the country has developed so far. Thus, they say the measures, as the Afro-Brazilians quotas, only create a new state with two different races.

They also sustain the measures favour some groups in detriment of the rest of the population, rejecting meritocracy, creating privileges, confronting the right to equal treatment.[138] As a result, the favoured people would be considered unable to achieve their results, remaining inferior and stereotyped.

Nevertheless, these comments against the measures do not sustain themselves accordingly to the right of equal treatment, because according to Aristotle, "the worst form of inequality is to try to make unequal things

[136] FRY, Peter; MAGGIE, Yvonne. Cotas raciais: construindo um país dividido? *Econômica*: Revista da Pós-Graduação em Economia da UFF, Niterói, v. 6, n. 1, p. 156, jun. 2004.
[137] FRY, Peter; MAGGIE, Yvonne. Cotas raciais: construindo um país dividido? *Econômica*: Revista da Pós-Graduação em Economia da UFF, Niterói, v. 6, n. 1, p. 157-161, jun. 2004.
[138] MOEHLECKE, Sabrina. Ação Afirmativa: história e debates no Brasil. *Cadernos de Pesquisa*, n. 117, p. 210, nov. 2002.

equal", therefore, we must treat unequal people differently to achieve full equality.[139]

Thus, positive discrimination measures play an important role in correcting historically rooted social distortions, since society is unable to solve and overcome them. An important aspect to consider is the actions are temporary and shall disappear when they achieve full equality, therefore the argument they create privileges does not prevail. The affirmative action measures are a temporary, but a fundamental step to apply the equality principle in a better way.

To those who do not trust in affirmative action measures, there is a question: how is it possible to guarantee equal access to civil and social rights to Afro-Brazilians, brown-skinned people, Indians, women, the LGBT community and disabled people in Brazil? The society impede those minorities to have equal access to their rights. Thus, there is no other way to achieve them than through positive discrimination actions, favouring unequal people to become equal to the other members of their society.

It is impossible to explain a country formed by the mix of cultures and supposed racial democracy that has 54% of Afro-Brazilians in its population; however, they are only 17,4% of the richest people and 76% of the poorest ones.[140] Likewise, it is impossible to sustain positive discrimination actions are unnecessary if, in 2008, Afro-women income represented R$ 383; Afro-men income was R$ 583; white women income was R$ 742, and white men reached R$ 1.181.[141]

The mentioned statistics are clear to demonstrate intense discriminatory acts towards gender, race, ethnicity and disabilities, making it diffi-

[139] AZEVEDO, Mário Luiz Neves de. Igualdade e equidade: qual é a medida da justiça social? *Revista Avaliação*, Campinas, Sorocaba, v. 18, n. 1, p. 129, mar. 2013.

[140] NEGROS representam 54% da população do país, mas são só 17% dos mais ricos. *UOL Economia*, São Paulo, 04 dez. 2015. Available at: <https://economia.uol.com.br/noticias/redacao/2015/12/04/negros-representam-54-da-populacao-do-pais-mas-sao-so-17-dos-mais-ricos.htm>. Access on: Sept. 2, 2017.

[141] BRUSCHINI, Cristina; LOMBARDI, Maria Rosa; MERCADO, Cristiano Miglioranza; RICOLDI, Arlene. Trabalho, Renda e Políticas Sociais: Avanços e Desafios. In: BRASTED, Leila Linhares; PITANGUY, Jacqueline (Org.). *O Progresso das Mulheres no Brasil 2003–2010*. Rio de Janeiro: CEPIA; Brasília: ONU Mulheres, 2011. p. 165-166.

cult for the discriminated people to achieve simple rights, available to the rest of Brazilian population.

Affirmative actions are necessary in Brazil. The next step is to understand the measures' advancements or stagnations regarding effectiveness in Brazil.

According to the United Nations in Brazil Report, from 2010, affirmative action measures have yielded significant social advancements, especially the ones aimed at implementing the recommendations from the III World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.[142]

3.1 **Effectiveness of affirmative action measures aimed at Afro-Brazilians**

Numbers show only 2,2% of brown-skinned people and 1,8% of Afro-Brazilians, aged from 18 to 24, attended universities or had bachelor degrees in 1997, according to the Ministry of Education in Brazil.[143] Afro-Brazilians represented 5,9% of university students in 2003, while brown-skinned were 28,3%. Seven years later the increased rate was 8,72% and 32,08%, respectively.[144]

The positive discrimination measured allowed more than 150 thousand Afro students to attend higher education in Brazil, between 2013 and 2015, which raised the rate of young Afro adults, aged from 18 to 24, to 8,8% (Afro-Brazilians) and 11% (brown-skinned). Brazil achieved its goal of having 50% of social and racial quotas in 2016.[145]

---

[142] ORGANIZAÇÃO DAS NAÇÕES UNIDAS NO BRASIL. *Ações afirmativas e avanços sociais*. Available at: <https://nacoesunidas.org/acoes-afirmativas-e-avancos-sociais/>. Access on: Sept. 20, 2017.

[143] SECRETARIA NACIONAL DE POLÍTICAS DE PROMOÇÃO DA IGUALDADE RACIAL. *Em 3 anos, 150 mil negros ingressaram em universidades por meio de cotas*. 2016. Available at: <http://www.seppir.gov.br/central-de-conteudos/noticias/2016/03-marco/em-3-anos-150-mil-negros-ingressaram-em-universidades-por-meio-de-cotas/>. Access on: Sept. 20, 2017.

[144] ASSOCIAÇÃO NACIONAL DOS DIRIGENTES DAS INSTITUIÇÕES FEDERAIS DE ENSINO SUPERIOR. *Pesquisa do perfil socioeconômico e cultural dos estudantes de graduação das IFES*. 2011. Available at: <http://www.andifes.org.br/wpcontent/files_flutter/1377182836Relatorio_do_perfi_ dos_estudantes_nas_universidades_federais.pdf>. Access on: Sept. 20, 2017.

[145] SECRETARIA NACIONAL DE POLÍTICAS DE PROMOÇÃO DA IGUALDADE RACIAL. *Em 3 anos, 150 mil negros ingressaram em universidades por meio de cotas*. 2016. Available at:

Therefore, the affirmative action measures taken to promote racial equality in Brazil permitted the Afro-Brazilians to access universities.

However, it is not possible to observe significant advances regarding Afro-Brazilians in the labour market, considering their incomes remain low. Besides, they still compound the minor portion of the richest people in the country and the massive bulk of the 10% poorest ones. Considering there are not enough public policies to reverse the reality, the condition is inert; quotas for higher education are an important step, but the effect shall appear in some decades when Afro-Brazilians get to labour market highly qualified.

3.2 **Effectiveness of affirmative action measures aimed at women**

Gender discrimination in Brazil has demanded three affirmative action measures: the first one, aimed at inserting women into politics;[146] the second one to include them in the labour market, in equal conditions as men;[147] and the third one to protect them against domestic violence.[148]

Regarding politics, women's participation is still innocuous, nevertheless all the attempts of positive discrimination measures. Even though there is a legal determination of 30% of women in political parties, when it comes to voting, most of them are not elected. As reported by the Brazilian

<http://www.seppir.gov.br/central-de-conteudos/noticias/2016/03-marco/em-3-anos-150-mil-negros-ingressaram-em-universidades-por-meio-de-cotas/>. Access on: Sept. 20, 2017.

[146] BRASIL. *Lei n. 9.100*, de 29 de setembro de 1995. Available at: <http://www.planalto.gov.br/ccivil_03/ leis /L9100.htm>. Access on: Sept. 3, 2017.

[147] CAVALCANTI, Stela Valéria. Igualdade, Discriminação Positiva e Políticas Públicas para Mulheres no Brasil. *Revista do Mestrado em Direito da Universidade Federal de Alagoas*, a. 2, n. 2, p. 368, 2006.

[148] The Law n. 11.340/2006 has created ways to fight domestic violence against women, according to the 1988 Constitution (article 226, paragraph 8) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. In: BRASIL. Lei n. 11.340, de 07 de agosto de 2006. Cria mecanismos para coibir a violência doméstica e familiar contra a mulher [...] e dá outras providências. *Diário Oficial da União*, Brasília, DF, 08 ago. 2006. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm>. Access on: Sept. 3, 2017.

Institute of Geography and Statistics, women were 51,4% of the Brazilian population, but only 12,3% of them were national politicians in 2013.[149]

Regarding the labour market, some advances have occurred. Women perceived 53,1% of men's salary in 1980. The amount raised to 63,1% in 1991, increased to 70% in 2000, went up to 71,5% in 2010, and in 2015 it got to 74%.[150] Even though inequality has been diminishing, new affirmative action measures are necessary to guarantee women and men earn the same amount. More than thirty years have passed since the 1988 Constitution, in which men and women are supposed to be alike, but intervention is still necessary since there is no gender equality in financial aspects.

Concerning labour positions, women participation arose in 17% in twenty years: they were 37,4% in 1995 and represented 43,7% in 2015, showing a more significant advance.[151]

Finally, about violence against women, the Brazilian Secretary of Policies to Women informed there were 1.133.345 (a million a hundred and thirty-three thousand, three hundred and forty-five) violence reports in 2016, 51% more than the numbers from 2015, 749.024 (seven hundred forty-nine thousand and twenty-four) cases.

The numbers show women are still victims of sexual offences and domestic violence in Brazil, despite the law to protect them and the specialised police stations. The number has been increasing, what demonstrates the measures taken so far are inefficient to protect women.

---

[149] INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICAS. *Indicadores sociais sobre a mulher*. Available at: <https://ww2.ibge.gov.br/home/presidencia/noticias/07032002mulher.shtm>. Access on: Sept. 3, 2017.

[150] FÁBIO, André Cabette. Dois séculos separam mulheres e homens da igualdade no Brasil. *Folha de São Paulo*, 26 set. 2015. Available at: <http://www1.folha.uol.com.br/asmais/2015/09/1675183-no-ritmo-atual-fim-da-desigualdade-entre-homens-e-mulheres-demoraria-240-anos.shtml>. Access on: Sept. 3, 2017.

[151] FÁBIO, André Cabette. Dois séculos separam mulheres e homens da igualdade no Brasil. *Folha de São Paulo*, 26 set. 2015. Available at: <http://www1.folha.uol.com.br/asmais/2015/09/1675183-no-ritmo-atual-fim-da-desigualdade-entre-homens-e-mulheres-demoraria-240-anos.shtml>. Access on: Sept. 3, 2017.

3.3 Effectiveness levels of affirmative action measures aimed at Indians

The affirmative action measures directed to Indians have two purposes: implement the 1988 Constitution content of demarcating the lands Indians have traditionally occupied and guarantee respect to their organisation, language, and customs.

When it comes to their lands, the 1988 Constitution has established the Brazilian government had five years to demarcate all the indigenous lands in the country.

The demarcation has not occurred so far due to some obstacles, from the political will to the resistant movement of the farmers who occupy the lands the Indians had previously occupied. It took more than ten years before the first advances started. Nowadays, almost 30 years after the 1988 Constitution, 13,8% of Brazilian territory belong to Indians, which means that of all the Brazilian territory (851.196.500 ha), 117.380.129 ha represent the 706 Indians lands already demarcated in Brazil.[152]

More than a half of those lands correspond to 355 ordinances of the Federal Government to demarcate Indigenous' lands over the past thirty years, with the 1988 Constitution's promulgation.[153]

Despite the advances, there is a lot more to debate on, since the Supreme Federal Court has decided the only lands to demarcate as Indigenous, are those occupied by Indians after October 5, 1988.[154] This decision has established a period for the demarcation suits, so immemorial possession no longer justifies demarcation in lands Indians did not occupy in 1988 because

[152] LOCALIZAÇÃO e Extensão das Terras Indígenas. *Povos Indígenas no Brasil*. Available at: <https://pib.socioambiental.org/pt/c/terras-indigenas/demarcacoes/localizacao-e-extensao-das-tis>. Access on: Sept. 3, 2017.

[153] ANJOS FILHO, Robério Nunes dos. Breve balanço dos direitos das comunidades indígenas: alguns avanços e obstáculos desde a Constituição de 1988. *Revista Brasileira de Estudos Constitucionais*, Belo Horizonte, v. 2, n. 8, p. 10, out. 2008.

[154] BRASIL. Supremo Tribunal Federal. Recurso Extraordinário 219.983. *Diário de Justiça da União*, 17 set. 1999.

of their expelling the past. This decision decreased the number of demarcations in Brazil.

Besides, in 2016 the United Nations reported[155] Brazilian Indians are in danger when it comes to the demarcation processes because a major portion of the demarcation suits have not developed, and there has been an increasing number of Indians murdered in lands disputes, in 2014 the number was 138 deaths.[156] This worrying situation demonstrates these measures' effectiveness level has been decreasing.

Regarding the positive discrimination actions aimed at preserving their customs, languages and traditions, few measures have been developed so far. Critics over the measures are severe because the policies to favour Indians are based on National guidelines to include the different ethnicities as if they are alike, not observing their differences.

The mentioned measures created by the Brazilian Government are the "Guidelines to a National Policy for Indigenous Education"[157] in 1993, the "National guidelines to Indigenous Schools",[158] in 1999, and the "National Policy for Indigenous Health",[159] in 2002. Even though the measures involve indigenous issues, they were not able to get their estimated results considering they have imposed a singular format that represses the cultural diversity among Indians, aiming to achieve the Indians insertion to Brazilian culture.

The inclusion policies aimed at Indians follow the same format as those aimed at Afro-Brazilians (quotas, for instance), they do not consider the Indians are a nation inside Brazil. They suffer an acculturation process, without respect

[155] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Relatório da missão ao Brasil da Relatora Especial sobre os direitos dos povos indígenas*. Available at: <http://unsr.vtaulicorpuz.org/site/index.php/es/ documentos/country-reports/154-report-brazil-2016>. Access on: Aug. 12, 2017.
[156] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Relatório da missão ao Brasil da Relatora Especial sobre os direitos dos povos indígenas*. Available at: <http://unsr.vtaulicorpuz.org/site/index.php/es/ documentos/country-reports/154-report-brazil-2016>. Access on: Aug. 12, 2017.
[157] BRASIL. Ministério da Educação e da Cultura. *Diretrizes para a Política Nacional de Educação Escolar Indígena*. Brasília, DF, 1993.
[158] BRASIL. Ministério da Educação e da Cultura. CEB. *Diretrizes Nacionais Para o Funcionamento das Escolas Indígenas*. Brasília, DF, 1999.
[159] BRASIL. Ministério da Saúde. *Política Nacional de Atenção à Saúde dos povos Indígenas*. Brasília, DF, 2002.

to their customs and their right to be different from the rest of the population. Thus, the affirmative action measures aimed at them are inefficient.

3.4 Effectiveness of affirmative action measures aimed at the LGBT group

The main affirmative action measures aimed at the LGBT group took place in Brazil in 2005 and 2006, when the government implemented the "National Reference Centres of Human Rights and Same-Gender Citizenship" in every capital city of all the Brazilian States, to promote the LGBT group legal, psychological, and social assistance.[160] Besides, the Unified Health System promotes gender confirmation surgeries (GCS) in all public hospitals, free of charge. Regarding the Judiciary Branch, due to the judge's proactive actions, the civil partnership between same-gender couples (with its property and pension rights) is a reality in Brazil.[161]

The first Governement measure, the reference centres, has not succeeded. The idea was good, indeed, but the resources were not enough to maintain the centres, so most of them have closed.[162] The attempt to transfer the service to Federal Universities has also failed, due to financial issues.

Regarding the gender confirmation surgeries (GCS) in all public hospitals, free of charge, their implementation was not simple as well. Until 1997 those surgeries were prohibited in Brazil, so the LGBT group was forced to find help in illegal foreign clinics.

The Government allowed those surgeries only in 2008, and until 2014 the number of surgeries was 9.867, including those to change the

[160] MELLO, Luiz; AVELAR, Rezende Bruno de; MAROJA, Daniela. Por onde andam as Políticas Públicas para a População LGBT no Brasil. *Revista Sociedade e Estado*, v. 27, n. 2, p. 297, maio/ago. 2012.

[161] RAMOS, Silvia; CARRARA, Sérgio. A constituição da problemática da violência contra homossexuais: a articulação entre ativismo e academia na elaboração de políticas públicas. *Physis - Revista de Saúde Coletiva*, v. 16, n. 2, p. 189, ago./dez. 2006.

[162] MELLO, Luiz; AVELAR, Rezende Bruno de; MAROJA, Daniela. Por onde andam as Políticas Públicas para a População LGBT no Brasil. *Revista Sociedade e Estado*, v. 27, n. 2, p. 297, maio/ago. 2012.

gender, to remove the breasts and the womb.[163] Accessing those services is still a struggle since there are only five credentialed hospitals in Brazil and the procedure demands a minimal number of professionals, including doctors, psychiatrics, endocrinologists, clinical doctors, nurses, psychologists, social workers, gynechologists and obstetricians, urologists and plastic surgeons.[164] Also, the time in the waiting list takes about ten years, which is the community's major complaint.

The most significant advances to the group came from judicial decisions. Dozens of law suits related to their lack of rights have permitted them to receive exaclty the same rights the rest of the society gets in the pensionary system, regarding social and civil spheres. Such astonishing impact resulted in private social insurance companies, banks and other Brazilian institutions recognising the rights to same-gender couples.

Nevertheless, homophobic acts of violence are still a worrying topic to consider regarding the LGBT community.[165] It is impossible to stand still and do nothing to change the reality when, in 2017, there is a murder every 25 hours in Brazil, and the victm's sexual orientation is the crime motivation.[166]

Even thoug the numbers are astonishing, the Brazilian Government has implemented no policies to change the reality so far.

[163] CIRURGIAS de mudança de sexo são realizadas pelo SUS desde 2008. *Governo do Brasil*, 2015. Availble at: <http://www.brasil.gov.br/cidadania-e-justica/2015/03/cirurgias-de-mudanca-de-sexo-sao-realizadas-pelo-sus-desde-2008>. Access on: Aug. 12, 2017.

[164] PACHECO, Clarissa. Apenas cinco hospitais fazem cirurgia transgenital pelo SUS no Brasil. *Jornal Correio*, 26 maio 2016. Available at: <http://www.correio24horas.com.br/noticia/nid/apenas-cinco-hospitais-fazem-cirurgia-transgenital-pelo-sus-no-brasil/>. Access on: Aug. 12, 2017.

[165] VINHAL, Gabriela. A cada 25 horas, uma pessoa LGBT é assassinada no Brasil, aponta ONG. *Correio Brasiliense*, 17 maio 2017. Available at: <http://www.correiobraziliense.com.br/app/noticia/brasil/ 2017/05/17/internas_polbraeco,595532/a-cada-25-horas-uma-pessoa-lgbt-e-assassinada-no-brasil.shtml>. Access on: Sept. 3, 2017.

[166] VINHAL, Gabriela. A cada 25 horas, uma pessoa LGBT é assassinada no Brasil, aponta ONG. *Correio Brasiliense*, 17 maio 2017. Available at: <http://www.correiobraziliense.com.br/app/noticia/brasil/ 2017/05/17/internas_polbraeco,595532/a-cada-25-horas-uma-pessoa-lgbt-e-assassinada-no-brasil.shtml>. Access on: Sept. 3, 2017.

3.5 Effectiveness of affirmative action measures for people with disabilities

According to the Brazilian Institute of Geography and Statistics, 24% of the Brazilian population (45 million people) had some disability, whether in hearing, visual, physical or intellectual aspect in 2016.[167] The number led to a great number of public policies aimed at promoting disabled people social inclusion, especially in education, labour market and accessibility.[168]

Concerning education, the first positive discrimination action happened in 1989 and aimed at providing access to public, and free of charge education in a system adapted for disabled people's needs.[169] However, after the system's creation, few schools have followed the rules in the law since it was not mandatory for them to have specialised teachers; also and few institutions have adapted their facilities or have acquired appropriated courseware for each type of disability.[170] On the contrary, the law admitted disabled students to attend non-regular schools, which increased their exclusion, considering they studied in schools aimed only at disabled students, similar to a segregation mode.

The segregation reveals itself in the numbers: from 1996 to 2003, 504.039 enrolments of disabled students were in specialised education

[167] CRESCE número de pessoas com deficiência no mercado de trabalho formal. *Portal Brasil*, 27 set. 2016. Available at: <http://www.brasil.gov.br/economia-e-emprego/2016/09/cresce-numero-de-pessoas-com-deficiencia-no-mercado-de-trabalho-formal>. Access on: Sept. 3, 2017.

[168] BRASIL. *Lei n. 7.853*, de 24 de outubro de 1989. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7853.htm>. Access on: Sept. 3, 2017.

[169] Article 2. the Government shall guarantee disabled people all basic rights, including the rights to education, health, labour, leisure, social security, childhood and motherhood assistance, among others on the 1988 Constitution that provide them welfare in society and economy. In: BRASIL. Lei n. 7.853, de 24 de outubro de 1989. Dispõe sobre o apoio às pessoas portadoras de deficiência [...] e dá outras providências. *Diário Oficial da União*, Brasília, DF, 25 out. 1989. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7853.htm>. Access on: Sept. 3, 2017.

[170] CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*. Belo Horizonte: Arraes Editores, 2009. p. 215.

(55,5%), and 15,6% of them attended special lessons.[171] Their inclusion was timid; there were 63.766 students (12,5%) using resource rooms and 81.375 students (16,4%) attending only regular lessons.[172]

There was a significant improvement in 2010: 80% of kids and teenagers with disabilities attended schools, 77% of them were in regular classes of basic education.

The National Education Plan, implemented in 2014, represented an important advance in affirmative action measures for disabled people.[173] It aims to universalise special education to disabled students aged from 4 to 17, preferentially in regular schools,[174] and resulted in 88,4% of children and adolescents with disabilities attending regular classes in basic education in 2015.[175]

Advances happened in the labour market as well, in public or private jobs, even though there was some resistance. Regarding public work positions, since 1988 there are quotas destined to disabled people, an achievement to the group. The measure effectiveness resulted from the legality principle, established in the 1988 Constitution that obliged them to follow the rules on the law 8.112/90,[176] which imposed the 20% quota system for disabled people in public contests.

---

[171] BRASIL. Ministério da Educação. Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira. *Censo escolar*, 2003. Available at: <http:/www.inep.gov.br/basic/censo escolar/sinopse/1996 e 2003>. Access on: Sept. 3, 2017.

[172] MENDES, Enicéia Gonçalves Mendes. A radicalização do debate sobre inclusão escolar no Brasil. *Revista Brasileira de Educação*, v. 11, n. 33, p. 357-559, set./dez. 2006.

[173] MORAES, Louise. *A Educação Especial no Contexto do Plano Nacional de Educação*. Brasilia/DF: Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira, 2017. p. 9.

[174] BRASIL. *Lei n. 13.005*, de 25 de junho de 2014. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l13005.htm>. Access on: Sept. 3, 2017.

[175] BRASIL. Instituto Nacional de Estudos e Pesquisas Educacionais (Inep). *Relatório do 1º ciclo de monitoramento das metas do PNE*: biênio 2014-2016. Brasília: Inep, 2016. Available at: <http://download. inep.gov.br/outras_acoes/estudos_pne/2016/relatorio_pne_2014_a_2016.pdf>. Access on: Sept. 3, 2017.

[176] *Article 5, Paragraph 2* - It is assured the right to apply for public contests for disabled people, to positions compatible to their needs, with a quota system of 20% of the vacancies offered. In: BRASIL. Lei n. 8.112, de 11 de dezembro de 1990. Dispõe sobre o regime jurídico dos servidores públicos civis da União, das autarquias e das fundações públicas federais. *Diário Oficial da União*, Brasília, DF, 19 abr. 1990. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L8112cons.htm>. Access on: Sept. 3, 2017.

Concerning the private labour market, the so-called "Quotas Law" obliged the companies with 100 or more employees to reserve 2% to 5% of their job offers to disabled people.[177] This law is from 1991, but its effective implementation occurred only in 2004, when the Government solved gaps in it and established it was mandatory and object of further inspection.

With that 325,3 thousand jobs were given to disabled people in 2011, representing 0,70% of all employment contracts in Brazil. The number increased to 0,73% in 2013 and to 0,77% in 2014. It reached 0,84% in 2015, characterising 403,2 thousand disabled people working in Brazil.[178]

Since the measure implementation, the Ministry of Labour inspects companies and fines those that fail to comply the law. There were more than 4,5 thousand fines in 2014.[179]

However, Brazilian companies claim the high costs to adapt their facilities comparing to the low qualification of the beneficiaries, a resistance that raises difficulties in accomplishing the affirmative action measure. There were 9,3 million people who could benefit from the quota system in 2015, but only 827 thousand job offers were available in quotas. Such disproportion happens due to the fact a significant number of companies do not fulfil the regulation; they prefer to pay the fees to give disabled people opportunities in their staff.

An important aspect to mention is even though the law has advanced by establishing the quota system, discrimination toward disabled people remains. The Brazilian Association of Human Resources has conducted a sur-

[177] Article 93. The companies with a hundred or more employees shall have from 2% to 5% of their staff formed by recovered people or skilled disabled people. In: BRASIL. Lei n. 8.213 de 24 de julho de 1991. Dispõe sobre os Planos de Benefícios da Previdência Social e dá outras providências. *Diário Oficial da União*, Brasília, DF, 14 ago. 1998. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L8213cons.htm>. Access on: Sept. 3, 2017.

[178] CRESCE número de pessoas com deficiência no mercado de trabalho formal. *Portal Brasil*, 27 set. 2016. Available at: <http://www.brasil.gov.br/economia-e-emprego/2016/09/cresce-numero-de-pessoas-com-deficiencia-no-mercado-de-trabalho-formal>. Access on: Sept. 3, 2017.

[179] CRESCE número de pessoas com deficiência no mercado de trabalho formal. *Portal Brasil*, 27 set. 2016. Available at: <http://www.brasil.gov.br/economia-e-emprego/2016/09/cresce-numero-de-pessoas-com-deficiencia-no-mercado-de-trabalho-formal>. Access on: Sept. 3, 2017.

vey, and its results show 81% of the employers maintain disabled people in their companies just *to practise the law*. Besides, only 4% of them have admitted hiring disabled people because they believe in their potential, while 12% hire them regardless the quota system.[180]

The accessibility affirmative action measures aimed at disabled people are excellent regarding law, considering they are in the 1988 Constitution[181] and infra-constitutional laws.[182] Despite the advances, accessibility's accomplishment still represents a considerable challenge in Brazil.

Even though there are explicit rules about accessibility in private buildings, commuter transportation, and the communication and sign systems, the guarantee of the fundamental right to come and go does not exist to disabled people in most of Brazilian cities. That is so because commuter transportation, public and private buildings, restaurants, universities, hotels and other public spaces do not practise the accessibility rules.[183]

Regarding commuter transportation, the Government has prohibited making buses without access for disabled people since 2008; however, the fleets have some old buses, which represents a major obstacle to the accessibility implementation process.[184]

---

[180] CAOLI, Cristiane. 81% contratam pessoas com deficiência só 'para cumprir lei'. *Noticiário G1*, 07 maio 2015. Available at: <http://g1.globo.com/concursos-e-emprego/noticia/2014/11/81-contratam-pessoas-com-deficiencia-so-para-cumprir-lei.html>. Access on: Sept. 3, 2017.

[181] *Article 227. Paragraph 2*. The law shall regulate construction standards for public sites and buildings and for the manufacturing of public transportation vehicles, in order to ensure adequate access to the handicapped. *Article 244*. The law shall provide for the adaptation of presently existing sites and buildings of public use and of the public transportation vehicles in order to guarantee adequate access to the handicapped, as set forth in article 227, paragraph 2. In: BRASIL. Constituição. República Federativa de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. (English version at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/ Constitution_2013.pdf>). Access on: Sept. 2, 2017.

[182] BRASIL. *Lei n. 10.098*, de 19 de dezembro de 2000. Available at: <http://www.planalto.gov.br/ ccivil_03/leis/L10098.htm>. Access on: Sept. 3, 2017.

[183] ACCESSIBILIDADE é desafio para deficientes em todo o país. *Revista Exame*, São Paulo, 03 dez. 2012. Available at: <https://exame.abril.com.br/brasil/Accessibilidade-e-desafio-para-deficientes-em-todo-o-pais/>. Access on: Sept. 3, 2017.

[184] ACCESSIBILIDADE é desafio para deficientes em todo o país. *Revista Exame*, São Paulo, 03 dez. 2012. Available at: <https://exame.abril.com.br/brasil/Accessibilidade-e-desafio-para-deficientes-em-todo-o-pais/>. Access on: Sept. 3, 2017.

In the 2010 Census, the Brazilian Institute of Geography and Statistics only 4,7% of Brazilian streets have wheelchair perpendicular ramps.[185] The historical negligence reflects on nowadays difficulties to implement accessibility rules in Brazil. Conversely, the federal government established, in 2012, all the buildings in the Brazilian housing programme called "Minha Casa Minha Vida"[186] shall follow accessibility rules, which represents a considerable increment in this sector.

By the way, the low rate of accessibility in public spaces is considerably different from the high rate observed in private buildings, since Brazilian law establishes rules to regularise[187] buildings and the Public Prosecution Service inspects and sues people in case of irregular buildings, demanding the practise of law.

Currently, all private real estate developments must fulfil all the accessibility regulation to obtain the licences; this results in a raising number of accessible buildings to Brazilian disabled people.

Conclusion

Analysing the affirmative action measures's historical development shows how discrimination and social exclusion have evolved from formal equality, where there was no space for positive discrimination, to the quest for substantial equality, based on compensatory policies favouring excluded groups.

Achieving substantial equality became a public policy from the 1988 Constitution, with affirmative action measures aimed at Afro-Brazilians,

[185] INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICAS. *Censo 2010*. Available at: <https://ww2.ibge.gov.br/home/estatistica/populacao/censo2010/entorno/default_entorno.shtm>. Access on: Sept. 3, 2017.

[186] The programme "Minha Casa Minha Vida" is a Federal Government initiative of housing development to rectify the shortage of good quality in urban spaces to lower middle class Brazilians In: BRASIL. Caixa Econômica Federal. *Minha Casa Minha Vida - Habitação Urbana*. Available at: <http://www.caixa.gov.br/voce/habitacao/minha-casa-minha-vida/urbana/Paginas/default.aspx>. Access on: Sept. 3, 2017.

[187] BRASIL. *Lei n. 10.098*, de 19 de dezembro de 2000. Available at: <http://www.planalto.gov.br/ccivil_03/ leis/L10098.htm>. Access on: Sept. 3, 2017.

women, Indians, and disabled people. Also, the Constitution established the prohibition against all forms of discrimination, which led to actions favouring the LGBT group.

Brazil takes an important role in the international scenario because it is a signatory of all declarations, conventions and treaties on human rights and specially because it aims estinguishing all forms if discrimination in its territory. The 1988 Constitution promulgation happened thirty years ago and, since then, the Brazilian Government has been working hard on implementing public policies to compensate and guarantee full equality to the five historically discrimiminated groups.

Many affirmative action measures implemented in Brazil (university quotas and public service, private companies and political parties, among others) are polemic, and their results are leading cases in the country's highest courts of justice. It happened because, while to some people the measures are necessary and valid, considering they can correct historical discrimination processes, to others they represent nothing but a new form of discrimination, which they consider unsuitable nowadays. According to this second group, the affirmative action measures are merely assistant, and they would only weaken the beneficiaries' self-esteem because their achievements in society would not consider their merits.

However, the emotional arguments do not sustain themselves according to the social exclusion numbers collected by the United Nations, the Organization of American States, and the Brazilian Institute of Geography and Statistics. How is it possible to assure affirmative action measures are unnecessary when Afro-Brazilians are 54% of the Brazilian population but represent only 17,4% of the richest people and 76% of the poorest?

How to say the public policies are "assistant" when they aim to implement affirmative actions in a country where, in 2008, Afro-women got only R$ 383 a month, Afro-men got R$ 583, white women got R$ 742, and white men made R$ 1.181, a clear social discrimination based on gender and race?

Is there a way to close the eyes to these minorities, when there were 3.398 violations toward the LGBT group in 2013 and among the total daily number of human rights violations that same year, 9,31were homophobic acts?

Is it possible to claim positive discrimination measures are avoidable when the Indians lands' demarcation suits are inert, and the number of indigenous deaths in lands dispute has significantly raised, reaching 138 in 2014?

Affirmative action measures have arisen in Brazil as major importance instruments to fight discrimination; they have become important tools to achieve the right to equal treatment. In almost thirty years, Afro-Brazilians have accessed universities, women have participated in politics and the labour market, the LGBT group has conquered social and civil rights, and the disabled people have participated more in society.

Regarding Indians, the affirmative action measures influenced their lands demarcation process and the respect to their traditions, languages and social organisation. Regarding Indians, however, there have been mistakes in the policies aimed at them, because the positive discrimination policies are acculturation ones, and do not respect the Indians characteristic of a nation inside Brazil. They confuse them with a group that needs social insertion in a society that does not represent their culture.

In summary, these are the positive and negative aspects concerning affirmative action measures in Brazil, how they show themselves in the Brazilian young and slow democracy. It is to remember they are mere instruments to fight social inequalities. By themselves, the measures do not transform the Brazilian society. There is still a lot to do, and one must not forget the affirmative action measures depend on the Brazilian population values, that must consist on fraternity, tolerance, and respect to diversity, therefore Brazil shall overcome discrimination and inequalities and build the long-cherish dream of free, just and solidary society.

EQUALITY AS PROHIBITION OF DISCRIMINATION AND THE RIGHT TO (AND DUTY OF) INCLUSION: ACCESS TO HIGHER EDUCATION AND REGULATION OF THE BRAZILIAN PERSONS WITH DISABILITIES ACT

Ingo Wolfgang Sarlet[1]
Gabrielle Bezerra Sales Sarlet[2]

Introduction

Disability (here in a broad sense, including physical and mental disability, and using the term as incorporated into the international and constitutional legal grammar) is generally considered a characteristic trait of minorities and a factor—even in the 21st century—of prejudice, discrimination and even exclusion. However, aligning the idea of disability purely and simply with the notion of minority is, to say the least, to ignore that the numbers point in the opposite direction,[3] besides removing all and any paternalistic statements. Furthermore, when portraying the challenges imposed on society as regards full inclusion, an attempt is made to show that disability is a kind of identity trait and cannot be used to justify any kind of discrimination, save those of a positive nature (the so-called affirmative actions) that are in fact the object of a constitutional requirement and of international

[1] PhD and Post-Doctor in Law from the University of Munich, Full Professor at PUCRS, High Court Justice in the state of Rio Grande do Sul.

[2] PhD in Law from the University of Augsburg, Germany. Post-doctoral student at PUCRS and the University of Hamburg. Lawyer.

[3] The results of the demographic Census of 2010 indicate that 23.9% of Brazil's population have some kind of disability; in other words, 45,606,048 million people declared that they had at least one of the disabilities investigated. Among the regions, the Brazilian Northeast has the municipalities with the highest percentages of this part of the population. In: INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. *Censo Demográfico 2010. Características gerais da população, religião e pessoas com deficiência*. Censo demogr., Rio de Janeiro, 2010, passim. Available at: <http://biblioteca.ibge.gov.br/visualizacao/periodicos/94/cd_2010_religiao_deficiencia.pdf>. Access on: May 19, 2016.

law on human rights itself, in the sense of inclusion policies and ensuring an appropriate level in terms of equal chances (opportunities).

In order to understand the exclusion suffered by persons with disabilities and, especially, to try to outline an inclusive view, it is therefore necessary to densify the focus on a global bundle of representations which will include the legal system, without being restricted to it, although a cross-disciplinary approach is not a part of this study. For this purpose, this work consists of a preliminary analysis of the forms of protection and promotion of persons with disabilities in Brazil, and its main objective is to present—based on a dialogue with legal scholarship (legislation, opinion of jurists and case law)—to the Brazilian scenario the new model to approach disability, with profound repercussions on the legal-constitutional framework itself, in its different dimensions and manifestations, particularly as regards opportunities to enter and remain in higher education in Brazil.

More precisely, the present text discusses the articulation of legal protection (and promotion) of persons with disabilities with the general principle of (and general right to) equality, as recognized by the Federal Constitution of 1988 (henceforth, FC), especially evaluating the need to reread it and implement it in the light of the UN Convention on the Rights of Persons with Disabilities (CRPD), incorporated into national law through a special and reinforced procedure provided for in article 5, § 3, of the FC, so that this convention, having the legal force equivalent to that of a constitutional amendment, is now part of the so-called block of national constitutionality. Thus, it is a parameter both of the control of constitutionality and of the so-called control of conventionality, through which the compatibility of internal rules (and practice) with the parameters of international law regarding human rights must be ensured.

Besides this, based on the normative framework established by the so-called block of constitutionality, the text examines, in the light of the example of access to higher education, the constitutional consistency of the Brazilian Persons with Disabilities Act—Law nº 13,146 of July 2015—, particularly as regards the way this law ensures and promotes material equality using certain measures (inclusion policies) and overcoming factual inequal-

ities. In this context, we seek to answer—in the light of examples—whether and how the domestic legislative body (the FC and especially Law nº 13,146/2015, including the way it has been understood and applied by the various State actors) operates as an adequate set of instruments to perform the State's duty to include persons with disabilities.

As regards the path to be taken, we shall begin by proposing a few thoughts on equality as a principle and fundamental right (2), then present and evaluate special clauses (special rights to equality) that establish the prohibition to discriminate and the duty to include persons with disabilities, and also their legislative implementation (3), and then evaluate the actual and potential role of the FC and of Law nº 13,146/2015, as well as of other laws that regulated them, and their application by the State actors, so as to implement the constitutional and legal normative program, especially as regards access to higher education in Brazil for these people, and conclude with a few final considerations (4).

1 **Equality as a principle and fundamental right in the FC**

1.1 **General considerations**

Equality and justice are notions that are closely related to each other, and this connection in turn can be traced back, philosophically, to classical Greek thinking, especially the thinking of Aristotle, who associated justice with equality and suggested that people who are equal should be treated equally, whereas those who are different should be treated unequally,[4] although—it should be recalled—justice is not restricted to equality and should not be confounded with it.[5] Since then, the principle of equality (and the notion of isonomy) has been closely related to the notion of justice and

[4] Oustanding here is the work ARISTÓTELES. *Ética a Nicômaco*. 3. ed. Translation Mário da Gama Kury. Brasília: Editora UnB, 1992. p. 96, "if people are not equal, they will not have an equal participation in things", although also for Aristotle justice is not limited to equality.
[5] See, pars pro toto, BOBBIO, Norberto. *Igualdade e Liberdade*. 2. ed. Translation Carlos Nelson Coutinho. Rio de Janeiro: Ediouro, 1997. p. 14.

to many different theories on justice, inasmuch as, besides other reasons that can be invoked to justify this connection, justice is always something experienced by the individual, primarily in an intersubjective and relative manner, i.e. in their relationship with other individuals and in the way they themselves and others are treated.[6]

Furthermore—but also for this very reason—equality has become a central value for contemporary constitutional law, representing a veritable "touchstone" of modern constitutionalism,[7] as it is an integral part of the constitutional tradition inaugurated with the first declarations of rights and their incorporation into the constitutions since the constitutionalism of the liberal-bourgeois type.

Since then—and increasingly (despite the major changes that occurred in the understanding and application of the notion of equality over time)—,according to the appropriate formulation of José Joaquim Gomes Canotilho and Vital Moreira, "the principle of equality is one of the structuring principles of the global constitutional system, dialectically conjugating the liberal, democratic and social dimensions inherent to the concept of democratic and social Rule of Law",[8] which is (also) the case of the State designed by the FC.

Particularly as regards the subject of this analysis, the Convention on the Rights of Persons with Disabilities approved by the UN in 2006[9] (henceforth CRPD), becomes the normative (and binding) framework in the international scenario and one of the most relevant documents in the field of human rights insofar as it shows the need for a dialogue between the trans-

---

6 See, pars pro toto, KLOEPFER, Michael. *Verfassungsrecht II. Grundrechte*. München: C.H. Beck, 2010. p. 199.

7 See, among many others, ROSENFELD, Michel. Hacia una reconstrucción de la igualdad constitucional. In: CARBONEL, Miguel (Ed.). *El principio constitucional de igualdad. Lecturas de introdución*. México: Comisión Nacional de los Derechos Humanos, 2003. p. 69.

8 See CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa Anotada*. 4. ed. Coimbra: Coimbra Editora, 2007. v. 1. p. 336-337.

9 Brasil. Decreto n. 6.949, de 25 de agosto de 2009. Promulga a Convenção Internacional sobre os Direitos das Pessoas com Deficiência e seu Protocolo Facultativo, assinados em Nova York, em 30 de março de 2007. *Diário Oficial da União*, Brasília, DF, 26 ago. 2009. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6949.htm>. Access on: June 10, 2014.

national (international) legal dimension and the national legal system, so as to fully cover the human phenomenon and protect it adequately.

The aforementioned law defined, in its article 2, the discrimination suffered by people with disabilities as any differentiation, exclusion or restriction based on disability whose result is all and any kind of limitation of access to rights and guarantees, as well as to the different forms of policies of recognition of their uniqueness and also to the distribution of goods and resources. The CRPD and its optional protocol were approved by the Brazilian Congress in Legislative Decree n. 186 of 2008, in conformity with the provision of paragraph 3 of article 5 of the FC, with a legal force equivalent to that of constitutional amendments, forming, together with the FC and with Law 13,146 of 2015, the Persons with Disabilities Act (*Estatuto da Pessoa com Deficiência* [henceforth EPD]), which is usually called constitutional block.[10]

It should also be noted, in a preliminary phase, that in the case of the FC the inclusion of special clauses to forbid discrimination and also to provide for the inclusion (affirmative actions) of persons with disabilities was a significant advance in relation to the previous trajectory, preparing the terrain for the improvement and advance represented by the CRPD and by the EPD, as well as their impact on the rest of national legislation and even on acts of the Executive Power and decisions of the Courts, as we will identify and evaluate below.

On the other hand, although it is not possible to map all constitutional and international texts that somehow concern this point, one must not ignore that the problem of discrimination and the inclusion of persons with disabilities is situated in the broader context of the acknowledgment and development of the content and reach of the principle of equality and of the corresponding general right to equality, which is the object of a significant change in its meaning and scope, especially in the move from a strictly

[10] SILVA, Carolina Machado Cyrillo da. A convenção internacional sobre os direitos das pessoas com deficiência e a hierarquia entre os direitos humanos e direitos fundamentais da Constituição Brasileira de 1988. In: BERTOLDI, Marcia Rodrigues et al. (Ed.). (*Direitos fundamentais e vulnerabilidade social*: em homenagem ao professor Ingo Wolfgang Sarlet. Porto Alegre: Livraria do Advogado, 2016. p. 249-250.

formal concept of equality to a material notion, although this change did not occur in the same way everywhere.

From this perspective, in order to understand the evolution mentioned above, it is possible to identify three phases that represent the change in the understanding of the principle of (and right to) equality, namely: (a) equality understood as equality of everyone before the law, in which equality also means the affirmation of the prevalence of the law; (b) equality understood as prohibition of discrimination of any kind; (c) equality as equality of the law itself, thus an equality "in" the law.[11] The three phases will be dealt with from now on in the sphere of the distinction between formal equality and material equality, a distinction that is still central for the understanding, as a whole, of the principle of and right to equality as a human and fundamental right.

At any rate, as well recalled by Oscar Vilhena Vieira, the statement that all are equal before the law cannot be understood as a proposition of fact, but rather as a claim of a moral nature, so that equality is a socially and politically constructed claim which, on the legal level, is translated into an "ought", a duty of equal treatment, equal respect and consideration.[12] It is also in this perspective that we can situate the transition from a merely formal equality to an equality in the material sense, also seen as an equality of opportunities. This is the context in which the central problem of the present text is located, which deals with the prohibition of discrimination and the duty to promote persons with disabilities, mainly as regards the guarantee of access to higher education, which still is particularly significant in Brazil.

[11] See the summary of GARCIA, Maria Glória F. P. D. *Estudos sobre o Princípio da Igualdade*. Coimbra: Almedina, 2005. p. 36.

[12] See VIEIRA, Oscar Vilhena. *Direitos Fundamentais. Uma leitura da jurisprudência do STF*. Colaboração de Flávia Scabin. São Paulo: Malheiros, 2006. p. 282-83. Similarly, likewise refuting a natural equality and claiming that equality is a "construct", see also ROTHENBURG, Walter Claudius. "Igualdade", In: LEITE, George Salomão; SARLET, Ingo Wolfgang (Ed.). *Direitos Fundamentais e Estado Constitucional. Estudos em Homenagem a J.J. Gomes Canotilho*. São Paulo: Revista dos Tribunais, 2009. p. 346ff.

1.2 The transition from formal equality to the so-called substantial equality

In its first phase of recognition, the principle of equality, as already mentioned, corresponded to the notion that all human beings are equal, understood as absolute equality in legal terms, corresponding to the right of all and any person to be subject to the same treatment provided for in the law, regardless of the content of the treatment given and the conditions and personal circumstances. For this reason, from this perspective, the principle of equality in a way corresponded to the demand for generality and prevalence of the law, which is typical of the liberal constitutional State.[13]

Equality before the law, which corresponds to formal equality, habitually conveyed by the expression "all are equal before the law", as already taught by Pontes de Miranda, is basically meant for the lawgivers, forbidding different forms of treatment, which, however, although it can be used to prevent inequalities in the future, is not enough to "destroy the causes" of inequality in a society.[14] Formal equality, therefore, as a postulate of practical and universal rationality, which requires that all who are in a same situation receive identical treatment (thus, equality understood as equality in applying the law), began to be complemented by the so-called substantial (material) equality, although it should be noted that the notions of formal and material equality are not always understood in the same way.[15]

Indeed, the circumstance that the law should be the same for all was not, in the first phase of the recognition of the principle of equality, considered incompatible with inequality in the matter of rights and obligations resulting from social and economic inequalities. This is well illustrated by the example of the limitations imposed in the sphere of political rights, since

[13] See GARCIA, Maria Glória F. P. D. *Estudos sobre o Princípio da Igualdade*, Coimbra: Almedina, 2005. p. 36-37.
[14] PONTES DE MIRANDA, Francisco Cavalcanti. *Democracia, liberdade, igualdade*: os três caminhos. São Paulo: José Olympio, 1945. p. 530.
[15] See GARCIA, Maria Glória F. P. D. *Estudos sobre o Princípio da Igualdade*, Coimbra: Almedina, 2005. p. 48.

for a considerable time the practice of requiring the demonstration of property and/or income was widely disseminated both to vote and to stand for election.[16]

Attributing a material sense to equality, which was (also) the equality of all before the law, was a reaction precisely to the perception that formal equality did not in itself rule out situations of injustice, besides affirming the requirement that the content of the law itself should be egalitarian, so that there was a move from equality before the law and in applying the law to equality also "in the law".[17]

Equality in the material sense also means forbidding arbitrary treatment, i.e. forbidding the use, for the purpose of establishing the relations of equality and inequality, of criteria that are intrinsically unfair and that violate the dignity of the human person, in such a way that equality, now already in the second phase of its meaning in the legal-constitutional realm, operates as a demand for reasonable and fair criteria for given unequal forms of treatment.[18]

The substantial view of equality, in turn, in the third phase that characterizes the evolution of the principle in the sphere of modern constitutionalism, involving a duty to compensate social, economic and cultural inequalities, thus generates what is usually called a social or de facto equality,[19] although also these terms are not always understood in the same way. It is also important to mention here that the three dimensions of equality that are part of the formal and substantial equality have led to a reconstruction of the notion of equality and its meaning in legal-constitutional terms, which was also the object of particular consideration by the FC, which enshrines both a principle of and a general right to equality in its formal and material double dimension by providing for various special clauses of equality, besides having rules that define duties of the State (and even of society) as

[16] See DÍEZ-PICAZO, Luiz Maria. *Sistema de Derechos Fundamentales*. 2. ed. Navarra: Editorial Aranzadi, 2005. p. 192.
[17] Ibidem, p. 193.
[18] See GARCIA, Maria Glória F. P. D. *Estudos sobre o Princípio da Igualdade*. Coimbra: Almedina, 2005. p. 62.
[19] See MIRANDA, Jorge; MEDEIROS, Rui. Constituição Portuguesa Anotada. Tomo II – Organização Económica, Organização do Poder Político, Coimbra Editora, Coimbra, 2006.

regards overcoming factual inequalities and that promote social, economic, political and cultural inclusion.

Indeed, in the FC, which is the immediate object of our attention, equality was markedly highlighted in several of its passages, beginning with the Preamble, in which equality (together with justice) and a pluralistic, unprejudiced society are part of the central values of the legal-constitutional system. Besides, equality is presented in the constitutional text both as a structuring principle of the Democratic Rule of Law and as a rule imposing tasks on the State. In this context it is sufficient to mention the provision of article 3, which, within the sphere of the fundamental objectives (especially items III and IV), lists the reduction of regional inequalities and the promotion of well-being for everyone, without prejudices of origin, race, sex, color, age and any other forms of discrimination.

As occurred in other contemporary constitutional orders, the FC too did not limit itself to enunciating a general right to equality, as in article 5, head provision ("all are equal before the law, without any kind of distinction [...]"), but, throughout the text, established a number of provisions imposing an egalitarian treatment and forbidding discrimination (special clauses or rights of equality), as in the case of equality between men and women (article 5, I), prohibition of differences in salaries, in carrying out functions and in criteria for admission due to sex, age, color or marital status (article 7, XXX), prohibition of any discrimination regarding salary and criteria for the admission of workers with disabilities (article 7, XXI), egalitarian and universal access to goods and services in the area of health care (article 196, head provision), equal conditions for entering and staying in school (article 206, I), equal rights and duties among spouses (article 226, § 5), prohibition of discrimination due to parentage (article 227, § 6). Likewise, already on the constitutional level, there is a duty to promote affirmative action policies, as is the case, for illustrative purposes, of article 37, VII, stipulating that the law should reserve a percentage of public positions and jobs for people with disabilities.

From this perspective it can be said that in Brazil, too, the principle of (and right to) equality covers at least three dimensions: a) prohibition of arbitrariness, so that at the same time it is forbidden to make differentiation

without reasonable justification based on the agenda of constitutional values and it is forbidden to give equal treatment for clearly unequal situations; b) prohibition of discrimination, thus, of differentiation based on merely subjective categories; c) obligation to provide different treatment to compensate for unequal opportunities, which presupposes the elimination, by government, of social, economic and cultural inequalities.[20]

As a subjective right, the right to equality operates as the foundation of individual and even collective positions that aim, from the negative (defensive) perspective, to forbid forms of treatment (burdens or charges) that are not in accordance with the requirements of equality, whereas, from the positive perspective, it operates as the foundation of derived rights to performances, that is, of equal access to performances (goods, services, subventions etc.) made available by the government or by private bodies insofar as they are connected to the principle of and the right to equality.[21]

Also the requirement of measures that will remove factual inequalities and promote their compensation, i.e. of equality policies and even affirmative action policies, can be traced to the positive (performative) function of equality that implies a duty for State action, be it in the normative sphere, be it in the factual sphere, so that it is possible to talk about the constitutional imposition of equal opportunities.[22]

In this context, the ratification of the Convention on the Rights of Persons with Disabilities and its implementation by additional domestic regulation in different sectors of public, private, social, economic and cultural life establishes particularly demanding and binding parameters (conveyed by principles and rules), even with regard to the actions of private persons. As regards applying the principle of equality, it is likewise necessary to start from the premise that equality is a relational and comparative concept, since

[20] Here we adopt the summary by CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa Anotada*. 4. ed. Coimbra: Coimbra Editora, 2007. v. 1. p. 339.
[21] See KLOEPFER, Michael. *Verfassungsrecht II*. *Grundrechte*. München: C.H. Beck, 2010. p. 202-203.
[22] See, pars pro toto, CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa Anotada*. 4. ed. Coimbra: Coimbra Editora, 2007. v. 1. p. 342.

any statement about equality or inequality presupposes a comparison.[23] No matter how correct one considers the Aristotelean notion of treating equals equally and unequals unequally, the proposition itself is insufficient to be able to answer the question as to which subjects should be treated unequally or, if it is the case, equally.[24]

Thus, in view of what has been said here, it can be claimed that the principle of equality contains both a legal duty to treat equally what is equal and a legal duty to treat unequally what is unequal. These duties, according to Robert Alexy, imply an argumentative burden in the sense of justifying—from the legal-constitutional perspective—potential unequal treatment, since what is forbidden, as already mentioned, is all and any arbitrary inequality, that is, which cannot be justified, since the principle of equality does not require that the lawgiver should treat all the same way, or that everyone should be equal in all respects.[25]

In this context, among other factors, it is important to distinguish between the general principle of (and right to) equality and the so-called special clauses of equality (as are precisely those that enunciate and define in more general and specific terms the prohibition to discriminate against persons with disabilities), since the intensity of the binding of State agencies, especially of the lawgiver, is greater in the case of special prohibitions regarding discrimination than in those based on the parameter of the general right to equality, implying a greater limitation of the freedom of lawmaking.[26] It should be mentioned that the special clauses of equality were precisely a response to the model of formal equality, in the sense of mere equality before the law, requiring that it be overcome.

---

[23] See, pars pro toto, GARCIA, Maria Glória F. P. D. *Estudos sobre o Princípio da Igualdade*, Coimbra: Almedina, 2005. p. 46.

[24] See, pars pro toto, MELLO, Celso Antônio Bandeira de. *Conteúdo Jurídico do Princípio da Igualdade*. 3. ed. São Paulo: Malheiros, 2004. p. 10-11.

[25] See ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Translation Virgílio Afonso da Silva. São Paulo: Malheiros, 2008. p. 401ff. (In the German original, *Theorie der Grundrechte*. 2. ed. Frankfurt am Main: Suhrkamp, 1994. p. 364ff)

[26] See, pars pro toto, PIEROTH, Bodo; SCHLINK, Bernhard. *Grundrechte. Staatsrecht II*. 26. ed. Heidelberg: C.F. Müller, 2010. p. 114.

Still within the scope of a substantial (and even positive) conception, it should be noted that the principle of equality can also operate as a requirement of equal opportunities (or equal chances)[27] aiming to ensure free and balanced competition, not only in the sphere of political life (in which the principle of equality takes on a particular relevance, as, for instance, the isonomic treatment of political parties, candidates and voters),[28] but also for the social and economic life, as occurs in the field of taxation, of intervention in the domain of economics and entrepreneurial freedom.[29] It should be emphasized that a consideration of equal opportunities does not mean abandoning legal equality in favor of an eminently factual equality, since material equality—just to underscore it—is not to be confounded with the notion of de facto equality, so that legal equality and factual equality must be conciliated through a (complex and differentiated) relationship of reciprocal consideration and adequate weighing.[30]

In the case of the Convention on the Rights of Persons with Disabilities and its regulation at a national level, we are dealing with a requirement for strict observance of the limits set by the special clauses of equality contained in it, with repercussions in various areas of non-constitutional law, be it from the perspective of the prohibitions of discrimination, be it on the level of the so-called affirmative actions turned toward the access and perma-

[27] About this topic see what the pioneering contribution by SCHOLLER, Heinrich. *Die Interpretation des Gleichheitssatzes als Willkürverbot oder als Gebot der Chancengleichheit*. Berlin: Duncker & Humblot, 1969, says regarding the definition of equal opportunities. See also the analysis by ALEXY, Robert. *Theorie der Grundrechte*. 2. ed. Frankfurt am Main: Suhrkamp, 1994. p. 377ff. (In the Portuguese language edition already mentioned, see pp. 415ff., in the context of the distinction and relationship between legal equality and factual equality).

[28] See, with reference to the case law of the Federal Supreme Court (STF): RIOS, Roger Raupp. O princípio da igualdade na jurisprudência do STF: argumentação, força normativa, direito sumular e antidiscriminação. In: SARLET, Ingo Wolfgang; SARMENTO, Daniel (Ed.). *Direitos fundamentais no Supremo Tribunal Federal*: balanço e crítica. Rio de Janeiro: Lumen Juris, 2001. p. 311-313.

[29] About this topic, see, pars pro toto, the weighty thesis for full professorship by ENGLISCH, Joachim. *Wettbewerbsgleichheit im grenzüberschreitenden Handel*. Tübingen: Mohr Siebeck, 2008. Especially p. 193ff. (regarding the meaning of equality in the sphere of free competition in a multilevel system).

[30] In this sense, pars pro toto, ALEXY, Robert. *Theorie der Grundrechte*. 2. ed. Frankfurt am Main: Suhrkamp, 1994. p. 380ff. (in the Brazilian edition, p. 419ff.).

nence—that is, to the inclusion—in higher education, which will constitute the focus of our attention below.

2 Considerations regarding the impact and challenges of the international convention on (and for) the Brazilian persons with disabilities act, underscoring the affirmative action policies turned toward the right to (and duty of) inclusion in the realm of access to education

2.1 General considerations: affirmative actions as instruments of promotion of factual equality and policies of inclusion and acknowledgment of persons with disabilities

The relationship between legal equality and factual equality is particularly relevant in the field of the currently disseminated—although more or less controversial—affirmative action policies. In this context a distinction between a direct modality of discrimination and cases of a so-called indirect discrimination has been widely accepted, in the sense that both forms of discrimination, when not constitutionally justifiable, violate the principle of equality. In the case of indirect discrimination, it is found that measures that are apparently neutral from the discriminatory point of view have, when applied, harmful effects that are particularly disproportional for given groups of people.[31]

Developed within the sphere of the North American case law, the so-called theory of disproportionate impact led to the gradual adoption of affirmative action policies, especially in the area of racial discrimination, whereas in other environments, as in the case of Europe, it developed particularly in the field of gender discrimination, and was adopted in other realms in which this phenomenon occurs. Ultimately, what matters is that regardless

[31] See the definition by GOMES, Joaquim Barbosa. *Ação afirmativa e princípio constitucional da igualdade*. Rio de Janeiro: Renovar, 2001. p. 24.

of demonstrating the intention to discriminate, the real impact of measures that are neutral in themselves should not disproportionately affect certain groups, placing them in a situation of real disadvantage in relation to the other social segments, under pain of these measures being considered incompatible with the principle of equality.[32]

Considering what has already been said so far, the FC, in several points, imposes—explicitly and implicitly—on the public power the promotion of (normative and factual) measures with a view to reducing inequalities, which, in other words, implies a duty of adopting affirmative action policies in the sense of a constitutional imposition whose non-compliance could lead to a state of unconstitutional omission.[33]

As shown by the Brazilian evolution in this field, which covers all the way from promotion of gender equality, prohibition of discrimination because of sexual orientation, disabilities, ageism, but especially, considering given peculiarities, of racial discrimination (race here taken as a normative concept), a series of affirmative action policies (or policies of positive or reverse discrimination, as such measures are also usually called) have been carried out, sometimes generating judicial disputes. This occurs particularly in the case of the quota policies for people of African ancestry, already implemented at dozens of public universities and even in private ones, or by force of federal law, as in the case of the University for All (*Universidade para todos*) program. All of them were maintained when submitted to the scrutiny of the Brazilian Federal Supreme Court (STF).

In the case of persons with disabilities, besides the specific constitutional provision imposing quotas and therefore inclusion policies, the Convention on the Rights of Persons with Disabilities supported this requirement and even reformulated the very notion of disability, proposing a more open and more inclusive reading which must be respected and implemented by the Brazilian legislation.

---

[32] See, pars pro toto, the excelent summary in SARMENTO, Daniel. *Livres e iguais*: estudos de direito constitucional. Rio de Janeiro: Lumen Juris, 2006. pp. 147ff.

[33] See, pars pro toto, CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa Anotada*. 4. ed. Coimbra: Coimbra Editora, 2007. v. 1. p. 342.

One might well recall, in order provide a context, that one of the first actions to include people with disabilities was because of the need to reinsert war wounded persons into society, especially after the two Great World Wars. In Brazil this action is chronologically situated after the Paraguayan war, when the Home for Invalids of the Fatherland (*Asilo dos Inválidos da Pátria*) was founded. In 1923, the ILO recommended the enactment of laws in Europe to ensure job quotas for war wounded. It was only in 1944, as a result of the Philadelphia Conference, that the ILO recommended that quotas should be guaranteed for non-combatants with disabilities.

In 1971 the UN proclaimed the Declaration on the Rights of the Mentally Disabled Persons and in 1975 the Declaration on the Rights of Persons with Disabilities was enacted, which strongly supported the principle of the dignity of the human person as a premise to ensure these rights, motivating the proclamation of 1981 as the International Year of Disabled Persons and the approval of the World Program of Action Concerning Disabled Persons in 1982, which basically intended to ensure for all people access to the general system of society, as regards the physical and cultural environment, housing, transport, social and health care services, opportunities for education and work, cultural and social life.

This view became a paradigm because of the change in the concept of disability, which was formerly only considered from the biomedical and individual perspective—i.e. in an extremely excluding and stigmatizing—,[34] and took on a social perspective in which there is a clear search for inclusion and adaptation of everyday life to the needs of all people, especially those of the most vulnerable, in other words the disabled.[35] Furthermore, this is a modality of perception of disability based on a sociological perspective, but likewise an expression of an eminently political concept.[36]

---

[34] SANDEL, Michael J. *Contra a Perfeição: ética na era da engenharia genética*. Translation Ana Carolina Mesquita. Rio de Janeiro: Civilização Brasileira, 2013. p. 64-65.

[35] DINIZ, Débora. *O que é deficiência?* São Paulo: Brasiliense, 2007. p. 27-28.

[36] RIOS, Roger Raupp. Direito da antidiscriminação e discriminação por deficiência. In: DINIZ, Débora; SANTOS, Wederson (Ed.). *Deficiência e discriminação*. Brasília, DF: Letras Livres, 2010. p. 73-96.

The central idea of the social model is, therefore, preponderantly marked at two points: (1) The disability itself cannot justify the inequality and exclusion that are still found in relation to persons with disabilities. In this sense it is in accordance with the proposal for a separation between the concepts of injury and deficiency; (2) Since it is a sociological concept, and likewise a political one, the approach would no longer be individual, personalized and biomedical in the sense of a personal tragedy or divine punishment, and it would be then thought of as an object to create public policies aiming at transforming all disenfranchising social standards, transferring the responsibility for inclusion to the State in partnership with civil society.[37]

The social model, as already mentioned, sought to overcome the so-called biomedical model of disability, that still insisted on a process that, in brief, intended to cure, treat or eliminate, and, in this way, tortured body and soul. These processes sought to mold persons with disabilities into a social, mental and physical standard that, actually, is to a great extent an ideal one. Anyway, this biomedical model recreated and, especially, reinforced the structures of discrimination and intolerance that already existed and that still discipline bodies and minds in our contemporaneous societies.

Deinstitutionalization, demedicalization and the struggle for civil rights are the main characteristics of this phase of the end of the 20th century, which even gave rise to the social model. This social model initially arose in the USA and was the result of an atmosphere of freedom and independence according to the American way of life and was supported by the package comprising market capitalism and the notions of freedom, above all political freedom. Basically, both in the USA and in the UK, which equally was outstanding in structuring the social model, the first claims revolved around overcoming socioenvironmental barriers, producing legislation against discrimination and promoting civil rights in general.

That is why it is claimed that the priority character of the Copernican turn which was forged based on the new idea of disability is overcoming

[37] DINIZ, Débora. *Modelo social da deficiência: a crítica feminista*. Brasília, DF: Letras Livres, 2003. (Série Anis). p. 2.

the traditional model that situated the person as a nuclear element within the biomedical and even religious standards that preceded it, going over to a standard in which society is called to take on its responsibility. In other words, it is a model that has full citizenship as its ultimate objective and in this sense is directly related to the theory and practice of Human Rights.

Therefore, the new perspective for disability involves concretely equalizing equality and dignity for all, indistinctly, promoting, where necessary, affirmative actions that will be appropriate to reverse the discriminatory context that continues up to the present and replace it with a solidary and inclusive standard.

In fact, one of the most important legacies of this social model was the contemporaneous view of disability in a collective approach open to plurality, equality, tolerance and diversity. The other legacy was the awareness that everyone, in solidarity, must remove the social, intellectual, cultural and architectural barriers that separate all people, with or without disabilities. Therefore, it is claimed that there was a neutralization of the stigmatizing aspect that was seen as inherent to the notion of disability.

It should also be noted that within the sphere of national law, more precisely of the Brazilian constitutional evolution, the topic began to receive more attention with the current FC, since in the previous constitutional texts the reference to persons with disabilities was isolated, and it was only after the enactment of Constitutional Amendment nº 12, in 1978, that the protection and promotion of people with disabilities received a more detailed treatment, still under the aegis of the previous constitutional system.[38]

In the text of the current FC, there are several provisions that directly or indirectly concern the prohibition to discriminate and the promotion of equality of persons with disabilities. Besides the objectives of articles 3 and 5, head provision, the matter is illuminated by the principle of human dignity, which, especially as regards the material content of the principle

[38] About this evolution see the summary of ARAÚJO, Luiz Alberto David. A proteção constitucional das pessoas portadoras de deficiência: algumas dificuldades para efetivação dos direitos. In: SARMENTO, Daniel; IKAWA, Daniela; PIOVESAN Flávia (Ed.). *Igualdade, Diferença e Direitos Humanos*. Rio de Janeiro: Lumen Juris, 2008. p. 911ff.

of equality and the comprehension of the legitimate forms of discrimination (legitimate because they are proportional and constitutionally justified) and illegitimate ones, became very important. It is not necessary to detail here how much persons with disabilities were and are still exposed, not only to explicit and implicit discrimination, but even to inhuman and degrading treatment (or even submitted to deliberate eugenic elimination)—without entering the debate here about to what extent discriminatory treatment is not already in itself an inhuman and degrading treatment.

As regards the constitutional provisions addressed especially at persons with disabilities, article 7, XXXI, says that all and any form of discrimination of such people regarding employment and remuneration is forbidden, which, in turn, as already mentioned in the previous sections, does not prevent establishing special requirements, as long as they are not arbitrary and incompatible with the criteria of proportionality, such as cases in which one cannot employ blind people to work as street police or airplane pilots, among other similar situations. On the other hand, there is an evident duty for proportional "accommodation", which in turn is related to a duty to take concrete measures to ensure the conditions for persons with disabilities to be able to carry out certain functions (often depending on special training or some technical resource available and that will not result in a disproportional impact on those who are to make it available).[39]

One can see that in the case of people with disabilities the problem of factual equality and the so-called indirect discrimination is particularly acute, so that not only does one not encounter great resistance to the notion of a duty for affirmative actions in this field, but also this duty was the object of an explicit constitutional provision contained in article 37, VII, of the FC, determining the reservation of a percentage of public positions and jobs for persons with disabilities. This is a provision that was already (besides the international rules on this matter as is the case, for instance, of Convention 111 of the ILO) the object of regulation by the non-constitutional legislator, who also established a policy for the inclusion of persons with disabilities in the

[39] Ibidem, p. 914-915.

job market; the addressees of this duty are the private players (outstanding on this topic are Laws 8,212 and 8,213, both enacted in 1991). However, it is not feasible to go further into this topic here.[40]

The affirmative actions to integrate disabled persons are obviously not limited to the world of work, as they comprise a duty of inclusion (integration and promotion) in all spheres of social, economic, political and cultural life. This has also already been the target of concerns of the FC, as in the case of the provision in article 203, IV, where it is established that the purpose of social welfare is to—also—qualify and rehabilitate persons with disabilities and to promote their integration in community life (suffice it here to point out special conditions for education in the school environment), and also the provision, likewise in the sphere of social welfare, of a monthly benefit of one minimum wage for a person with a disability who proves that they do not have the means to maintain themselves or be maintained by their family (article 203, V), although there is a controversy in legal scholarship and case law about the constitutional legitimacy of the legal criteria to enjoy such a benefit.[41] The same concern is found within the international system of protection of human rights, in the national legislation, in policies implemented by the Executive Power and a considerable number of court decisions.[42]

In July 2015, Law 13,146 was enacted. It is commonly known as the Persons with Disabilities Act and aims to implement ideas of equality, dignity, tolerance, citizenship and freedom so as to effectively include persons with disabilities in all spheres of national life. This law is the result both of

[40] About the topic, see, among many others, a more general perspective in GURGEL, Yara Maria Pereira. *Direitos Humanos, Princípio da Igualdade e Não Discriminação. Sua Aplicação às Relações de Trabalho*. São Paulo: LTr, 2010, and, more recently, with greater emphasis on access to work, the summary and evaluation by FINCATO, Denise Pires; BUBLITZ, Michele Duas. Proteção Legal do Acesso ao Trabalho das Pessoas Portadoras de Deficiência: Um Direito Fundamental. *Revista Direitos Fundamentais & Justiça*, v. 4, n. 12, p. 158-183, jul./set. 2010.

[41] About the discussion in the Brazilian Supreme Court, see, pars pro toto, MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo G. *Curso de Direito Constitucional*. 6. ed. São Paulo: Saraiva, 2011. p. 719ff.

[42] About such legislative and administrative actions, and considering a large number of legal decisions, see, more recently and among others, RIBEIRO, Lauro Luiz Gomes. *Manual dos direitos da pessoa com deficiência*. São Paulo: Verbatim, 2010. Especially p. 41-110.

the Convention on the Rights of Persons with Disabilities and of the optional protocol ratified by the National Congress in 2008 and enacted by Decree 6,949 of 2009.

For the purpose of definition, a preliminary consideration of that act was the idea of a person with a disability as one who has a long-term hindrance that may obstruct their actual and full participation in society on an equal footing with other people, aligning the legal perspective with the concept coming from the social model. It affirmed the broad idea of hindrances as those that comprise all kinds of hindrances, from physical, intellectual, sensory to mental ones, and pointed out the importance of multiprofessional and interdisciplinary care both to evaluate the disability and to provide care for the person with a disability.

The law determined the pillars of its fundamental action, emphasizing autonomy and dignity so that accessibility, as well as all possibilities of technological resources, will fully promote the active participation of persons with disabilities by enabling them to overcome all kinds of barriers and hindrances on the basis of the rights to equality and to non-discrimination. It innovated by considering the distinction between disability and civil capacity, guiding the promotion of free development of the person and leading to proportional responsibility in degrees of discernment and vulnerability. It emphasized applying the principle of solidarity along the same lines as the FC, involving the State, society and families in assigning duties for care and protection of persons with disabilities.

Strictly speaking, because of the application of the principle of the dignity of the human person and considering the promotion of autonomy of persons with disabilities, the Persons with Disabilities Act is characterized by broadening the different forms of manifestation of will, which implies overcoming the current regime of incapacities. Thus, despite the pecuniary or proprietary aspect, it reinforced the enhancement of the value of existential autonomy from a perspective in which the autonomous person is, above all, someone who can reinvent their life story at any time, acknowledging the point of departure and thus resignifying the points of arrival.

Since autonomy is not limited to a mere competence for decision-making which follows the prevailing social standard, what this act emphasizes is the search for a perception of the human person as a protagonist insofar as the grasping of the fruit of their discernment will express as faithfully as possible the uniqueness and subjectivity peculiar to each person on the basis of the principle of presumption of capacity and autonomy. Law 13,146/2015 also instituted the national registry of inclusion of people with disabilities in the form of an electronic public record that tries to succinctly map the information about these people, their lives and the hindrances to their active participation in society, and is designed especially to provide a base for the production and implementation of public policies in this field.

2.2 Affirmative actions for persons with disabilities and higher education in Brazil

Now that, in the previous sections, we have shown the imperative (conventional, constitutional and legal) character of inclusion policies and, especially, affirmative actions for people with disabilities, it is time to begin the discussion of the specific problem of access to higher education in Brazil.

As already mentioned, the central internal normative framework in this area was and is still the FC, especially in the text of articles 227 and 37, VIII, as well as the subsequent internalization of the international rules (especially the UN Convention on the Rights of Persons with Disabilities) which became part of the Brazilian constitutional block. This accessibility provided for in the Constitution was defined by Federal Law 7,853/89 and by Federal Decree 3,298/99 which regulated it. It must be underscored that in the sphere of education inclusion was late in happening although, according to the latest National Research on Health (*Pesquisa Nacional de Saúde*) carried out by the Brazilian Institute for Geography and Statistics (IBGE), 6.2% of the Brazilian population have some kind of physical, mental, intellectual,

auditory or visual disability.[43] And in the national exam for the end of high school (ENEM – *Exame Nacional do Ensino Médio*) in 2016, 68,907 students informed that they had some kind of disability.[44]

One can thus see that, in the light of what was established by the provisions of Law 13,146/2015, especially in articles 27, 28 and 30, Law 13,409/2016 constitutes a measure that aims at fully implementing the right to education of persons with disabilities, mainly because it adds them to the percentage that defines the scope of the quotas, thus complying with the proportionality requirements in relation to the specificities of the Brazilian population, measured by the latest IBGE census, besides establishing the revision of this system designed to expand the guarantee of access to higher education within 10 years from the date of the enactment of the law of 2012.

In fact, the ultimate objective of this constellation of rights for persons with disabilities and duties to the State, society and family is to guarantee, also in the sphere of higher education, an inclusive educational system in the sense that it will render feasible the maximum development of the talents and abilities of the people who are being educated, regardless of their profile and according to their characteristics, interests and needs of learning, safeguarding them against all and any form of discrimination, violence and negligence, in consonance with what is inferred from article 205 of the FC.

In the case of persons with disabilities it is also important to list the content of articles 203, IV and 218 of the FC. In brief, higher education, especially in the case of persons with disabilities, should be aligned to the preparation to exercise citizenship and to the enjoyment and fruition of a life with dignity, both individually and socially.

---

[43] INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. *Censo Demográfico 2010. Características gerais da população, religião e pessoas com deficiência*. Censo demogr., Rio de Janeiro, 2010, passim. Available at: <http://biblioteca.ibge.gov.br/visualizacao/periodicos/94/cd_2010_religiao_deficiencia.pdf>. Access on: May 19, 2016.

[44] INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. *Pesquisa Nacional de Saúde 2013. Percepção do estado de saúde, estilos de vida e doenças crônicas. Brasil, grandes regiões e Unidades da Federação*. Rio de Janeiro, 2014. Available at: <http://portalarquivos.saude.gov.br/images/pdf/2015/agosto/24/PNS-Volume-1-completo.pdf>. Access on: Sept. 8, 2017.

Concluding remarks

In summary, it can be concluded that the criterion of a disability (which in itself must be spelled out by legislation and case law), as well as the particular situation of persons with disabilities, is one of the main challenges not only for the adequate management of the principle of and right to equality, in all its dimensions, but above all for a State and society that intend to respect and promote human dignity and accomplish the principle of solidarity through the effective integration of the vulnerable groups and the necessary intolerance toward discrimination.

Through its incorporation to internal law, with the force of a constitutional amendment, the international Convention on the Rights of Persons with Disabilities already meant a growth in terms of internal (national) measures to promote the protection (against acts of discrimination), recognition and improvement—through affirmative actions—of equal opportunities. However, the social efficacy of the legal framework of persons with disabilities is still far from standards that might be considered satisfactory and appropriate to the national and international normative parameters.

As regards the problem of substantial equality in terms of equal opportunities and of overcoming factual inequalities, it could be seen that in the field of implementation of the right to higher education Brazil is still in a deficient situation, especially due to the lack of coverage of the number of persons with disabilities both in the face-to-face modality and in the distance education modality. It was also found that, in general, higher education continues to be an almost unreachable step for most Brazilians with disabilities, notably for people with low income, above all because of the general intolerance of society in relation to those who are different, to the scenario of lack of knowledge and general lack of enforcement of the laws that still exists in Brazil and the lack of commitment by some higher education institutions with regard to complying with the law and adopting inclusive measures.

It may, however, be inferred that some relevant practices can already be recognized in the shaping of a more inclusive panorama, especially as re-

gards the laws that were issued by the Legislative Power, the positioning of legal scholarship and the production of a case law that will be appropriate to make the presence of persons with disabilities mandatory in higher education. Although the current percentage of persons with disabilities enrolled in the federal system of education is irrelevant, it has increased significantly in recent years. Nevertheless, there are still many barriers which concern how the public power, society and the families themselves solidarily deal with the issue of disabilities, the implementation of equality and the fulfillment of the human and fundamental rights of these persons.

It should be emphasized that the most essential right of the persons with disabilities can be expressed in the present time as the right to live free from all and any form of discrimination.[45] However, the ideology of normality is so perverse and so insidious, that the discrimination resulting from it is silent, so that there is actually not even a nomenclature to describe a person who discriminates against someone because of their disability.[46] It is notoriously difficult to combat this kind of discrimination, since it appeals to intimate and even unconscious sentiments, which, through mistaken actions, supposedly seek the well-being of these people, insofar as they evoke attitudes that mix attitudes ranging from violence[47] proper to extreme paternalism. Thus, it is challenging to construct a scenario in Brazil in which, after balancing many of the contrary interests, struggling against intolerance toward those who are different and overcoming the biomedical standard, persons with disabilities will in fact be recognized in their primordial and inalienable status as subjects of rights.[48]

---

[45] RIOS, Roger Raupp. Direito da antidiscriminação e discriminação por deficiência. In: DINIZ, Débora; SANTOS, Wederson (Ed.). *Deficiência e discriminação*. Brasília, DF: Letras Livres, 2010. p. 73-96.

[46] DINIZ, Débora; SANTOS, Wederson. Deficiência e direitos humanos: desafios e respostas à discriminação. In: DINIZ, Débora; SANTOS, Wederson (Org.). *Deficiência e Discriminação.* Brasília: Letras Livres; EdUnB, 2010.

[47] MAZZITELLI, Fábio. Aluno com atraso mental é torturado. *Estadão*, 2009. Available at: <http://emais.estadao.com.br/noticias/geral,aluno-com-atraso-mental-e-torturado,389067>. Access on: April 10, 2012.

[48] ELIA, Luciano. *O conceito de sujeito*. Rio de Janeiro: Jorge Zahar, 2004. p. 14-16.

AFFIRMATIVE ACTION IN SOUTH AMERICA: THE CASES OF ARGENTINA, CHILE, COLOMBIA, AND PERU

Dr. Iván Obando Camino
Dr. Alberto Olivares Gallardo
Dr. Gustavo Rayo Urrutia
Mg. Rodrigo Hernández Fernández[1]

Introduction

This chapter deals with the origins, development, and challenges of affirmative action in some Southern American polities: Argentina, Chile, Colombia, and Peru. The objectives are to determine how affirmative action made its way into the policy agenda of these polities; which are the constitutional foundations that underpinned the passage of affirmative action policies by their legislatures; and what is their eventual policy impact in a couple of cases where there is more evidence available, in a first attempt to gauge the state of affirmative action therein.

This focus on affirmative action implies that this chapter dwells on the meaning and scope of the right to equality before the law in those polities, particularly on how the legal community –judges, lawyers, and scholars- constructs this right, for which purpose it digs up briefly into their constitutional history to make sense of their process of legal development.

On this vein, the constitution framers of these countries closely followed the liberal tradition regarding first generation rights until recently. They envisioned the right to equality before the law under a formal approach, which assumed prohibiting legal discrimination among people al-

[1] Dr. Iván Obando Camino is Associate Professor of Public Law; Dr. Alberto Olivares Gallardo is Assistant Professor of Public Law; Dr. Gustavo Rayo Urrutia is Assistant Professor of Public Administration; Mg. Rodrigo Hernández Fernández is Assistant Instructor of Public Law. They are faculty members at the Faculty of Juridical and Social Sciences of the Universidad de Talca, Chile.

most as an axiom. This approach fitted conveniently with the variegated vertical, top-down structure of these societies, as the Independence Wars did not alter the preexisting social structure that dated back from colonial times, except for the early abolition of slavery.

In order to make room for this social reality, legislatures, courts, and bureaucracies developed a standard to implement this right in laws, judicial decisions, and administrative regulations, partly inspired by Aristotelian philosophy: equality for those who were equal, inequality for those who were unequal, and a pledge for non-arbitrary treatment at the hands of government.

Interestingly enough, this standard allowed these agencies to take a broader view about their societies over time, because it made possible the passage of measures that provided differential legal treatment for people under diverse situations as long as legislatures offered some justification thereof. In so doing, the right to equality ended up being interpreted as a ban on unjustified differences at first and unreasonable differences later.

The nineteenth-century republican, Southern American constitutions adopted this formal approach extensively and their twentieth-century counterparts did not depart totally from this pattern. As a matter of fact, a review of the historical trajectory followed by some of these polities, especially those where political liberalism and some form of constitutionalism took root, shows the long-lasting impact of this understanding of the right to equality and how a new trend that focused on material equality, sometimes referred as equal opportunities, and a more activist state role emerged in the twentieth-century, thus leaving both a permanent imprint in their constitutions.

Contemporary Southern American constitutions share many traits with their Latin American counterparts, all of which have been a subject of academic reflection lately,[2] especially in their approach to new fundamental

[2] LUDWIKOWSKI, Rett R. Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot. *Boston University International Law Journal*, Boston, v. 21, p. 39-54, 2003. Available at: <https://scholarship.law.edu/scholar/440/>. Access on: July 10, 2017; UPRIMNY, Rodrigo. The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges. *Texas Law Review*, Austin, v. 89, p. 1599-1609, 2001. Available at:

rights, conceptions of the state, and government institutions. In this regard, Uprimny emphasizes the important role that equality plays in these constitutions, which persuaded constitution framers, on the hand, to prohibit racial, gender, and social discrimination and, on the other hand, to introduce into the constitutions "special affirmative action policies to make equality real and effective."[3] The latter implies that a structural view on equality somehow made its way into these polities, which allowed bringing the plight of groups historically and systematically excluded and discriminated against into their policy agendas, even when their constitutions remained silent about the validity of affirmative action.

Indeed, as a matter of fact, a cursory review of the constitutions of Spanish speaking Southern American polities reveals that Argentina, Bolivia, Colombia, Ecuador, Paraguay, and Venezuela include affirmative action as a policy means to face inequality issues; conversely, the constitutions of Chile and Uruguay are silent on this subject, whereas the constitution of Peru makes a single passing reference to electoral quotas for subnational elections. Nonetheless, constitutional paucity is not a reliable guide to make sense of real life events sometimes, as shown in two of the cases reviewed below.

The cases selected for this study are Argentina, Chile, Colombia, and Peru, all of which share an important tradition of liberal inspired constitutionalism and legality, notwithstanding their different political development trajectory, party systems, and government structures. They share a liberal democratic form of government with greater or lesser government stability and efficiency, including a recent authoritarian past in three of them; mar-

<http://www.corteidh.or.cr/tablas/r27168.pdf>. Access on: July 10, 2017; GARGARELLA, Roberto. Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution. *Notre Dame Journal of International and Comparative Law*, Notre Dame, v. 4, n. 2, p. 9-18, 2014. Available at: <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1023&context=ndjicl>. Access on: July 10, 2017; MIROW, M. C. The Age of Constitutions in the Americas. *Law and History Review*, v. 32, p. 229-235, 2014. Available at: <http://ecollections.law.fiu.edu/faculty_publications/239/>. Access on: July 11, 2017.

[3] UPRIMNY, Rodrigo. The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges. *Texas Law Review*, Austin, v. 89, p. 1592, 2011. Available at: <http://www.corteidh.or.cr/tablas/r27168.pdf>. Access on: July 10, 2017.

ket-oriented economies that made possible the emergence of some sort of economic societies over time; vibrant civil societies that exert their civil and political rights to contest structures inherited from the past; functioning government structures that create and implement public policies oriented toward specific groups; and a long-lasting understanding of the right to equality before the law based on a formal approach that sinks its roots in the liberal constitutions passed at the dawn of these republics. Likewise, they all share some activism in the field of international human rights that persuaded their governments to ratify the most important treaties on this subject, e.g. ICESCR, CDAW, etc., which made room for a broader comprehension of discrimination practices over time that influenced their policy making, as shown below. Thus, the political context and the legal culture of these polities make these case studies especially attractive for research because they bring into focus the tensions and controversies that emerge from conflicting views on equality rights in liberal democratic polities characterized by their current diversity and disparity.

It is important to mention too that administrative decisions facilitated the selection of these case studies. The governments of these countries have implemented digital strategies to have public data into the cyberspace since some time ago, making thus easier to have access to relevant public information in a couple of them. Civil society contributed to this effort by uploading similar information in those countries allowing thus researchers to cross-check government information.

These circumstances persuaded the research team to focus on these polities as the information sources available were both reliable and accessible, besides dealing in one case with their home country. Last but not least, the research team consisted of a group of faculty members of the Faculty of Juridical and Social Sciences of the University of Talca with an expertise on constitutional law and public policy, all of which contributed to one or more sections of this chapter.[4]

[4] Professor Obando wrote sections I, II paragraphs 1-3, III, IV paragraph 1, and V paragraph 1, which focus on the theory of affirmative action, the Argentine constitutional law on equality

Finally, regarding the formal structure of this chapter, it consists of five sections, besides an Introduction and Conclusions. Section I deals with the theory of affirmative action and Sections II to V analyze the Argentine, Chilean, Colombian, and Peruvian case studies from different perspectives based on the particularities of these polities.

1 Affirmative action and inequality

1. Southern American countries have variegated vertical societies that are the end result of a process of dependent economic development, a patriarchal family structure, and some exclusionary practices inherited from the first European settlers, all of which have conspired against an upward social mobility of masses, an effective inclusion and participation of minorities in their polities, and a greater diversity in mainstream social and political institutions.

In this context traditional policy-making dealt with issues of inequality and discrimination through measures that took aim at promoting specific constituencies, programs of focalized public expenditures that took aim at the poorest people, policies of positive action that favored specific groups, and eventually strategic litigation that tore down the most egregious cases of discrimination through piecemeal judicial adjudication. The passage and implementation of affirmative action policies and programs constituted a late comer for both legal experts and policy-makers in these countries, basically because they defy some tenets firmly entrenched in their home breed notion of constitutionalism, particularly in their nineteenth-century liberal

rights, the Chilean case study, and the historical overviews about equality rights in Colombia and Peru, besides the Introduction and Conclusions. Professor Olivares wrote section IV paragraphs 2-5 that deal with the Colombian constitutional approach to affirmative action. Professor Rayo wrote section II paragraphs 4-6 which provide an in-depth analysis of the impact of affirmative action policies in Argentina. Professor Hernández wrote section V paragraphs 2-5 that focus on the uncertain constitutional status of affirmative action in the Peruvian case study. Importantly enough, all researchers provided insightful advice on conceptual issues at different times that found their way into section I and the Conclusions of this chapter.

inspired notion of the right to equality. The latter is hardly surprising because the whole idea of affirmative action was foreign to most legal systems in the region; as a matter of fact, it was the International Labor Organization (ILO from now on) the first one that passed something resembling it in 1952, e.g. the ILO Convention No. 111 on labor discrimination, but it was President Kennedy who popularized the expression with the signing of Executive Order No. 10925 in 1961, precisely to respond the demands of the civil rights movement regarding racial discrimination in that country.[5] Nonetheless, it should be clarified that international human rights activism in different forums, including the passage of relevant international treaties, preceded the debate on affirmative action in Latin America after the restoration of democracy in this region.

2. There is not a widespread agreement on the proper noun for these policies and programs; after all, they take aim at the structural inequality that deprives some groups of their fair share of dignity and rights in everyday life. Sometimes, legal experts use expressions like affirmative action, positive action, reversal discrimination, and positive discrimination in interchangeable way to signify the same object, whereas their precise meaning vary in different circumstances and countries; for example, American legal experts take expressions like affirmative action and positive action as synonyms, while their Chilean counterparts tend to distinguish between them.[6]

On this score, Figueroa maintains that the notion of positive action is too broad, because it is meant to fulfill a positive obligation by the government, such as providing housing subsidies, primary health actions, etc., which does not necessarily imply a policy of affirmative action; likewise, expressions like reversal or positive discrimination carry a pejorative connota-

[5] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 30-31.

[6] FIGUEROA, Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 189-214, 2015.

tion most of the time.[7] The latter accounts for his preference for the expression affirmative action, which he explains, as follows:

> I shall understand for affirmative action those policies that are destined to improve the inclusion and participation of women and/or groups that have suffered persistent and systematic exclusion and discrimination for long periods of time, giving thus way to a factual inequality of such a magnitude that a formally equalitarian statute is incapable of reversing the disadvantage that impairs women or certain groups so that they require, for the same reason, measures of affirmative action. Consequently, affirmative action does not refer to any disadvantaged group, but to those that have been victims of a persistent and systematic discrimination (direct or indirect) for long periods of time.[8]

It goes without saying that this long-standing pattern of discrimination impairs the ability of specific groups to enjoy real equality in life, so it comes as little surprise that the language of equal opportunities or programs of public expenditures focalized on the poorest are sometimes little more than a window dressing that neither level the field among participants nor change the underlying reality of exclusionary and discriminatory practices against specific groups.[9]

These assumptions strongly suggest that affirmative action is a policy means to redress situations of structural inequality that impair an effective enjoyment of human rights by specific groups for reasons other than their free will or lack thereof, which are issues that stand out at the core of the deeply ingrained discrimination practices everywhere. Effectively, Saba maintains that affirmative actions are state policies that take aim at revers-

---

[7] FIGUEROA, Rodolfo. Acción afirmativa en la jurisprudencia del Tribunal Constitucional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 2, p. 403, 2016.

[8] FIGUEROA, Rodolfo. Acción afirmativa en la jurisprudencia del Tribunal Constitucional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 2, p. 403, 2016.

[9] EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 138-139;; FIGUEROA Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 195-199, 2015.

ing situations of long-term taken-for-granted group exclusion or segregation from public spaces that springs out of social practices, so they assume implementing differential treatment among people based on criteria that are unreasonable at face value but whose justification lies in the dismantling of a situation that contradicts any idea of equality as a denial of submission to someone else.[10] Moreover, this author makes the point forcefully that the government cannot look the other way in the presence of these practices, precisely because there exists an imperative to ensure anyone a non-arbitrary treatment, as follows:

> The right to an equal treatment, of course, requires a non-arbitrary treatment from the State, but it also requires that the State cannot behave as if situations of systematic and structural group submission and exclusion do not exist in circumstances that they do. The neutrality and blindness of the State concerning irrelevant differences among people to make distinctions in treatment cannot be applied when these situations do exist.[11]

3. This focus on structural inequality suggests that there are different models of equality, all of which respond to diverse assumptions. In that sense, taking stock of Figueroa´s research, it is possible to distinguish three theoretical models on equality, as follows: equality of resources, equal opportunities, and equality of outcomes.[12] This author maintains that the first one consists of distributing a nominal equal share of resources among people regardless of their personal circumstances; the second one deals with affording extra opportunities to some people, precisely because of their personal circumstances, regardless of the final outcome; and the third one has

[10] SABA, Roberto P. Desigualdad estructural y acciones afirmativas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equalitas, 2013. p. 84-87.

[11] SABA, Roberto P. Desigualdad estructural y acciones afirmativas. In: Varas, Augusto; Díaz-Romero, Pamela (Eds.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equalitas, 2013. p. 84-87.

[12] FIGUEROA, Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 190 2015.

to do with distributing unequal resources among people to achieve different outcomes, so the emphasis is on final objectives instead of resources or opportunities.[13] Moreover, Figueroa asserts that the first model (i.e., equality of resources) corresponds to a model of formal equality, whereas the second (i.e., equal opportunities) and third (i.e., equality of outcomes) models correspond much more to a model of material equality; however, equality of outcomes may lead to equal opportunities in the long-run, as follows:

> There may exist factual inequalities that turn impossible to have in fact the same opportunities for different people. Nevertheless, it is possible to achieve that factual equality of opportunities in the future. In order to achieve this objective, there may be a need to implement a system of equality of outcomes that levels the field to achieve equal opportunities in the middle or long-run. An example is gender quotas for Parliament.[14]

The latter persuades Figueroa to point out that affirmative action implies a model of equality of outcomes,[15] although it is fair to assert also that affirmative action focuses on material equality as a starting point only, because it usually goes beyond this form of equality to address issues of structural inequality.[16]

4. Taking into account the relationship among structural inequality and equality of results, as explained above, it is not far-fetched to assume that issues of participation and integration of specific groups (e.g., women, indigenous people, and persons with disabilities, among others) into the national community are at stake in social contexts characterized by their persistent and systematic

[13] FIGUEROA, Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 190-191, 2015.
[14] FIGUEROA, Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 191, 2015.
[15] FIGUEROA, Rodolfo. ¿Son constitucionales las cuotas de género para el parlamento? *Revista Chilena de Derecho*, Santiago, v. 42, n. 1, p. 192, 2015.
[16] CLÉRICO, Laura; ALDAO, Martín. La igualdad en la reforma de 1994. La igualdad "des--enmarcada. In: BERNAL, Marcelo; PIZZOLO, Calogero; ROSSETI, Andrés (Coord.). *¡Qué veinte años no es nada! Un análisis crítico a veinte años de la reforma constitucional de 1994 en Argentina*. Buenos Aires: Eudeba, 2015. p. 187-194.

exclusion and discrimination. Thus, affirmative action consists of transitory policies and programs that effect a removal of historical structural, taken-for-granted barriers that impair the effective participation and integration of those groups, so that their members may exercise their rights under conditions of equality, even at the expense of the rights of the majority.

In these circumstances affirmative action involves a breach of the formal right to equality that usually favors mainstream groups in society, but it is carried out for powerful reasons by governments. It is hardly surprising, then, that Bidart maintained that

> [...] something that apparently may look like injurious to equality and, very far from that, it is o it may be a reasonable section to reach it, is the so-called "reversal" discrimination. In some circumstances that sufficiently pass the test of reasonableness, it is constitutional to favor determined persons from certain social groups in greater proportion than others, if through that "discrimination" it is sought to compensate and to balance the unequal marginalization or relegation that falls upon those persons that are benefited with the reversal discrimination. The latter is called precisely reversal discrimination because it tends to overcome the unequal discrimination of the sector injured by that relegation.[17]

In so doing, governments exhibit a truly serious, real commitment to equality in the long-run that goes even beyond traditional notions of both formal and material equality.

2 **Argentina: constitutional certainties with uncertain results**

1. Political developments swayed a broad understanding of the right to equality by the late twentieth-century in Argentina, notwithstanding some constitutional continuity over time too.

[17] BIDART, Germán C. *Tratado Elemental de Derecho Constitucional Argentino*. Buenos Aires: Ediar, 1993. v. 1. p. 388.

In a historical perspective, the Constitution of the United Provinces in South America of 1819 recognized a general principle of equality for men in Article 100, as follows: "Men are in such a way equal before the law that whether the law is penal, mandatory or protective, it should be the same for everyone, and favor equally the powerful and the miserable for the conservation of his rights." This constitution also abolished slave trade in the national territory and recognized equal dignity and rights of indigenous peoples, while it addressed the legislature to level them with other classes in Article 128.[18] Few years later, constitution framers restated the constitutional protection of the principle of equality in the short-lived Constitution of 1826, which used the same language in Article 160 and prohibited the granting of nobility titles in Article 180.

The overthrown of the authoritarian government of Rosas in 1852 persuaded Argentine provincial leaders to draft a new constitution for a national government, which became known as the Constitution of 1853. This liberal constitution recognized equal rights for all the inhabitants of the Argentine Confederation, including equality before justice in Article 16, equality for immigrants in Article 20, and a proscription of slavery in Article 15. On this vein, Article 16 prescribed that this confederation "neither admitted blood nor birth prerogatives: there are neither personal charters nor nobility titles in her. All people are equal before the law and admissible in any employment regardless of any other consideration except suitability. Equality is the basis of taxes and public charges." Nonetheless, equality took a back seat in the constitutional architecture, because the framers adopted liberty as a paramount constitutional value; thus, "the equality before the law [...] appears as a formal value under equal circumstances."[19]

---

[18] BASTERRA, Marcela I. Constitución de 1819. Un paso adelante en el proceso de consolidación del Estado Constitucional Argentino. In: MONTI, Natalia (Coord.). *Constituciones Argentinas. Compilación histórica y análisis doctrinario*. Buenos Aires: Dirección Nacional del Sistema Argentino de Información Jurídica, 2015. p. 6-7. Available at: <http://www.saij.gob.ar/docs-f/ediciones/libros/Constituciones_argentinas.pdf>. Access on: Sept. 19, 2017.

[19] DALLA, Alberto V. Constitucional Nacional de 1853. In: MONTI, Natalia (Coord.). *Constituciones Argentinas. Compilación histórica y análisis doctrinario*. Buenos Aires: Dirección Nacional del Sistema Argentino de Información Jurídica, 2015. p. 6-7. Available at: <http://

Later, a constitutional amendment passed in 1949 moved this constitutional right to a new Article 28, which widened the scope of the latter, though it did not depart from an approach based on formal legal equality, as follows:

> The Argentine Nation neither admits racial differences, nor blood or birth prerogatives; there are neither personal charters nor nobility titles. All people are equal before the law and admissible in any employment regardless of any other consideration except suitability. Equity and proportionality are the basis of taxes and public charges.

Curiously enough, this amendment insisted also on the proscription of slavery in Article 27.

However, an unconstitutional government abrogated this amendment in 1957, just to return to the Constitution of 1853 that existed validly before 1949. This government -headed by General Aramburu- summoned a constitutional convention to amend the constitution the same year, but the convention passed only two amendments at last. One of them strengthened both labor and social security rights by introducing a new Article 14 Bis, which provided equal pay for equal work. Looking backward, Vanossi maintained that this amendment "obligates the State to remove the obstacles that impede or hinder to get access to equal opportunities and condition the development of the people."[20]

The return of democracy to Argentina in 1983 persuaded the democratic elites to reenact the Constitution of 1853, but under the text that went

www.saij.gob.ar/docs-f/ediciones/libros/Constituciones_argentinas.pdf>. Access on: Sept. 19, 2017.

[20] LOIANNO, Adelina. Reforma Constitucional de 1957. In: MONTI, Natalia (Coord.). *Constituciones Argentinas. Compilación histórica y análisis doctrinario*. Buenos Aires: Dirección Nacional del Sistema Argentino de Información Jurídica, 2015. p. 6-7. Available at: <http://www.saij.gob.ar/docs-f/ediciones/libros/Constituciones_argentinas.pdf>. Access on: September 19, 2017.

into effect in 1957.[21] There arose, however, some questioning about the extent of the constitutional guarantee of equality before the law, basically to determine whether or not it included real or material equality. On this vein, Bidart maintained that real or material equality had a constitutional foundation in the notion of Social and Democratic Rule of Law, so the "benefits of freedom [could be] extended and made available for the equal access of everyone [...]"[22]

Nevertheless, this constitution was extensively amended in 1994, precisely to make room for new institutions and rights. This constitutional reform did not touch upon Article 16,[23] but it incorporated into the constitution the most important human rights treaties and it created a legislative mechanism to incorporate like treaties later according to Article 75 No. 22 Paragraph 2,[24] all of which emphasized the importance of equality and non-discrimination as one of their main goals[25] and acquired constitutional supremacy over laws and regulations in the aftermath of this reform. The same reform authorized the passage of positive actions to guarantee real equal opportunities among men and women to get access both to popular

[21] BIDART, Germán C. El sistema constitucional argentino. In: GARCÍA, Domingo; FERNÁNDEZ, F. S.; HERNÁNDEZ, R. V. (Coord.). *Los Sistemas Constitucionales Iberoamericanos*. Madrid: Editorial Dykinson, 1992. p. 37-38; LINZ, Juan J., STEPAN, Alfred. *Problems of Democratic Transition and Consolidation*. Baltimore: The Johns Hopkins University Press, 1996. p. 202.

[22] BIDART, Germán C. El sistema constitucional argentino. In: GARCÍA, D. B.; FERNÁNDEZ, F. S.; HERNÁNDEZ, R. V. (Coord.). *Los Sistemas Constitucionales Iberoamericanos*. Madrid: Editorial Dykinson, 1992. p. 59.

[23] The current Constitution, amended in 1994, still deals with the prohibition of slavery, the emancipation of slaves, equality before the law, justice, and public employment, and elimination of aristocratic privileges, in Articles 15 and 16, which are almost identical to the ones that went into effect in 1853 and 1957.

[24] BARCESAT, Eduardo. A veinte años de la Reforma Constitucional. Examen y perspectiva. In: MONTI, Natalia (Coord.). *Constituciones Argentinas. Compilación histórica y análisis doctrinario*. Buenos Aires: Dirección Nacional del Sistema Argentino de Información Jurídica, 2015. p. 267. Available at: <http://www.saij.gob.ar/docs-f/ediciones/libros/Constituciones_argentinas.pdf>. Access on: Sept. 19, 2017.

[25] CLÉRICO, Laura; ALDAO, Martín. La igualdad en la reforma de 1994. La igualdad "des--enmarcada. In: BERNAL, Marcelo; PIZZOLO, Calogero; ROSSETI, Andrés (Coord.). *¡Qué veinte años no es nada! Un análisis crítico a veinte años de la reforma constitucional de 1994 en Argentina*. Buenos Aires: Eudeba, 2015. p. 179-181.

public offices and to party offices in accordance with Article 37 Paragraph 2. Likewise, Article 75 Paragraphs 17 and 19 authorized Congress to recognize the ethnic and cultural preexistence of Argentine indigenous peoples as well as guaranteeing their identity, and to pass legislation that ensures equal opportunities and possibilities -without any discrimination- in the organization of education. By the same token, Article 75 No. 23 Paragraph 1 authorized Congress

> to pass legislation and to promote measures of positive action that guarantee real equal opportunities and treatment, and the full enjoyment and exercise of the rights recognized by this Constitution and valid international human right treaties, particularly regarding children, women, elders, and persons with disabilities.

All in all, these constitutional provisions established the foundations to carry out affirmative action policies and programs for particular groups, especially because of their reference to positive actions and treatment, thus clarifying the extent and scope of the right to equality recognized by the constitution.[26]

2. Certainly, Article 16 guarantees formal equality –also known as a civil equality- which implies an interdiction of unreasonable privileges granted upon specific groups, persons, or classes by the State under the same circumstances;[27] in other words, it is unconstitutional only "hostile, persecutory, arbitrary or stigmatizing discriminations that rely upon purposes of unjust persecution or undue privilege of people or groups", as ruled some

[26] SABA, Roberto P. Desigualdad estructural y acciones afirmativas. In: VARAS, Augusto; Díaz-Romero, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equalitas, 2013, p. 119-121; AGDOCONSULTORA. *El principio de igualdad y la discriminación positiva del art. 75 inc. 23 de la Constitución argentina*. Available at: <http://underconstitucional.blogspot.cl/2014/08/el-principio-de-igualdad-y-la.html>. Access on: Sept. 20, 2017; CLÉRICO, Laura; ALDAO, Martín. La igualdad en la reforma de 1994. La igualdad "des-enmarcada. In: BERNAL, Marcelo; PIZZOLO, Calogero; ROSSETI, Andrés (Coord.). *¡Qué veinte años no es nada! Un análisis crítico a veinte años de la reforma constitucional de 1994 en Argentina*. Buenos Aires: Eudeba, 2015. p. 180, 188-189.

[27] BADENI, Gregorio. *Derecho Constitucional. Libertades y garantías*. Buenos Aires: Ad-Hoc S.R.L., 1993. p. 242-243.

time ago by the Argentine Supreme Court.[28] The latter implies to factor in, on the one hand, that public authorities may treat people differently "as long as it is done in an homogenous, uniform, and non-arbitrary way"[29] and, on the other hand, that the standard of reasonableness that applies to circumstances invoked to justify differential treatment must "keep a relation of 'functionality' or 'instrumentality' between the goal pursued by the norm and the criterion or category chosen to justify that different treatment."[30]

In a sense, the right to equality requires providing somebody with "equal treatment under equal situations or circumstances";[31] therefore, it amounts to a breach of the constitution not only to treat unequally those who are under equal circumstances, but also to treat equally those who are under different circumstances.[32] In so doing, the constitution provides a yardstick to ensure equal opportunities to everyone, although this formal approach to equality is not enough when dealing with those groups who face deep seated discrimination for reasons related to their origins, gender, religion, race, among others. The latter requires state programs and policies to remove those obstacles that impair equal opportunities among people, precisely to revitalize a balance among social groups and to guarantee a fair economic order for individuals.[33]

---

[28] EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 140.

[29] SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 129, 2005.

[30] SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 130, 2005.

[31] EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 140.

[32] BADENI, Gregorio. *Derecho Constitucional. Libertades y garantías*. Buenos Aires: Ad-Hoc S.R.L., 1993. p. 242-243; EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 139-141; BIDART, Germán. *Compendio de Derecho Constitucional*. Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera Ediar, 2004. p. 75-77; SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 126-129, 2005.

[33] EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 138-139; BIDART, Germán. *Compendio de Derecho Constitucional*. Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera Ediar, 2004. p. 75-76.

In this regard, Saba points out that the new Article 75 Paragraph 23 impacted on the meaning of Article 16, because the Supreme Court suggested -to some extent- a structural approach to the right of equality in the ruling *González Delgado*, issued in 2000.[34] This approach became apparent in the particular vote written in this decision by Judge Petracchi, as follows:

> The stringent standard of review that applies to classifications based on sex does not turn those in a category totally forbidden; though, it means that categories based on sex should not be used to create or perpetuate the legal, social, and economic inferiority of women. In any case, classifications based on gender may be used to compensate women for the incapacities that have suffered throughout history. (Motive 9 Paragraph 4).[35]

According to Saba, the notions that underlay Judge Petracchi's particular vote are the principle of disadvantaged group and equality as no submission to other groups, so the objective of the right to equality is "to avoid the emergence and establishment of groups that are submitted, excluded or subjugated to other groups."[36] Therefore, this author maintains that the right to equality – understood as a no submission to other groups- implies an interdiction on suspected categories associated to these groups.[37]

It is hardly surprising, then, that Bidart pointed out that the Constitution enhanced the reach of equality in society after 1994, as well as suggested that it made room for

[34] SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 126, 138, 143, 2005.

[35] ARGENTINA. *Sentencia de la Corte Suprema de Justicia ´González Delgado y otros c/ Universidad Nacional de Córdoba s/Recurso de Hecho*. Available at: <http://www.saij.ob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-gonzalez-delgado-cristina-otros-universidad-nacional-cordoba-recurso-hecho-fao-0000224-2000-09-19/123456789-422-0000-0ots-eupmocsollaf>. Access on: Sept. 20, 2017.

[36] SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 139, 2005.

[37] SABA, Roberto. (Des)igualdad Estructural. *Revista de Derecho y Humanidades*, Santiago, n. 11, p. 145, 2005.

> "reverse discrimination" (according to which it is constitutional to favor some people or social groups in greater proportion than others, when that "discrimination" tends to compensate, to balance, and to overcome the marginalization or unequal relegation that falls upon those who are favored by the "reversal" discrimination."[38]

3. The Supreme Court followed the judicial doctrine set in Consultative Opinion 18 (CO-18) by the Inter American Court of Human Rights, in 2003, to construct the extent of the right to equality, especially under the new provisions of Article 37 Paragraph 2 and Article 75 Paragraph 23.

This Consultative Opinion expressed that States had a general obligation to respect and to guarantee human rights, without any discrimination, so

> States must refrain from carrying out actions that in any manner take aim at, directly or indirectly, creating situations of legal or factual discrimination. [...]/ Also, States are obligated to pass positive measures to revert or change discriminatory situations that exist in their societies, which affect a determined group of persons. This implies that States must exert a special duty of protection regarding acts and practices of third parties that, under its tolerance or acquiescence, create, keep, or favor discriminatory situations./ [...] States may only establish objective and reasonable distinctions, when they are carried out with utmost respect of human rights and according to the principle of applying the norm that best protects a human being. (Paragraphs 103, 104, and 105).[39]

In other words, States could also be held accountable for a specific omission: failing to pass positive measures to revert or change discrimina-

[38] BIDART, Germán. *Compendio de Derecho Constitucional*. Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera Ediar, 2004. p. 77.

[39] CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Opinión Consultiva OC-18/03 de 17 de Septiembre de 2003 solicitada por los Estados Unidos Mexicanos. Condición Jurídica de los Migrantes Indocumentados*. Available at: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2003/2351.pdf?view=1>. Access on: Sept. 20, 2017.

tory situations that affect determined social groups, including deeply ingrained social practices carried out by "third parties".

Likewise, this Consultative Opinion touched upon an issue of horizontal efficacy of human rights when it expressed that

> [...] in a labor relation regulated by private law, it must be kept in mind that exists an obligation to respect human rights among private persons. That is, from the positive obligation to ensure the effectiveness of protected human rights that exists in each State derive effects with respect to third parties (erga omnes). [...] fundamental rights must be respected by both public powers and private persons with respect to other private persons. (Paragraph 140).[40,41]

The Supreme Court adopted the Inter American Court's doctrine in the rulings *Alvarez* (Motive 4 Paragraph 2),[42] *Pellicori* (Motive 5 Paragraph 3),[43] and *Sisnero* (Motive 3),[44] issued in 2010, 2011, and 2014, respectively.

---

[40] CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Opinión Consultiva OC-18/03 de 17 de Septiembre de 2003 solicitada por los Estados Unidos Mexicanos. Condición Jurídica de los Migrantes Indocumentados*. Available at: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2003/2351.pdf?view=1>. Access on: Sept. 20, 2017.

[41] The latter involved a departure from a traditional doctrine held in Argentine constitutional law regarding equality, because some authors maintained that it did not project necessarily into private social relations that did not impact on public order, public moral, or good customs. Cfr. BADENI, Gregorio. *Derecho Constitucional. Libertades y garantías*. Buenos Aires: Ad-Hoc S.R.L., 1993. p. 244; EKMEKDJIAN, Miguel A. *Tratado de Derecho Constitucional*. Buenos Aires: Editorial Depalma, 1994. v. 2. p. 151-156.

[42] ARGENTINA. *Sentencia Álvarez, Maximiliano y otros c/ Cencosud S.A. s/ acción de amparo*. Available at: <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-alvarez-maximiliano-otros-cencosud-sa-accion-amparo-fa10000047-2010-12-07/1234-56789-740-0000-10ts-eupmocsollaf>. Access on: Sept. 21, 2017.

[43] ARGENTINA. *Sentencia de la Corte Suprema de Justicia ´Pellicori, Liliana Silvia c/ Colegio Público de Abogados de la Capital Federal s/ Amparo´*. Available at: <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-pellicori-liliana-silvia-colegio-publico-abogados-capital-federal-amparo-fa110-00149-2011-11-15/123456789-941-0001-10ts-eupmocsollaf>. Access on: Sept. 21, 2017.

[44] ARGENTINA. *Sentencia de la Corte Suprema de Justicia ´Pellicori, Liliana Silvia c/ Colegio Público de Abogados de la Capital Federal s/ Amparo´*. Available at: <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-pellicori-liliana-silvia-colegio-publico-abogados-capital-federal-amparo-fa110-00149-2011-11-15/123456789-941-0001-10ts-eupmocsollaf>. Access on: Sept. 21, 2017.

These decisions enhanced -to a greater or lesser extent- the *ius cogens* status of the principle of equality, the prohibition of discrimination, and the *erga omnes* obligations generated by this principle for States and persons.[45]

4. Regarding women, CEDAW, General Comment No. 19, and the Inter American Convention on the Prevention, Punishment, and Eradication of Violence Against Women are reference points for law-making in this country.[46]

The first instrument of affirmative action was the gender quota for congressional elections created by Act No. 24,012 of 1991. In so doing, Argentina became the first Latin American country that enacted quotas to increase women participation in politics.

This law emerged out of an initiative to amend the National Electoral Code introduced by Senator Margarita Malherro in 1989, who drafted her initiative based on the United Nations Charter, the Universal Declaration of Human Rights, and the International Convention of Political Rights of Women, which received broad support in the Senate floor, although several representatives had introduced the same legislation at that time into the House of Deputies.[47]

This law made mandatory for all parties to include in their electoral lists for national and provincial elections a representative number of female candidates, which amounted to 30% at least of all candidates expected in those lists. The impact of this law was significant in the middle-run because

[45] AGDOCONSULTORA. *El principio de igualdad y la discriminación positiva del art. 75 inc. 23 de la Constitución argentina*. Available at: <http://underconstitucional.blogspot.cl/2014/08/el-principio-de-igualdad-y-la.html>. Access on: Sept. 20, 2017.

[46] Congress passed both conventions through Act No. 23,179 on 1985 and Act No. 24,632 on 1996, respectively. Based on CEDAW former President Menem created the National Council on Women in 1992 as a presidential agency that looks after the implementation of this convention, coordinates executive actions to fulfill the convention objectives, and designs public policies to make effective its provisions.

[47] CARRIÓ, Elisa M. Los retos de las mujeres en el Parlamento. Una nueva mirada al caso argentino. In: MÉNDEZ-MONTALVO, Myriam; BALLINGTON, Julie (Eds.). *Mujeres en el Parlamento. Más allá de los números*. Estocolmo: IDEAS, Serie Manuales, Edición en Español, 2002, p. 137. Available at: <https://www.idea.int/sites/default/files/publications/mujeres-en-el-parlamento-mas-alla-de-los-numeros-2002.pdf>. Access on: Sept. 10, 2017; VAZQUEZ, Silvia. Introducción. In: VAZQUEZ, Silvia (Comp.). *Hombres Públicos, Mujeres Públicas*. Buenos Aires: Friedrich Ebert Stiftung y Fundación Sergio Karakachoff, 2002. p. 16-21. Available at: <http://library.fes.de/pdf-files/bueros/argentinien/02094.pdf>. Access on: Sept. 10, 2017.

both the House's and the Senate's gender composition changed favoring thus a greater presence of women in both houses, partly induced by the electoral system too. Indeed, today's gender composition of the Senate includes a 40% of female members, while in the House this percentage amounts to 39% of all members.[48] In any case, Congress passed new legislation to increase this quota to 50% of all candidates in parties' electoral lists on November 23rd, 2017, so this new Bill on Gender Parity shall become effective for the congressional elections of 2019.[49]

This quota law received further use in union elections, just as a new law on union quotas went into effect in 2002. Act No. 25,674 proclaimed that there should be a proportional participation of female delegates in negotiations of union contracts, according to the number of workers involved in each branch of economic activity. It also established that women representation in elective and representative offices of union associations must be 30% at least, when the number of women reaches or overcomes that percentage over the number of workers.

On this score, it is important to review the assumptions that underlie these quotas. From a normative viewpoint, they presuppose that the formal political equality recognized in laws and constitutions requires being shore up with regulations that promote substantive equality in the definition of candidacies to popular public offices;[50] therefore, quotas are just instrumen-

[48] However, this achievement required the enactment of successive regulations, even judicial decisions, so that female candidates could have some probability of success. A case in point was Decree No. 1,246/2000 that looked forward to comply with the National Electoral Code, especially after Decree No. 451/2005 amended that decree to eliminate gender alternation in the make-up of electoral lists, which betrayed the spirit of the law. In any case, women participation reached 30% in both houses for the first time in 2001, though the efficacy of this affirmative action is not unrelated to an electoral system of proportional representation and closed lists.

[49] INFOBAE. *Diputados aprobó la ley de paridad de género en listas electorales*. 2017. Available at:<https://www.infobae.com/politica/2017/11/23/diputados-aprobo-la-ley-de-paridad-de-genero-en-listas-electorales/>. Access on: Nov. 23, 2017

[50] CAMINOTTI, Mariana. Ideas, legados y estrategias políticas en la reforma de las reglas de selección de candidatos: La ley de cuotas pionera de Argentina. *Revista Uruguaya de Ciencia Política*, Montevideo, v. 23, n. 2, p. 65-85, 2014. Available at: <http://www.scielo.edu.uy/scielo.php?script=sci_arttext&pid=S1688-499X2014000200004>. Access on: Sept. 10, 2017.

tal or strategic reference points, but not an end in and of themselves.[51] On the other hand, from a cognitive viewpoint, it is apparent a different emphasis in discourses about gender, as a vision of society, such as, gender parity or equality in the spheres of political decision, physical and economic autonomy, and women empowerment;[52] thus, ECLA maintained that "the inequality or lack of autonomy that women endure is a consequence of a maldistribution of power, income, and time among men and women, as well as a lack of recognition of women rights by economic and political elites."[53] The latter implies that the instrumental value of quotas requires a careful evaluation of their potential to modify patterns of domination and inequity that exist in gender relationships.[54]

It should not been overlooked, however, that quotas are only means for a long-run goal of modifying power relations between genders, but they

[51] VAZQUEZ, Silvia. Introducción. In: VAZQUEZ, Silvia (Comp.). *Hombres Públicos, Mujeres Públicas*. Buenos Aires: Friedrich Ebert Stiftung y Fundación Sergio Karakachoff, 2002. p. 22. Available at: <http://library.fes.de/pdf-files/bueros/argentinien/02094.pdf>. Access on: Sept. 10, 2017. Carrió echoed this idea by stating "[...] the Quota Law is a means. Its promoters conceived of this law as a means to achieve subsequent objectives and never as an end in and of itself." Cfr. CARRIÓ, Elisa M. Los retos de las mujeres en el Parlamento. Una nueva mirada al caso argentino. In: MÉNDEZ-MONTALVO, Myriam; BALLINGTON, Julie (Ed.). *Mujeres en el Parlamento. Más allá de los números*. Estocolmo: IDEAS, Serie Manuales, Edición en Español, 2002, p. 142. Available at: <https://www.idea.int/sites/default/files/publications/mujeres-en-el-parlamento-mas-alla-de-los-numeros-2002.pdf>. Access on: Sept. 10, 2017.

[52] CEPAL. *Informe Anual 2011. El salto de la autonomía. Del margen al centro.* Santiago: Observatorio de Igualdad de Género en América Latina y El Caribe (OIG), 2011. p. 9. Available at: <http://repositorio.cepal.org/bitstream/handle/11362/3931/1/S2011102.pdf>. Access on: Sept. 12, 2017.

[53] CEPAL. *Informe Anual 2011. El salto de la autonomía. Del margen al centro.* Santiago: Observatorio de Igualdad de Género en América Latina y El Caribe (OIG), 2011. p. 9. Available at: <http://repositorio.cepal.org/bitstream/handle/11362/3931/1/S2011102.pdf>. Access on: Sept. 12, 2017.

[54] This debate echoes the positions advanced by the Argentine suffragist movement in the 1950s. The issues discussed at that time were basically how to make effective the political rights of women or how to make politics from their own deprivations and alienations. Cfr. PERRIG, Sara. ¿Y ahora qué? Las mujeres anti-peronistas y los derechos políticos femeninos (1947–1951). *Latinoamérica. Revista de Estudios Latinoamericanos*, n. 61, p. 99-111, 2015. Available at: <http://www.scielo.org.mx/pdf/latinoam/n61/1665-8574-latinoam-61-00097.pdf>. Access on: Sept. 12, 2017.

have some inherent limits of their own.[55] Indeed, the reference to a participation quota in legislatures evinced soon limitations for a quest of gender equality, because parity in representation should be the goal to achieve; nonetheless, the latter presupposes that women reach economic and physical autonomy, which involves to pass legislation and to implement policies that pursue to modify the current division of labor based on gender, especially at the domestic level.[56]

On this vein, it is fair to ask if the legislative agenda involves this goal in relevant terms of priority, as a consequence of greater female participation in congressional politics; moreover, it is tempting to ask if the quota law alter the power structure and decision making of parliamentary groups. In this regard, a study about the impact of increased women participation in Congress determined that there was not a major modification both in the power legislative structure and in the budget allocation priorities,[57] so the conclusion was rather straightforward: "The thematic distribution among parliamentary committees also demonstrates inequality of power: women keep legislating as Super Mothers."[58]

5. Regarding indigenous people, affirmative action acquires a particular dimension because it is about getting recognition of their own identity and to have access to ownership onto those territories that sustain that identity. In this case autonomy requires that indigenous peoples may exert

[55] MARTELOTTE, Lucía; GHERARDI, Natalia; MORELLI, Mariana *Agenda de las Mujeres: Elecciones de 2011. Análisis de candidaturas desde una perspectiva feminista*. Buenos Aires: Equipo Latinoamericano Justicia y Género (ELA), 2011. p. 37-38. Available at: <http://www.ela.org.ar>. Access on: Aug. 12, 2017.

[56] MARTELOTTE, Lucía. 25 years of Quota Laws in Latin America. *SUR Revista Internacional de Derechos Humanos*, São Paulo, v. 13, n. 24, p. 94-96, 2016. Available at: <http://sur.conectas.org/wp-content/uploads/2017/02/8-sur-24-ing-lucia-martelotte.pdf>. Access on: Aug. 12, 2017.

[57] ALDREY, Sasha C. *Ley de cuotas y distribución de poder en las comisiones legislativas de América Latina*. Madrid: Universidad Complutense de Madrid, Tesis Doctoral, 2017. p. 220-225. Available at: <http://eprints.ucm.es/42672/1/T38769.pdf>. Access on: Aug. 12, 2017.

[58] ALDREY, Sasha C. *Ley de cuotas y distribución de poder en las comisiones legislativas de América Latina*. Madrid: Universidad Complutense de Madrid, Tesis Doctoral, 2017. p. 220-225. Available at: <http://eprints.ucm.es/42672/1/T38769.pdf>. Access on: Aug. 12, 2017.

authority onto these territories,[59] so it is hardly surprising that ILO Conventions reflected this development over time.[60]

Nowadays, the ILO Convention No. 169[61] recognizes indigenous peoples as right holders which membership is a manifestation of a collective subjective adscription, while it recognizes also their aspirations to take control of their own institutions, ways of life, and economic development, as well as to keep and strengthening their identities, languages, and religions within the framework of the States where they live.

Indigenous people represent 2.4% of the total population according to the 2010 Census. They are organized into more than 6,000 mostly rural communities, 32 indigenous peoples that pre-existed the nation, and 13 original languages. These facts explain that the 1994 constitutional reform recognized their cultural and ethnic preexistence in Article 75 Paragraph 17, which granted upon Congress the authority

> to guarantee the respect to their identity and the right to a bilingual and intercultural education; to recognize the legal personality of their communities and the community possession and ownership of the lands traditionally occupied by them, besides regulating the grant of others that are suitable and sufficient for human development; none of them shall be alienable, transmissible, or susceptible of liens or attachments./ To ensure their participation in the management of their natural resources and other interests that concern to them [...]

Later on, Congress passed Act No. 26,994 that authorized indigenous communities to exert community possession and ownership of the lands tra-

[59] RADOVICH, Juan. Política Indígena y Movimientos Etnopolíticos en la Argentina Contemporánea. Una aproximación desde la Antropología Social. *Revista Antropologías del Sur*, n. 1, p. 140, 2014. Available at: <http://www.revistaantropologiasdelsur.cl/wp-content/uploads/2014/11/Radovich-Juan-Carlos_Pol%C3%ADtica-Ind%C3%ADgena-y-Movimientos-Etnopol%C3%ADticos-en-la-Argentina.pdf>. Access on: Aug. 15, 2017.

[60] Cfr. ILO Convention No. 107 and the Preamble of the ILO Convention No. 169.

[61] The Argentine government ratified it in 2000, but it went into effect in 2001.

ditionally occupied by them, as well as of those others that are suitable and sufficient for human development in accordance with the law.

In any case, the founding of the National Institute of Indigenous Affairs in 1985 was the starting point for affirmative action in favor of indigenous peoples. This institute was created by Act No. 23,302, better known as the "Act on the Indigenous Policy and Support of Aboriginal Communities", as a decentralized administrative agency that includes internal indigenous participation and depends on the Ministry of Health and Social Action. Indeed, Article 1 of Act No. 23,302 declared that it

> is of national interest to pay attention and to support aboriginal and indigenous communities that exist in the country, and their defense and development for their full participation in the socioeconomic and cultural process of the Nation, with due respect to their own values and modalities. For this purpose there shall implement plans that allow their access to land ownership and the promotion of their farming, timber, mining, industrial, or craft production in any of their specializations, the preservation of their cultural guidelines in the teaching plans and the protection of health for their members.

Whereas Article 2 Paragraph 2 defined indigenous communities, as follows: "those family sets that recognize themselves as such through descending from populations that inhabited national territory at the time of the conquest or colonization and indigenous and natives to the members of those communities."[62]

[62] Notwithstanding these legal developments, different international conventions and UN resolutions swayed legislation and public policies about indigenous peoples in this country. Likewise, the World Conference against Racism, Racial Discrimination, and Xenophobia, held in Durban in 2001, contributed to justify affirmative action policies toward ethnic minorities throughout Latin America. Cfr. LURASCHI, Estefanía. *From Invisibility to Affirmative Action: Afro-Argentines in Contemporary Argentina*. Georgetown : Georgetown University, Master Thesis, 2014, p. 49. Available at:<https://repository.library.georgetown.edu/bitstream/handle/10822/710008/Luraschi_georgetown_0076M_12728.pdf?sequence=1&isAllowed=y>. Access on: Aug. 12, 2017.

However, it is important to keep in mind that land grants became the main instrument recognized in this law to make up for the history of confiscations carried out by the State since the dawn of the republic, just like in other parts of the Americas.[63] Moreover, the law stated that land grants are free of charge, their beneficiaries are exempted of any type of taxes and charges, and there shall be preferential credits and technical assistance for the economic exploitation of states.

Notwithstanding the time elapsed since the enactment of this legislation, there have been several –if not recurrent- difficulties to achieve the objectives stated in this law according to the UN Special Rapporteur Mr. Ruteere, who referred straightforwardly to the unfavorable situation of indigenous peoples therein in 2016, especially regarding to their "invisibility" in the polity, the lack of implementation of the aforesaid legal provisions, and their socioeconomic location among the poorest people of this country.[64]

[63] CLARO, Magdalena; SEONE, Viviana. *Acción afirmativa*: hacia democracias inclusivas. Argentina. Santiago: Fundación Equitas, 2005. p. 80-81. Available at: <https://issuu.com/fundacion.equitas/docs/aa_argentina/4>. Access on: Aug. 15, 2017.

[64] Mr. Ruteeree expressed this bleak picture, as follows: "Regardless an integral legal and institutional framework, there is a lack of effective implementation and still persist important challenges. In particular, the situation of original peoples in some areas of the country is terrible because they live under extreme poverty conditions, isolated, and without access to basic services. While a great deal of minorities is still invisible to all spheres of society, the situation of original peoples is especially critical and demands immediate attention. They are denied access to basic needs such as drinking water, a dignified house, quality health care, employment opportunities, and adequate and quality education. They are excluded from social and political life in general. There is an absence of their representatives in key offices, even in those that have to do specifically with issues related to their peoples. The consultation methods used with this population are not in agreement with their culture and approach to life. Access to ownership of lands is still a great challenge and it must be approved rapidly new provisions to protect communities of being evicted given the expiration in 2017 of the term established in Act No. 26,554. It is necessary to simplify the system to register title deeds about community lands as well as to provide adequate assistance in this process." Cfr. NACIONES UNIDAS. *Texto completo del comunicado de prensa preparado por el Relator Especial de las Naciones Unidas sobre las formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia Sr. Mutuma Ruteere, 23 de mayo de 2016, en la Ciudad Autónoma de Buenos Aires, Argentina*. 2016. Available at: <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20005&LangID=S>. Access on: Aug. 10, 2017.

6. Regarding persons with disabilities, an agreed upon conception of people with disabilities focuses on those individuals that have "difficulties or limitations in their daily activities and restrictions in their participation, which originate in a deficiency [...] that impairs them permanently to cope with their daily life within their physical and social milieu [...]"[65]

The number of persons with disabilities in Argentina (5.1 million app.) is big enough to justify special attention from different quarters, according with the 2010 Census. After all, it amounted to 12.9% of the total population, though disability impairs a greater proportion of women (55.75%) than men (44.25%).

Precisely, Act No. 26,378 of 2008 incorporated the International Covenant on the Rights of People with Disabilities to the constitutional block, so this covenant went immediately into effect throughout the federal union. The latter implied also that the State had to follow the official interpretations provided by UN bodies in the policy-making process, like those put forward in General Comment No. 5. Indeed, Paragraph 9 of this General Comment referred to

> [...] the obligation of States parties to the Covenant to promote a progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments [...] in the case of such a vulnerable and disadvantaged groups is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that [...] a wide range of specially tailored measures will be required.[66]

[65] BELLINA, Jorge Y. Discapacidad, mercado de trabajo y pobreza en Argentina. *Invenio*, v. 16, n. 30, p. 75, 2013.

[66] CESCR. *General Comment N° 5*: Persons with Disabilities. 1994. p. 3. Available at: <http://www.refworld.org/docid/4538838fo.html>. Access on: Aug. 15, 2017.

However, this country began to address the situation of these persons long before the passage of this convention. Act No. 22,431 of 1981 became an important milestone in this regard, because it created the System for the Integral Protection of Persons with Disabilities which purpose consisted of granting to these persons health care, education, access to social security, "as well as to grant upon them privileges and stimuli that make possible to neutralize the disadvantage that disability befell on them and to give them an opportunity, through their effort, to perform in the community a role equivalent to the one performed by normal persons."

This law established some measures of affirmative action that all public agencies and private utility companies should implement to favor persons with disabilities; for instance, it prescribed that each one of these entities must hire persons with disabilities that fulfill conditions of suitability for no less than 4% of the payroll, besides reserving exclusive positions for them.[67] It also directed these institutions to prioritize those companies that hire persons with disabilities in their procurement processes, if they offer their goods and services under equal cost and according to the bidding norms.

On the other hand, Act No. 24,901 of 1997 created a system of basic social security benefits for the integral protection of persons with disabilities. This law established that health care providers have an obligation to supply full coverage of basic benefits to persons with disabilities that joined them as members, while it confers upon the State a like obligation regarding persons with disabilities that lack membership therein under a subsidiary role.[68]

[67] Decree No 498/83 regulated the percentage of reserved positions for persons with disabilities, clarified that companies and agencies must implement this action in regards to new positions, and they must give a preference to visually impaired persons for 1% of those new positions.

[68] FUENTES, Patricia. *Discapacidad en la República Argentina. Aspectos Normativos*. Instituto Universitario de Ciencias de la Salud, 2014. p. 42-44, 46-52. Available at: <http://www.barcelo.edu.ar/greenstone/collect/tesis/index/assoc/HASH011a/0e66bead.dir/TFI%20Fuentes%20Patricia.pdf>. Access on: Aug. 12, 2017.

To fund these programs, Congress passed a law on bank checks that earmarked all proceedings on check penalties to programs for persons with disabilities two years earlier, which the government renewed in 2003, besides appropriating funding for like programs in the budget law since 2001.[69]

Finally, Act No. 24,314 of 1994 amended Act No. 22, 431 to improve access of persons with reduced mobility to the physical environment. Nevertheless, there are still important deficits in physical access to facilities, notwithstanding the time elapsed since the passage of the first laws and regulations. Likewise, there is a lack of statistical studies at all levels of the federal state regarding physical accessibility. Moreover, the federal form of government brings about important unbalances in the implementation of legislation and regulations among the provinces. Thus, it became non-viable "to carry out autonomously actions in public facilities that neither lack braille signage systems nor count with alternative resources for orientation based on persons with disabilities´ logic of mobility and detection."[70]

3 Chile: muddling through public policy under constitutional uncertainty

1. Chilean constitutional development on equality rights looks like a regression in the long-run once the Constitution of 1980 went into effect; however, democratic governments loosened somehow the bonds of this constitution after 1991.

In a historical perspective, the Moralist Constitution of 1823 proclaimed in Article 7 that "[...] every Chilean is equal before the law [...]", while Article 8 prescribed that "[...] there were not slaves in Chile: whoever treads its territory for a single natural day shall be free. [...]" In turn, the Lib-

[69] Decree No. 1277/2003 created the National Fund for the Integration of Persons with Disabilities, wherein converge all the funding collected through different sources.

[70] REDI; CELS; FAICA; FENDIM; ADC. *Informe alternativo. Situación de la discapacidad en Argentina 2008-2012*. Buenos Aires: 2012, p. 13. Available at: <http://www.redi.org.ar/Documentos/Informes/Informe-alternativo-al-comite-sobre-los-derechos-de-las-personas.pdf>. Access on: Aug. 15, 2017.

eral Constitution of 1828 addressed the proscription of slavery only in Article 11, although sticking closely to the language used five years earlier. The Autocratic Constitution of 1833 went one step further by guaranteeing to all inhabitants of the republic "[...] the equality before the law. There is not privileged class in Chile", as prescribed in Article 12, in circumstances that Article 132 dealt with the proscription of slavery by using almost the same language as in 1828.[71]

After the breakdown of democracy in 1924 a new constitution went into effect. Although a liberal view on constitutional rights inspired mostly the newly passed Constitution of 1925, there was some recognition of social rights too. This constitution did not depart from the previous constitution regarding the right to equality,[72] although an amendment passed in 1970 -Act No. 17.398- recognized a new constitutional right to participation that assumed an active state role in furthering positive freedom and equality among people,[73] partly inspired in international human rights treaties, as follows: "17. °The right to participate actively in the social, cultural, civic, political, and economic life to achieve a full development of the human being and its effective incorporation into the national community. The State should remove the obstacles that limit, in fact, freedom and equality of people and groups [...]"[74] Unfortunately, this was a short-lived amendment because a military coup *d´etat* led by General Pinochet brought down this constitution in 1973, so the military enacted a new constitution eight years later, better known as the Constitution of 1980, which comprised important differences on the subject analyzed herein.

---

71 ROLDÁN, Alcibíades. *Elementos de Derecho Constitucional de Chile*. Santiago: Imprenta, Encuadernación i Litografía "Barcelona", 1913. p. 145.

72 SILVA, Alejandro B. *Tratado de Constitucional*. Santiago: Editorial Jurídica de Chile, 1963. v. 2. p. 210-212.

73 SILVA, Alejandro B. Proyección política de los cuerpos intermedios. In: JORNADAS DE DERECHO PÚBLICO, 6., 1976, Valparaíso. *Anales*... Valparaíso: Ediciones Universitarias de Valparaíso, 1976. p. 118-119, 121-122.

74 EVANS DE LA CUADRA, Enrique. *Chile, hacia una Constitución contemporánea*. Santiago: Editorial Jurídica de Chile, 1973. p. 118, 126.

This constitution was heavily influenced by conservative and neoliberal views regarding the relationship among the state, the society, and the individual, which permeated the bill of rights and state responsibilities therein. A case in point is the right to equality, which included several manifestations thereof in the bill of rights, such as equality before the law (Article 19 No. 2), equal legal protection in the exercise of rights or equality before justice (Article 19 No. 3), equal access to public health programs (Art. 19 No. 9 Paragraph 2), prohibition of labor discrimination (Article 19 No. 16 Paragraph 3), equal admission to all public employment and offices (Article 19 No. 17), equal distribution of taxes (Article 19 No. 20), and a prohibition of arbitrary economic discrimination by the State (Article 19 No. 22), among others.

Indeed, the right to equality before the law responded to the constitutional tradition that existed before 1970 insofar as Article 19 No. 2 guaranteed to all people "[...] equality before the law. In Chile there is neither privileged person nor privileged group. In Chile there are not slaves and whoever treads its territory shall be free./ Neither the law nor any authority may establish arbitrary differences." The latter implied only a formal equality that did not address the long-standing social inequality that pervaded many quarters of this country, so there is little surprise that critics pointed out that it omitted positive measures targeted at destitute people, conversely to modern constitutions,[75] notwithstanding proclaiming the principle of equal dignity and rights for all people in Article 1 Paragraph 1. Likewise, the prohibition of labor discrimination established in Article 19 No. 16 Paragraph 3 did not go farther than an implicit interdiction of arbitrary discrimination, but it left plenty of room to introduce subtler forms of discrimination; as a matter of fact, the constitution did not include a general proscription of any type of discrimination, even though former President Allende ratified the Interna-

[75] CASSESE, Antonio. Principios de la constitución chilena que rigen las relaciones socioeconómicas. In: VERKRUISE, Willem G. (Comp.). *Constitución de 1980. Comentarios de Juristas Internacionales*. Santiago, Ediciones Chile y América/CESOC, 1984. p. 131, 133.

tional Convention on the Elimination of all Forms of Racial Discrimination few years earlier.[76]

Regarding state responsibilities, this constitution established several duties that were incumbent upon the State based on an integrationist perspective.[77] Thus, Article 1 Paragraph 4 proclaimed that the state role consists of being at the service of human beings, whereas its goal consists of promoting common good, for which purpose "it should contribute to create the social conditions that allow everyone and each member of the national community her greatest spiritual and material development, while respecting the rights and guarantees established in this Constitution." By the same token, Article 1 Paragraph 5 foresaw a couple of state duties, one of which had to do with equal opportunities, partly inspired by the constitutional reform of 1970, as follows: "It is the obligation of the State [...] to promote the harmonious integration of all sectors of the Nation and to ensure the right of people to participate with equal opportunities in the national life." Likewise, Article 5 Paragraph 2, amended in 1989, prescribes that it is an obligation of all state organs both to respect and to promote the essential rights that spring out of human nature guaranteed in the constitution and in international treaties in force ratified by the government. Needless to say, the Constitutional Tribunal gave a new breath of life to these provisions after the return of democracy in 1990, besides the fact that a constitutional amendment introduced to Article 19 No. 2 in 1999 made it explicit that men and women are equal before the law.

2. The Constitution of 1980 includes a general clause on equality in Article 19 No. 2 that guarantees to all people the following rights: "[...] equality before the law. In Chile there is neither privileged person nor privileged group. In Chile there are not slaves and whoever treads its territory shall be

[76] ERMACORA, Félix. Las cláusulas relativas a los derechos humanos en la nueva constitución chilena. In: VERKRUISE, Willem G. (Comp.). *Constitución de 1980. Comentarios de Juristas Internacionales*. Santiago: Ediciones Chile y América/CESOC, 1984. p. 23.

[77] CASSESE, Antonio. Principios de la constitución chilena que rigen las relaciones socioeconómicas. In: VERKRUISE, Willem G. (Comp.). *Constitución de 1980. Comentarios de Juristas Internacionales*. Santiago, Ediciones Chile y América/CESOC, 1984. p. 128-129.

free. Men and women are equal before the law./ Neither the law nor any authority may establish arbitrary differences." The latter implies that the same legal regime applies to all inhabitants that are under the same circumstances, so that it is forbidden to introduce distinctions among people based on their gender, race, nationality, occupation, or socioeconomic origins for the purpose of exercising their civil or social rights; in other words, the Constitution proclaims the "[...] the inadmissibility of arbitrary discriminations [...]"[78]

Consequently, this provision does not prevent the law or administrative regulations from introducing distinctions among people based on age, kinship, income, geographical location, etc., for reasons that are functional, objective, and reasonable regarding the goals of a public policy, which is expressly reinforced by Article 19 No. 2 Paragraph 2. Thus, the concept of arbitrariness has to do *prima facie* with the reasonableness or rationality that underlies decisions and measures issued by public authorities, e.g. legislature, presidency, bureaucracy, or, in the words on one of the constitution framers, "[...] it is understood by arbitrary discrimination any differentiation or distinction, carried out by the legislator or any other public authority, that appears as contrary to elemental ethics or a normal process of intellectual analysis; in other words, that has no rational or reasonable justification."[79]

3. The Constitutional Tribunal highlighted the concept and scope of this guarantee in a string of decisions that dealt with equality before the law. This tribunal maintained that equality before the law implies that legal norms must be the same for people who are under the same circumstances, while different for people who are under different circumstances in the Case Docket Rulings Nos. 53, 787, and 790. Also, it held that this guarantee does not consist of an absolute equality, but it involves applying the law in each case based on the constitutive differences of the case in the Case Docket Rul-

[78] EVANS DE LA CUADRA, Enrique. *Los Derechos Constitucionales*. Santiago: Editorial Jurídica de Chile, 1999, p. 125. v. 2.

[79] EVANS DE LA CUADRA, Enrique. *Los Derechos Constitucionales*. Santiago: Editorial Jurídica de Chile, 1999, p. 125. v. 2.

ings Nos. 755-2007, 1254-2008, 807-2007, 783-2007, and 698-2006;[80] therefore, "reasonableness is the set square or standard according to which appreciate a measure of equality or inequality", as it maintained in Motive 27 of the Case Docket Ruling No. 757-2007.[81,82] Moreover, it ruled that the constitution does not rule out the possibility of establishing a different and proportional treatment for people who are under a diverse situation, "based on circumstances that are both relevant and objective for the diversity of treatment introduced by the law", as asserted in Motive 9 of the Case Docket Ruling No. 698-2006, which was iterated in the Case Docket Ruling No. 1170-2008 later.[83]

The Supreme Court applied the same doctrine in a case about racial discrimination in service provision by a spa in Motive 1 of the Case Docket Ruling No. 621-1993, wherein it ruled that preventing people from accessing public places or places with public attention, whether free or paid,

> based on circumstances of race, sex, language, religion or any other ethnic, social or cultural circumstance implies an unequal and discriminatory treatment that contravenes the principles that prevail today in modern societies about human rights, included in the United Nations Chart, the International Covenant on Civil and Political Rights, (SIC) the American Convention on Human Rights that are laws of the Republic in accordance with Article 5° Paragraph 2° of our Fundamental Chart.[84]

The Constitutional Tribunal applied implicitly the same doctrine in a case about sex and age discrimination in health care provision by a Health Maintenance Organization (the so-called *ISAPRES*) in the Case Docket Rul-

[80] VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 67.
[81] VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 67.
[82] Cfr. also Supreme Court Case Docket Rulings Nos. 1552-2010, 140-2008, 1996-2006, 1879-2006. VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 67.
[83] VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 67-68.
[84] VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 70-71.

ing No. 1710-2010, in which it declared unconstitutional Article 38 ter of Act No. 18,933 that allowed ISAPRES to raise premiums of health care contracts based on sex, conditions of the insured person, and age ranges.

In this case the Tribunal ruled that sex and age exist independently of the personal will, because they are natural states that should not be affected negatively by the law; also, differences based on age and sex are neither reprehensible nor arbitrary in and of themselves if based on a reasonable foundation, but the same reasoning does not apply to those differences that derive from the factors spelled out in Article 38 ter. The Tribunal concluded that those factors associated with age and sex

> are opposites of the equality before the law guaranteed in numeral 2° of Article 19 of the Fundamental Chart, because they admit the introduction of arbitrary differences by means of not establishing suitable, necessary, proportionate, and reasonable limits to the exercise of the discretionary power that the same legal norm confers upon the respective Superintendence to determine, through ´instructions of general application´, age caps, within the structure of the factors table that, in turn, are used by ISAPRES to create their health care contracts and determine how shall it influence an increase or reduction of the factor that corresponds to a party of a contract based on his or her age in the price variation of the same contracts.[85]

4. Affirmative action received renewed attention after the country returned to democracy in 1990, once policy-makers realized that the Constitution lacked a provision that explicitly authorized this type of policy. This phenomenon did not deter new democratic governments to create programs and policies for specific constituencies, some of which included both affirmative actions and positive actions,[86] despite some constitutional ob-

[85] VERDUGO, Mario M. (Dir.). *Constitución Política de la República de Chile. Sistematizado con Jurisprudencia*. Santiago: Abeledo Perrot, 2011. p. 69-70.

[86] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 51.

jections.[87] The latter implies that governments created and implemented affirmative action programs and policies without a clear-cut constitutional authorization, so their validity depended of the construction of the guarantee of equality before the law by a constitutional interpreter, even though they had a strong backing in international treaties ratified by the government.[88]

The integrationist-inspired state duties written into Article 1 Paragraphs 4 and 5 required also being constructed by a constitutional interpreter, lest speak of the new state duty to respect and to promote the essential rights that spring out of human nature according to Article 5 Paragraph 2; however, the restoration of democracy implied that there was room for an evolutionary construction that conceived of the constitution in transcendental, changing, or visionary terms,[89] as reflected in legal discussions over time.

Thus, for instance, Fernández maintained that the legislature could pass public policies that included "positive actions", whether or not quotas, based on the state duties to guarantee the right to participate with equal opportunities in national life, as well as to respect and to promote essential rights that spring out of human nature, but the constitutionality of specific measures depended on the observance of the constitutional principle of equality, that is, whether or not that measure implied an arbitrary discrimination, "because it benefits a group or sector that has historically been and still is discriminated against, without exempting it from complying with the requisites or minimal conditions that are required in the specific ambit";[90] however, he rejected the possibility of implementing quotas for employment

[87] FERNÁNDEZ, Miguel A. *Principio Constitucional de Igualdad ante la Ley*. Santiago: Editorial Jurídica ConoSur/Fundación Fernando Fueyo, 2001, p. 60-73, 325-328; DÍAZ DE VALDÉS, José J. Discriminación positiva: constitucionalidad de una importación de Derecho Comparado. In: Jornadas Chilenas de Derecho Público, 38., 2007, Valparaíso. *Anales*... Valparaíso: Ediciones Universitarias de Valparaíso, 2007. p. 141-142.

[88] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 43-44, 50-51.

[89] MURPHY, Walter F.; FLEMING, James E.; HARRIS, William F. *American Constitutional Interpretation*. Mineola, NY: The Foundation Press, Inc., 1986. p. 289-291.

[90] FERNÁNDEZ, Miguel A. *Principio Constitucional de Igualdad ante la Ley*. Santiago: Editorial Jurídica ConoSur/Fundación Fernando Fueyo, 2001. p. 106.

positions and popular public offices because capacity, suitability, nationality, and age limits are the only constitutional basis to discriminate against for paid jobs according to Article 19 N° 16 Paragraph 3.[91] On the contrary, Peña maintained that the interdiction of arbitrary discrimination, regulated in Article 19 No. 2 Paragraph 2, implied only a prohibition of differentiations unsupported by a value that is germane for the community, from which he deduced that it is constitutional to introduce a differential treatment based on plausible reasons.[92]

The Constitutional Tribunal dwelled on the subject in two major rulings which asserted –mostly through *obiter dicta*- the constitutionality of affirmative action, besides some minority votes that dealt with this issue in half-a-dozen rulings.[93] These were not unanimous rulings though so it is a moot point the perdurability of this doctrine, especially if there is a change in the composition of this tribunal in the short-run. These ruling were the following:

Case Docket Ruling Nos. 2387-12-CPT/2388-12-CPT:[94] The Tribunal referred to affirmative action with regard to self-executing treaties, as follows:

> [...] It is incumbent upon the legislator to define the original ethnic groups' authorities or representative organisms that have the right to participate in the consultation; the opportunity and form of participation in the legislative process in a free, informed, and non-coerced way, besides establishing the procedure. It is only

[91] FERNÁNDEZ, Miguel A. *Principio Constitucional de Igualdad ante la Ley*. Santiago: Editorial Jurídica ConoSur/Fundación Fernando Fueyo, 2001. p. 325-328.

[92] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Eds.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 50-51.

[93] FIGUEROA, Rodolfo. Acción afirmativa en la jurisprudencia del Tribunal Constitucional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 2, p. 405-413, 2016.

[94] The Tribunal issued this decision in accordance with Article 93 No. 3 of the Constitution that authorizes it to review the constitutionality of a bill project, a constitutional reform project, or an international treaty submitted before Congress. In this case the Tribunal reviewed a bill project that amended the General Fisheries Act, after Congress members filed a legal request that asserted that the legislature had breached ILO Convention No. 169 during the passage of that bill, but it is important to clarify from the start that this case did not deal with an issue of affirmative action in and of itself.

> under these conditions that this Constitutional Tribunal may control if, effectively, there has been a creation of conditions for equal participation of indigenous peoples that balance their opportunities and tend towards a fair development, clearing up a special functioning right of consultation and participation, which is a derivation of the guarantee to equal treatment before the law insofar as it is a measure of positive discrimination that takes aim at amending, eventually, determined diminished situations in accordance with international treaties about rights of indigenous peoples and prohibition of racial discrimination, so that no sector of the people may attribute itself an exercise of sovereignty that excludes others [...] (Motive 23).[95]

In this ruling the Tribunal merely singled out the consultation to indigenous peoples –foresaw in ILO Convention No. 169 – as a measure of affirmative action which, in turn, derived from the right to equality before the law. The latter suggests that the Tribunal considered affirmative action "as a form to comply with the principle of equality"[96] inserted in the constitution.

Case Docket Ruling No. 2777-15-CPT:[97] The Tribunal held that a gender quota is a mechanism of affirmative action geared at guaranteeing an effective equality before the law, equal opportunities, and social inclusion. It pointed out that a quota favors social groups that face historical submission, which came close to suggest that equality means also a lack of submission to other groups. The latter implied to introduce a structural perspective to

[95] FIGUEROA, Rodolfo. Acción afirmativa en la jurisprudencia del Tribunal Constitucional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 2, p. 411-412, 2016; CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 2387-12-CPT/2388-12-CPT'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 16, 2017.

[96] FIGUEROA, Rodolfo. Acción afirmativa en la jurisprudencia del Tribunal Constitucional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 2, p. 412, 2016.

[97] The Tribunal issued this decision also in accordance with Article 93 No. 3 of the Constitution. In this case the Tribunal reviewed a bill project that substituted a proportional representation system for a binominal system for congressional elections, after Congress members filed a legal request to have a newly introduced gender quota declared unconstitutional because both prevented parties to implement partisan primaries and infringed upon parties' autonomy to nominate congressional candidates. Nevertheless, plaintiffs did not challenge the quota mechanism in and of itself, but its alleged effects on partisan primaries.

analyze discrimination and, therefore, to go beyond a mere formal analysis regarding equality rights, besides validating affirmative action.

To introduce some "precisions", the Tribunal established the relationship between quotas and equality, as follows: "Such system of quotas is destined to reserve some vacancies to groups or sectors of people that have been historically undervalued. These (sic) are mechanisms of affirmative action oriented to ensure the effective equality before the law (article 19, No. 2nd., of the Constitution)." (Motive 28).[98] Moreover, it addressed the submission of some groups in the same motive, as follows:

> [Quotas] exist with respect to groups or collectives whose submission is historical or prolonged, situation that has weakened them severely, obligating thus to correct or compensate them for such a secular handicap. Affirmative action supposes a benefit for that collective that without it would remain in a situation of submission (Motive 28).[99]

Finally, it pointed out the relationship between these actions and equal opportunities, as follows:

> These measures seek to provide people with the same opportunities at the starting point (article 1º, final paragraph, of the Constitution). One way or the other, they promote systems of social inclusion that the State should contribute to create (article 10, fourth paragraph, constitutional). In this particular case, such quotas are based on the postulate of article 19, No. 2nd., of the Fundamental Chart, that establishes that men and women are equal before the law./ It is a fact that women do not have adequate representation in politics. In 1991, there was one woman representative; in 1993,

[98] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 2777-15-CPT'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 16, 2017.

[99] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 2777-15-CPT'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 16, 2017.

> there were 9; in 1997, there were 14; in 2001, 15; in 2006, 18; in 2014, 19 (Motive 28).[100]

The Tribunal repeated this doctrine in Case Docket Ruling No. 2776-15-CPR few months later.[101] In this ruling, the Tribunal dismissed swiftly an identical challenge raised at the effects of a newly created gender quota on partisan primaries by means of iterating -in a nutshell- the same reasons provided earlier, as follows:

> That, in the Case Docket Ruling No. 2777-15-CPT, this Tribunal, likewise, analyzed this matter, concluding that the norms of the bill project mentioned previously are adjusted to the Constitution, after taking into consideration that it is not challenged the mechanism of gender quota in and of itself, but the limitation of 40% that is written for primary elections, in circumstances that the organic constitutional legislator may, legitimately, establish this limitation, because it restricts temporarily and partially the primary system, while the mechanism of gender quota guarantees equal opportunities and equality before the law (Case Docket Ruling N° 2777-15-CPT, Motives 26th to 34th). (Motive 31).[102]

5. Regarding women, the ratification of international treaties on women rights prompted legal initiatives to fulfill the goals envisaged in them. Besides the conventions of the International Charter of Human Rights, both the Convention on Political Rights of Women and CEDAW spawned several policy initiatives to include a gender dimension in public policy after 1990, even though they were ratified in 1967 and 1989, respectively.

---

[100] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 2777-15-CPT'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 16, 2017.

[101] The Tribunal issued this decision in accordance with Article 93 No. 1 of the Constitution that authorizes it to carry out a preventive review of constitutionality of some bill projects passed by Congress. In this case, it was the very same bill that introduced proportional representation and a gender quota for congressional elections.

[102] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 2776-15-CPR'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 19, 2017.

To carry out the struggle against women discrimination, the government created SERNAM in 1990, as a state agency to develop policies, including the legal status of out-of-wedlock children, the enactment of a divorce law, the struggle against family violence, and women participation in popular public offices, among others. Interestingly enough, the foundational documents of this agency included into its mission "to develop mechanisms of positive action that increase the effective participation of women in popular public offices."[103]

Putting aside legal reforms on family, labor, social security, and criminal law, this agency made strenuous efforts to make visible the plight of women in the Chilean society since its inception. For instance, SERNAM achieved that government ministries included a gender indicator in the drafting and evaluation of their annual budgets in 2001, precisely to bring into focus women discrimination in the access to public goods. Likewise, it developed a number of positive actions –sometimes called quotas- that favored a greater women access to government credits, vocational training, completion of formal studies, property ownership, working thus together with other agencies under the guidelines of successive governments.

To a great extent, these initiatives were not perceived as problematic by most quarters, but the same did not apply to increased female participation in popular public offices through gender quotas, even though center-leftists parties adopted voluntary quotas for their directive offices in the late 1980s and the first Bachelet Administration implemented a gender parity cabinet representation that lasted almost one year in 2005.

Indeed, bill projects introduced in 1997, 2003, and 2007 to have gender quotas for candidacies to all popular public offices stalled in Congress due to opposition from many quarters, including Congress members from government parties, lest speak of its lack of visibility for Chilean public opinion. The most important reasons to oppose these quotas had to do with their

[103] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 59.

perception by Congress members and party leaders: elite oriented policy; lack of citizen support; insufficient evidence about their end results; lack of legal limitations for female electoral competition; introduction of an arbitrary means to favor women in elections; lack of access to education and labor impairs women access to popular public offices; etc.[104]

Looking backward, these failed initiatives prepared the field for the final introduction of gender quotas in 2015, as the preparatory works and evidence gathered at that time made possible to draft initiatives that minimize congressional opposition later. In this regard, the Report of the Committee for Electoral Reform convened by President Bachelet in 2006, during her first administration, highlighted the convenience to substitute a proportional representation system for the existing binominal system both to make Congress much more representative of existing party organizations and to make it more amenable to women access to congressional offices, besides analyzing extensively the subject of quotas. Interestingly enough, several conclusions of this report became law a decade later, though they failed to make inroads into the policy agenda in the short-run.

Effectively, Act No. 20,840 of 2015 introduced a gender quota for congressional elections, while taking advantage of a substitution of a proportional representation system for a binominal system for the same offices. For this purpose, this law modified both the congressional election law (Act No. 18,700) and the primaries elections law (Act No. 20,640), but the gender quota for candidacies to congressional elections went unchallenged in and of itself before the Constitutional Tribunal, as mentioned above.

Thus, Article 3 bis Paragraph 5 of Act 18,700 establishes a legal cap on candidacies of any gender, as follows:

> Of all the declarations of candidacies to representative or senator, whether or not there is an electoral pact, neither male candidates nor female candidates may ex-

[104] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 54-57, 62-68.

> ceed sixty percent of the respective total. This percentage shall be obligatory and computed independently of the form of nomination of candidacies. The transgression of the aforementioned norm shall result in a rejection of all the candidacies for representatives or senators, accordingly, of the party that did not comply with this requisite.

To prevent a transgression of this cap by a congressional primary election, Article 3 Transitory of Act 20,840 limits the number of candidacies that a party may submit to primary elections from 2017 through 2029, as follows:

> The political party that decides to submits itself to the system of primary elections regulated in articles 3rd et seq of this law for the parliamentary electoral periods of the years 2017, 2021, 2025, and 2029 may only submit to this procedure up to forty per cent of the total candidacies to representative or senator that may declare in the definite election, whether or not it goes in an electoral pact.

It goes without saying that this law forces parties only to comply with the maximum percentage of female or male candidacies in their electoral lists, because it is under the parties' authority to determine the place of female candidates in those lists, which depends on the electoral competitiveness of these candidates. The general congressional election of November 19th, 2017 was the first one under these new electoral arrangements and the choice of female candidates by parties became a controversial topic in the weeks that preceded the election, basically because it was unclear whether or not parties chose competitive candidates in all districts.[105]

However, the general results on Election Day showed an increase in women access to congressional offices in both houses of Congress, as compared with the results of the previous congressional election. Effectively, the percentage of female House members went up from 15.8% in 2013 to 22.5% in 2017, whereas the percentages of female Senate members also increased

[105] NÚÑEZ, María. *Ley de cuotas*: El salto de las mujeres al Congreso. 2017. Available at: <http://www.t13.cl/noticia/politica/ley-cuotas-mujeres-congreso>. Access on: Nov. 20, 2017.

from 15.8% in 2013 to 23.2% in 2017. Nonetheless, it is still too early to infer general trends from this election because of the constellation of conditions that surrounded it: previous breakdown of the two long-lasting electoral coalitions, a new electoral system based on proportional representation, electoral pacts among parties and independent candidates; a redrawing of all electoral districts for both houses; and the introduction of gender quotas; although, it is fair to conjecture that the new electoral system based on proportional representation –that is more amicable to the representation of minorities- made possible that several female candidates made their way into Congress.

On the other hand, Congress passed Act 20,915 in 2016 to amend the political parties law (Act No. 18,603) and to introduce a gender quota in the collegiate organs of political parties, among others. Accordingly, Article 23 Paragraph 5 of Act No. 18,603 prescribes nowadays, as follows:

> In the integration of the collegiate organs contemplated in this law, it shall be observed mechanisms especially contemplated in the party by-laws that guarantee that none of the sexes exceeds 60 per cent of its members. In case of three members, it is understood that the norm is fulfilled when one of them is from a different sex, at least.

The penalties for the transgression of this legal provision are the same of other breaches of this law: written admonitions, fines, suspension of rights in elections and plebiscites, and theoretically dissolution.

The same year Congress passed Act No. 20,940 to amend the Labor Law Code. This law authorized to write into union contracts some gender issues during collective bargaining. It also introduced a minimal gender quota in the governing boards of trade unions, union federations, union confederations, and central unions, which also went unchallenged before the Constitutional Tribunal. Broadly speaking, these union organizations ought to write into their by-laws a mechanism to guarantee that, at least, one third of the membership of each board with right to trade immunity ought to consist of women in accordance with Articles 231 *et seq* of the Labor Law Code.

Nevertheless, Act No. 20,940 did not establish a penalty for a breach of this legal provision, so it is unclear how to comply with this quota and what is the effect of its transgression.[106] In any case, it is still too early to assess the effects of this reform.

6. Regarding indigenous peoples, democratic governments implemented a reformist agenda to recognize some of their cultural and economic aspirations, but their drive to grant them constitutional recognition stalled in Congress due to conservative opposition.

The number of people that recognizes themselves as indigenous persons is not small in this country. It reached to 1.5 million by 2015, which amounted to 9% of the Chilean population according to the 2015 CASEN Report.[107] These persons are part of the 9 indigenous ethnicities that pre-existed the State according to Act No. 19,253, the most numerous of which is the *Mapuche* ethnicity.

The passage of Act No. 19,653 in 1993 –the so-called Indigenous Law- became one of the most important landmarks in regard, because both positive action and affirmative action inspired several of the legal institutions created by this law, all of which sprung out of the political decision to respect and promote the culture and lands of indigenous peoples. As a matter of fact, this law recognized certain specific rights to these peoples and set guidelines for an indigenous public policy "on three lines: land, development, and culture."[108]

This law also created CONADI as a decentralized state agency that promotes, coordinates, and implements policy actions regarding indigenous

[106] MARZI, Alejandra. *La tangente de género en la Reforma Laboral*: comentarios al dictamen sobre cuotas en las directivas sindicales. 2017. Available at: <http://www.prosindical.cl/la-tangente-de-genero-en-la-reforma-laboral-comentarios-al-dictamen-sobre-cuotas-en-las-directivas-sindicales/#_ftnref1>. Access on: Sept. 27, 2017.

[107] MINISTERIO DE DESARROLLO SOCIAL. *Pueblos Indígenas*: síntesis de resultados. 2015. Available at: <http://observatorio.ministeriodesarrollosocial.gob.cl/casen-multidimensional/casen/docs/CASEN_2015_Resultados_pueblos_indigenas.pdf>. Access on: Sept. 27, 2017.

[108] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Eds.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 69.

peoples. Moreover, this agency administers three special funds: the Fund for Indigenous Lands and Waters, the Fund for Indigenous Development, and the Fund for Culture and Education. The first one funds the purchase of lands and water rights by indigenous communities and persons; the second one funds special programs geared at the development of indigenous persons and communities; finally, the third one funds programs and initiatives to preserve indigenous cultures, patrimony, and languages, as well as to provide professional training and intercultural education to indigenous persons. In other words, CONADI provides key financial backing to implement a number of programs and initiatives that are paramount for the objectives of the Indigenous Law, among which some of the most important have to do with the preservation of indigenous lands and the purchase of lands to overcome the limitations that small rural states impose upon indigenous persons and communities.

It goes without saying that only indigenous persons and communities may apply for these financial benefits which financial impact is not negligible by most accounts, although they have not been enough to surmount the historical exclusion and poverty of these peoples.

Thus, regarding land recovery, the Fund for Indigenous Lands and Waters funded land purchases for almost US$410 million from 1994 through 2013, which corresponded to 187,173 hectares, benefited 16,141 families, and amounted to 50% of CONADI's annual budget throughout those years.[109] Moreover, the government also transferred state owned lands to increase indigenous land holdings under these programs in accordance with the Indigenous Law. These are real affirmative actions implemented in favor of indigenous peoples and persons by the government, but their impact is meager in historical perspective.

[109] CENTRO DE DERECHOS HUMANOS. *Informe Anual sobre Derechos Humanos en Chile*. Santiago: Facultad de Derecho Universidad Diego Portales, 2014. Available at: <http://www.derechoshumanos.udp.cl/derechoshumanos/images/InformeAnual/2014/Cap%2004%20Territorios%20indigenas%20y%20politica%20publica%20de%20entrega%20de%20tierra.pdf>. Access on: Sept. 27, 2017.

Three decades after the passage of the Indigenous Law there is a mixed record about the accomplishments of this legislation. Perhaps, the implementation of positive actions regarding indigenous culture and education sensitized new generations of Chileans to the historical plight of these peoples, as well as made possible for thousands of young indigenous persons to have access to education through government scholarships (almost 80,000 students by 2015),[110] but the record looks quite bleak regarding the preservation and expansion of ancestral lands, as suggested above, because they are keys to preserve their cultural identity and traditions, like in neighboring Argentina.

Needless to say, the existing programs have had some positive impact on indigenous peoples, but they have not stopped the desecration of their ancestral sites by the industry and urban expansion; their migration to urban centers due to the lack of lands and water; their socioeconomic location among the poorest people; their discrimination in the access to quality education; and their gradual assimilation to a mainstream culture that condemns them to cultural disappearance in the middle-run.

Besides the silence of the Constitution about affirmative action, the limitations of the aforementioned programs geared at indigenous peoples have become apparent in the absence of a constitutional recognition of indigenous peoples, notwithstanding some international treaties ratified by the government.

However, the protracted process that led to the ratification of the ILO Convention No. 169,[111] as well as the way the Constitutional Tribunal interpreted it, confirms that the government walks over a tightrope in this matter. Actually, major points of contention in the congressional arena dealt with the implementation of affirmative actions to redress the historical debt

[110] JUNAEB. *Cuenta Pública Participativa*. 2015. Available at: <https://www.junaeb.cl/wp-content/uploads/2016/08/Informe-de-Gesti%C3%B3n-2015.pdf>. Access on: Sept. 5, 2017.

[111] It took Congress almost two decades to pass the ILO Convention No. 169 at last in 2008, after strong congressional opposition and a legal challenge before the Constitutional Tribunal, even though the country ratified the International Convention on the Elimination of all Forms of Racial Discrimination in 1971.

towards indigenous peoples; the recognition of their collective rights; their equal participation in policy-making organs that deal with their affairs; and their recognition as an autonomous people endowed with a right to self-determination.[112] Also, there is an ongoing questioning about the constitutionality of the convention from conservative parties based on an alleged breach of the principles of equality of treatment and national unity, as well as on the allegedly deleterious effects that such policies may have on the economic development of indigenous persons, even though the Constitutional Tribunal asserted in the Case Docket Rulings Nos. 309-00 (Motives 38, 39, and 44)[113] and 1050-08 (Motive 13)[114] that their recognition neither implied to create an autonomous collective entity between the individuals and the State, nor meant a cession of national sovereignty.[115] To some extent, the circumstance that the Constitutional Tribunal may declare inapplicable a treaty provision based on constitutional grounds in a particular judicial case, in accordance with Article 93 No. 6 of the Constitution, keeps this artificial controversy alive for those defeated in the legislative process.

7. Regarding persons with disabilities, they were traditionally one of the most vulnerable groups, notwithstanding their numerical importance. As a matter of fact, the 2012 Census revealed that 2.1 million people had some type of disability, that is, people with disabilities amounted to 12.7% of the total population.[116]

---

[112] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 69-76.

[113] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 309-00'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 23, 2017.

[114] CHILE. *Sentencia del Tribunal Constitucional 'Rol N° 1050-08'*. Available at: <http://www.tribunalconstitucional.cl/expediente>. Access on: Aug. 23, 2017.

[115] CLARO, Magdalena. Acción afirmativa: hacia democracias inclusivas. In: VARAS, Augusto; DÍAZ-ROMERO, Pamela (Ed.). *Acción Afirmativa. Política para una democracia efectiva*. Santiago: RIL Editores/Fundación Equitas, 2013. p. 74-75.

[116] SENADIS. *Censo 2012 en Discapacidad revela que las personas con discapacidad son el principal grupo vulnerable en Chile*. 2013. Available at: <http://www.senadis.gob.cl/sala_prensa/d/noticias/2990/censo-2012-en-discapacidad-revela-que-las-personas-con-discapacidad-son-el-principal-grupo-vulnerable-en-Chile-SaladePrensa-Senadis>. Access on: Sept 29, 2017.

After the return of democracy, the Aylwin Administration proposed new legislation to address this issue, paying thus heed to the newly enacted Decade of Disability passed by the United Nations in 1993. One year later, Congress passed Act No. 19,284 that became the first law that considered these persons as rights holders, while taking aim at their full social integration. This law also created an autonomous agency to oversight the implementation of the new legislation and to fund scholarship programs and projects, called FONADIS. Last but not least, this agency promoted the involvement of private enterprises through Local Councils and put forward a proposal to set a quota (3%) for persons with disabilities in the hiring processes of all state agencies, but this proposal failed to make inroads into legislation.[117]

Congress passed new legislation to supersede this legal regime in 2010, after President Bachelet introduced a bill project to regulate equal opportunities and social inclusion for persons with disabilities.

In this regard, Act No. 20,422 created a new state agency –called SENADIS- to oversigh and to implement this law, including the authority to file complaints and lawsuits before courts. In turn, Article 7 expressed that equal opportunities for people with disabilities implied not only an absence of discrimination, but also "the adoption of positive actions geared at avoiding or compensating the disadvantages of a person with disability to fully participate in political, educational, labor, economic, cultural, and social life." Moreover, this absence of discrimination received full expression in Article 8, according to which state measures implemented against discrimination should consist of requirements of accessibility, the performance of necessary adjustments, and the prevention of harassment behaviors. Furthermore, Article 23 prescribed that the State "shall boost and implement positive action measures to encourage the elimination of architectonic barriers and to promote universal accessibility", for which purpose this law estab-

[117] CLARO, Magdalena; SEONE, Viviana. *Acción afirmativa*: hacia democracias inclusivas. Chile. Santiago: Fundación Equitas, 2005. p. 87-88. Available at: <http://www.upla.cl/inclusion/wp-content/uploads/2014/07/2014_0731_inclusion_documentos_interes_accion_afirmativa.pdf>. Access on: Aug. 15, 2017.

lished guidelines to guarantee accessibility in educational facilities, libraries, television networks, public facilities, and public transportation vehicles and terminals, among others, in a time span that went from two years through eight years in some cases, i.e. public transportation and public facilities. Interestingly enough, a mix of factors that included the leadership of SENADI, strong communicational campaigns, and an active government role both to include this issue in daily governmental operations and to oversight the implementation of this law made possible to reach this goal to a great extent in a six years period, although there still remain important deficits that have to do with a decaying urban infrastructure.

This law fell short of establishing a quota for persons with disabilities in state agencies or private enterprises though, but it authorized the State to implement programs and to provide incentives for their permanent employment. Precisely, this law introduced a type of affirmative action into the hiring processes of the public sector in Article 45 Paragraph 1, which prescribes today, as follows:

> In personnel selection processes, the organs of the State Administration [...], the National Congress, the Judicial Power, the Public Prosecutor Office, the Constitutional Tribunal, the Electoral Service, the Electoral Justice and the remaining special courts created by law, shall select preferably, under equal conditions of merit, persons with disabilities.

However, Act N° 20,422 had a discrete effect on the labor inclusion of persons with disabilities, as suggested by MIDEPLAN's 2016 Report on Social Development. Based on data collected during 2015, this ministry reported that 20% of the population exhibited some type of disability, that the rate of labor participation of persons with disabilities reached to 42.8% only, and that this participation was even smaller for women; therefore, there was a need for additional state actions.[118] The latter explains the amend-

[118] MINISTERIO DE DESARROLLO SOCIAL. *Informe de Desarrollo Social 2016*. Available at:<http://www.ministeriodesarrollosocial.gob.cl/pdf/upload/Informe_de_Desarrollo_So-

ments introduced to that legislation by Act No. 21,105, better known as *Act on Labor Inclusion*, in 2017 which created a minimal quota of 1% of the total annual payroll in all state agencies and organs with 100 or more employees for persons with disabilities or assignees of disability pensions. This law also created a like quota in private enterprises, although it offered alternative means to fulfill this obligation to private employers.

Although these quotas are closer to world standards, it is still too early to determine their eventual effects. Any prospective assessment should factor in the small percentage of positions reserved for persons with disabilities, the minimum number of staffers that is required to comply with these quotas, and the possibility to fulfill the legal obligation by alternative means by private employers. From this viewpoint, these new quotas may help to socialize further the plight of person with disabilities and their need for labor inclusion, so it is not far-fetched to surmise that new legislation may make its way out of Congress in the middle-run. After all, gradualism is a characteristic staple of the Chilean policy-making process of the last decades.

4 Colombia: constitutional certainties to face the consequences of internal political conflict

1. The emergence of the right to equality in Colombian constitutional law met a fate similar to other countries after independence, regardless of the constitutional formula adopted to organize the State.

Most of the republican constitutions guaranteed a liberal version of the right to equality that focused on formal equality. Thus, the Constitution of the Republic of Colombia of 1830 proclaimed that all Colombians were equal before the law and public offices in Articles 12 and 13; by the same token, it proscribed hereditary titles and distinctions. The Constitution of 1832 reiterated these provisions under a slightly different language in Articles 11, 181, and 205, whereas the Constitution of 1843 – the Republic of New Grenada's – fol-

cial_2016.pdf>. Access on: Sept. 27, 2017.

lowed suit in Articles 14, 152, and 157, even though this constitution conferred upon the government an obligation to protect the equality of all Grenadians.

The federal liberal Constitution of 1853 went one step further by guaranteeing equality of rights both to citizens and foreigners in the territory of New Grenada in Articles 5 and 8, respectively. Indeed, Article 5 No. 10 guaranteed to every citizen of New Grenada "[…] the equality of all individual rights; not being recognized any distinction that arises from birth, nobility or professional title, charter, or class" and Article 6 abolished slavery.

Nevertheless, the scope of this right narrowed in the Constitution of the Grenadian Confederation of 1858, basically because it recognized to everyone, including passer-by people, equality before justice and public charges in Articles 56 and 58. Thus, Article 56 No. 8 recognized "[…] the equality according to which everyone should be tried in accordance with the same laws by the Judges instituted therein, and cannot be submitted to contributions and exceptional services that burden some people while exempting others that are in the same circumstances."

The situation did not change in the federal Constitution of the United States of Colombia of 1863. Besides guaranteeing some sort of equality before public offices in Article 22, this constitution merely recognized in Article 15 No. 10 "[…] the equality; consequently, it is illegal to grant privileges or distinctions that yield in sheer favor or benefit of the bestowed; nor to impose special obligations upon some individuals that worsen them than others." The language of this provision was clearly reminiscent of the Constitutions of 1853 and 1863, so it still implied a notion of formal equality.

Curiously enough, the country's longest-living constitution, the Constitution of 1886, dealt only with the issue of slavery as Article 22 stated that "[…] there will not be slaves in Colombia/ Any slave who thread into the territory of the Republic shall be free." Besides a constitutional amendment that granted equal civil rights to foreigners in 1936 and another that conferred equal political rights to women in 1958, there were not additional reforms that dealt with equality rights; instead, the framers incorporated social rights into the constitution in 1936.

On the contrary, the current Constitution of 1991 provides for an extensive recognition and guarantee of fundamental rights, so it is hardly surprising that it is known as the "Constitution of Rights", even after more than twenty amendments. First of all, the Constitution establishes several essential state purposes in connection with the right to equality in Article 2 Paragraph 1, all of which suggest that the State becomes actively involved in making human rights a living reality, such as "to serve the community, [...] and to guarantee the effectiveness of principles, rights, and duties proclaimed in the Constitution; to facilitate the participation of everyone in the economic, political, administrative, and cultural life of the Nation; [...]" Moreover, it declares the primacy of the inalienable rights of human beings, while it protects and recognizes the ethnic diversity of the nation in Articles 5 and 6, respectively. Secondly, the Constitution recognizes equality before the law from birth and states that authorities must protect and treat everyone equally, "all of which shall enjoy the same rights, liberties, and opportunities without any discrimination based on sex, race, national or familiar origin, language, religion, or political or philosophical opinion" according to Article 13 Paragraph 1. The latter projects itself in Article 17 that prohibits slavery, servitude, and human trafficking in any form, and in Article 40 Nos. 1 and 7 both of which recognize equality before public offices.[119] Thirdly, Article 2 Paragraphs 2 and 3 address the subject of real inequality, for which purpose it bestows upon the State an active obligation, as follows:

> The State shall promote the conditions for real and effective equality, and shall adopt measures in favor of discriminated or outcast groups./ The State shall protect especially those people that are under conditions of manifest weakness due to their economic, physical, and mental condition, and shall punish the abuses or mistreatments committed against them.

[119] Article 53 Paragraph 2 prescribes that the labor law ought to include equal opportunities for workers, among other fundamental principles; Article 70 Paragraph 1 prescribes that the State should promote and foment the access to culture for all Colombians under equal opportunities; and Article 75 Paragraph 1 guarantees equal opportunities in the access to the electromagnetic spectrum.

Fourthly, the Constitution recognizes equal rights and opportunities for men and women in Article 43, besides prohibiting the subjection of women to any type of discrimination and, if head of a household, shall receive special support from the State. Fifthly, the Constitution made the international human rights treaties ratified by Congress to prevail over domestic laws in accordance with Article 93. Thus, it goes without saying that these new constitutional provisions made possible to develop a policy approach to equality rights, especially for disadvantaged groups, authorized by the Constitutional Court.

2. The Constitution of 1991 offers a particular perspective to analyze affirmative action. Thus, on the one hand, it includes several provisions that guarantee formal and material equality, as well as equal opportunities among people, out of which emerge laws, policies, programs, plans, actions, and measures that take aim at equalizing and reestablishing fundamental rights of discriminated and excluded groups; on the other hand, it singles out the main collective groups that require special attention from the State based on a history of past discrimination, allowing thus a deeper development than somewhere else in the region.

On this vein, it is important to point out that the concept of affirmative action both replaces and compliments the notion of positive discrimination, because the latter tries to compensate social groups historically abandoned by the State through temporary measures that provide direct benefits, but without deepening a removal of the obstacles that cause that discrimination. However, the Constitutional Court does not totally share this approach because it does not distinguish clearly both concepts, as evinced in the Case Docket Ruling C-293/10, dated as of April 21st, 2010, wherein it maintained in Motive 3.3., as follows:

> The doctrine and jurisprudence of those countries have recognized several types of affirmative action among

> which stand out actions to promote or facilitate and the so-called actions of positive discrimination that are sometimes confused with the very concept of affirmative action, though they are actually a specie of affirmative action. Actions of positive discrimination take place in a context of distribution and provision of scant public goods, such as positions for employment, high public offices, educational slots or even the selection of contractor for the State. In any case, the implementation of an affirmative action implies costs or charges that should be reasonable and are frequently both disseminated and taken over by the society as a whole. However, it must be highlighted that in the case of actions of positive discrimination the cost or charge may fall exclusively on determined persons.[120]

Nevertheless, the importance of implementing measures of affirmative action, instead of measures of positive discrimination, lies in the fact that the former "pretend to question and modify those factual situations that impede and block excluded groups and individuals from reaching effective equality in claiming their rights."[121] In any case, the country admitted affirmative action some time ago, beginning with the writing into the Constitution of equal access to political participation, which made possible a step forward in women access to popular public offices, but it did not address discrimination from an intersectional viewpoint; therefore, it did not succeed in making inroads into a greater political participation of indigenous or African American people.[122]

---

[120] COLOMBIA. *Sentencia de la Corte Constitucional 'C-293/10'*. Available at: <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-293-10.htm>. Access on: Aug. 18, 2017.

[121] DURANGO, Gerardo. Las acciones afirmativas como mecanismos reivindicadores de la paridad de género en la participación política inclusiva: Ecuador, Bolivia, Costa Rica y Colombia. *Revista de Derecho de la Universidad del Norte*, Barranquilla, v. 45, n. 1, p. 141, 2016. Available at: <http://www.scielo.org.co/scielo.php?pid=S0121-86972016000100007&script=sci_abstract&tlng=es>. Access on: Aug. 18, 2017.

[122] DURANGO, Gerardo. Las acciones afirmativas como mecanismos reivindicadores de la paridad de género en la participación política inclusiva: Ecuador, Bolivia, Costa Rica y Colombia. *Revista de Derecho de la Universidad del Norte*, Barranquilla, v. 45, n. 1, p. 142, 2016. Available at: <http://www.scielo.org.co/scielo.php?pid=S0121-86972016000100007&script=sci_abstract&tlng=es>. Access on: Aug 18, 2017.

3. Generally speaking, affirmative action recognizes its foundation in a principle of equality that is inexorably linked to justice.[123] In essence, it is presupposed that modern constitutions include the different manifestations of the principle of equality –formal, material equal opportunities- that deploys itself in a series of fundamental rights that are developed in laws and administrative regulations later.

In this perspective, there is a need for state-developed affirmative actions in the presence of historical discriminations wherein the equal receives a different treatment and the unequal receives equal treatment, because both of them involve a form of discrimination that departs farther away from an Aristotelian inspired notion of equality. In effect, this notion of equality holds as an axiom that equality involves a double dimension, that is, to treat equally what is equal and to treat in a distinct way what is unequal.

Needless to say, the Constitution complies with this axiom insofar as it includes provisions that protect both dimensions of equality. Thus, for instance, the notion that equality implies to treat in a different way what is unequal is involved in the following constitutional provisions: Articles 7, 10, 19, 44, 45, 46, 47, 63, 64, and 171. Conversely, the following constitutional provisions rely on the idea that equality implies to treat in the same way what is equal: Articles 13, 40, 43, 49, and 70.

In so doing, the Constitution guarantees equality for all inhabitants in the following scopes: before the law; political participation; rights and opportunities; access to health care and environmental sanitation; and access to culture. Likewise, it promotes special protection for the following collective groups: ethnic and cultural groups; religious confessions and churches; children and adolescents; women; elders; persons with physical, sensory, and psychic disabilities; and agrarian workers or peasants. In this regard, the aforementioned provisions are useful to build an inclusive pluralist political, legal system with the collaboration of the State, which may implement af-

[123] CARBONELL, Miguel. Igualdad y Constitución. In: CARBONELL, Miguel; RODRÍGUEZ, Jesús; GARCÍA, Rubén; GUTIÉRREZ, Roberto. *Discriminación, igualdad y diferencia política*. México D.F.: Comisión de Derechos Humanos del Distrito Federal, 2007. p. 38-39, 42-45. Available at: <http://www.corteidh.or.cr/tablas/27899.pdf>. Access on: Aug. 18, 2017.

firmative actions that are deemed necessary to remove the obstacles that impede those groups to acquire an equal situation vis-à-vis other historically favored collective groups.

4. It is recognized that the Constitutional Court uses a *pro person* interpretation of the Constitution that spills onto the subject of affirmative action. Indeed, this court expressed in Motive 3.3 of the Case Docket Ruling C-293/10 that are constitutional

> those political measures or public decisions by means of which come into effect an advantageous treatment that is in and of itself formally unequal, but it favors determined persons or human groups that are traditionally marginalized or discriminated against, for the sole purpose of advancing towards substantive equality of the whole social conglomerate.[124]

In this particular respect, it is appropriate to bring into focus the following decisions:

Case Docket Ruling C-293/10 (April 21st, 2010): The Court referred to the incorporation of affirmation action measures into the national law, as follows:

> In Colombia there are norms passed before 1991 that may be understood as affirmative actions, but this concept gains special notoriety above all since the enactment of the new Political Constitution whose Article 13 highlights the obligation of the State to promote the conditions for effective equality and to implement measures in favor of discriminated or marginalized groups. The higher text includes also other provisions that in a specific manner pose the same mandate for specific collectivities [...] Based on these guidelines, the Constitutional Court has dealt frequently with this issue both in rulings about the constitutionality of the enforceability of legislative measures of this type or their eventual omission like in rulings on writs of amparo wherein it

[124] COLOMBIA. *Sentencia de la Corte Constitucional 'C-293/10'*. Available at: <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-293-10.htm>. Access on: Aug. 18, 2017.

> ordered to advance concrete actions or to abstain from negatively impair groups or persons that deserve special constitutional protection. (Motive 3.3).[125,126]

On the other hand, the Court expressed its position on persons with disabilities, as follows:

> However, the Constitutional Court has had also frequent opportunity to enhance, when analyzing concrete situations in decisions on writs of amparo, the great interest that constitution drafters had about the full and effective protection of rights of these persons, highlighting the need that the State, through affirmative actions, guarantees that their special condition do not imply limitations in their exercise of rights and their access to the benefits and services enjoyed normally by most people. Notwithstanding the great importance of the rights of persons with disabilities, it is important to mention that their current development in the Colombian law is still incipient highlighting especially Act No. 361 of 1997 ´Through which it is established some mechanisms of social integration for persons with limitations and other rules are issued´, and to deal with specific situations Act No. 324 of 1996 ´Through which it is created some norms that favor deaf people´, and more recently Act No. 1,275 of 2009 ´Through which it is established guidelines of National Public Policy for persons that exhibit dwarfism and other rules are issued´./ Based on all of the above, taking into account that the provisions of this treaty imply a vigorous recognition of the particular situation of persons with disabilities, as well as a set of instruments geared to make real the aforementioned equal opportunities, this Court considers that the Convention analyzed herein adjusts with-

[125] COLOMBIA. *Sentencia de la Corte Constitucional 'C-293/10'*. Available at: <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-293-10.htm>. Access on: Aug. 18, 2017.

[126] The Court issued this decision in accordance with Article 241 No. 10 that authorizes to review the constitutionality of international treaties and laws. Indeed, the Court reviewed Act No. 1,346 of 2009 by means of which Congress passed the International Covenant on the Rights of People with Disabilities.

> out difficulties to the constitutional norms regarding its general objective. (Motive 3.1).[127]

Finally, this ruling warned that the analysis should pose

> the need to verify the reasonableness of measures, because it would not be constitutionally admissible that they gave way to situations that essentially discriminate against persons with disabilities, nor that their implementation generates excessive or disproportionate costs. Therefore, the Court reminds the necessity that all measures adopted as affirmative actions should respect the principles of reasonableness and proportionality. (Motive 3.3).[128]

Case Docket Ruling T-025/04 (January 22nd, 2004): This decision went to a great length to detail the fundamental rights of internally displaced people impaired by the State.[129]

It pointed out that the Court had issued seventeen rulings since 1997, when the Court addressed the situation of displaced people for the first time in the Case Docket Ruling No. T-227. Those rulings dealt with the following rights:

> (i) 3 times to protect displaced population against acts of discrimination; (ii) 5 times to protect life and personal integrity; (iii) 6 times to guarantee effective access to health care services; (iv) 5 times to protect the right to the vital minimum guaranteeing access to programs of economic restoration; (v) 2 times to protect the right to housing; (vi) in one case to protect the freedom of mobilization; (vii) 9 times to guarantee access to the

[127] COLOMBIA. *Sentencia de la Corte Constitucional 'C-293/10'*. Available at: <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-293-10.htm>. Access on: Aug. 18, 2017.

[128] COLOMBIA. *Sentencia de la Corte Constitucional 'C-293/10'*. Available at: <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-293-10.htm>. Access on: Aug. 18, 2017.

[129] The Court issued this decision to adjudicate a writ of *amparo* filed by the Association of Displaced People, which acted as unofficial agent of the population in situation of forced internal displacement, mostly made up of people protected by the Constitution, such as women, underage minors, ethnic minorities, and elders.

> right of education; (viii) 3 times to protect the rights of children; (ix) 2 times to protect the right to choose the place of residence; (x) 2 times to protect the right to free development of personality; (xi) 3 times to protect the right to work; (xii) 3 times to guarantee access to humanitarian emergency aid; (xiii) 3 times to protect the right to petition in connection with access to some of the programs to assist displaced people; (xiv) 7 times to avoid that the requirement to be registered as a displaced person prevented access to aid programs. (Motive 5.1).[130]

The Court expressed then that:

> The problem of forced internal displacement in Colombia, which current dynamics began in the decade of the 1980s, impairs great masses of population. The situation is so worrisome that in different opportunities the Constitutional Court qualified it as (a) 'a problem of humanity that all people must face with solidarity, beginning, logically, by State workers'; (b) 'a truly state of social emergency', 'a national tragedy that impairs the fate of countless Colombians and that shall leave an imprint in the future of the country for the next decades' and 'a serious danger for the Colombian political society'; and, more recently, (c) an 'unconstitutional state of affairs' that 'contradicts the implicit rationality of constitutionalism' by bringing about an evident tension among the pretension of political organization and the prolific declaration of values, principles, and rights contained in the Fundamental Text and the daily and tragic realization of exclusion from that covenant for millions of Colombians. (Motive 5.2).[131]

Likewise, the Court both justified and called upon the State to draft affirmative actions to favor persons that have been victims of forced internal displacement, as follows:

---

[130] COLOMBIA. *Sentencia de la Corte Constitucional 'T-025-04'*. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>. Access on: Aug. 19, 2017.

[131] COLOMBIA. *Sentencia de la Corte Constitucional 'T-025-04'*. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>. Access on: Aug. 19, 2017.

> Due to the circumstances that surround internal displacement, persons –mostly householder women, children, and elders- are forced ´to abandon untimely their place of residence and their usual economic activities to migrate to other place inside the borders of the national territory´ to escape from the violence generated by the internal armed conflict and the systematic violation of human rights or international humanitarian law, so they become exposed to a greater level of vulnerability which implies a grave systematic, massive violation of their fundamental rights and, for the same reason, it deserves special attention from the authorities: ´Persons displaced by violence are in a state of weakness that makes them deserving of a special treatment by the State´. In the same order of ideas, the Court pointed out that ´the need to bend the political agenda of the State towards a solution of internal displacement and the obligation to give it priority over other topics of the public agenda´, because of the determining incidence that this phenomenon shall exert on the national life due to its dimensions and psychological, political, and socioeconomic consequences. (Motive 5.2).[132]

For this reason, the Court declared

> the existence of an unconstitutional state in the situation of displaced population because of the lack of agreement between the severe impairment of their constitutional rights as developed by law, on the one hand, and the volume of resources earmarked to ensure their effective enjoyment of such rights and the institutional capability to implement the corresponding constitutional and legal mandates, on the other hand. (Resolution First).[133]

[132] COLOMBIA. *Sentencia de la Corte Constitucional* '*T-025-04*'. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>. Access on: Aug. 19, 2017.

[133] COLOMBIA. *Sentencia de la Corte Constitucional* '*T-025-04*'. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>. Access on: Aug. 19, 2017.

Case Docket Ruling T-239/13 (April 19th, 2013): This decision dealt with the right to dignified housing of persons that have been victims of forced internal displacement.[134]

On this score, the Court ruled, as follows:

> When dealing with population displaced by the armed conflict, the right to dignified housing implies at least the following obligations of immediate compliance: (i) to relocate displaced people who have been forced to settle down in high risk lands because of the displacement; (ii) to grant these people solutions for temporary housing and, later, to facilitate their access to permanent housing. In this sense, the Corporation [the Court] has specified that is not enough to offer solutions for the long-run access if in the meantime it is not provided temporary accommodation under dignified conditions to displaced people; (iii) to provide advisement on procedures to get access to programs for displaced people; (iv) to take into consideration the special needs of displaced population and subgroups that exist within it –elders, householder mothers, children, persons with disabilities, etc.- when designing housing plans and programs; (v) to eliminate the barriers that impede access of displaced people to the state social assistance programs, among others." (Motive 5).[135]

Likewise, the Court pointed out that displaced population is a subject of special constitutional protection which

> is no more than the materialization of the different constitutional guarantees that have as a goal the protection of the human person, which is in harmony with the obligations of all state authorities to undertake affirmative actions in favor of the population that is in a circumstance of manifest weakness [...] On the other hand,

[134] This decision adjudicated a writ of *amparo* that dealt with the situation of displaced population, though it addressed specifically the protection of their right to dignified housing impaired by forced eviction due to internal political violence.

[135] COLOMBIA. *Sentencia de la Corte Constitucional 'T-239/13'*. Available at: <http://www.corteconstitucional.gov.co/relatoria/2013/t-239-13.htm>. Access on: Aug. 23, 2017.

> because of the numerous constitutional rights impaired by the displacement and taking into consideration the special circumstances of weakness, vulnerability, and defenselessness of displaced people, the constitutional jurisprudence recognized them the right to receive urgently preferential treatment from the State based on constitutional Article 13, treatment that is characterized by the readiness in meeting their needs because "otherwise it implies that the impairment of fundamental constitutional rights would perpetuate, and in many occasions, aggravate [...]" Consequently, the authorities are under the obligation to take special measures that make less vulnerable displaced people, to repair the injustices that originated in an involuntary displacement, and to take aim at an effective fulfillment of the rights that provide a minimal wellbeing that allows those people to be autonomous and self-sufficient. (Motive 4).[136]

5. All in all, the Constitution recognizes a need for affirmative action in favor of persons and collective groups singled out as subject of special protection. The Constitution mentions them all throughout its text and the State deploys a number of norms, policies, programs, and measures that develop affirmative actions in their favor.

In the same way, the Court develops the constitutional provisions that identify those persons and collective groups making thus important inroads into the subject of affirmative action. In so doing, two especially vulnerable groups stand out in the constitutional jurisprudence: persons with disabilities and displaced people.

Regarding persons with disabilities, the State incorporated into national law the International Covenant on the Rights of People with Disabilities in 2009, which moved the Court not only to rule favorably on its constitutionality, but also to urge the State to implement the treaty provisions both rapidly and effectively. Regarding displaced people, the Court declared an un-

[136] COLOMBIA. *Sentencia de la Corte Constitucional 'T-239/13'*. Available at: <http://www.corteconstitucional.gov.co/relatoria/2013/t-239-13.htm>. Access on: Aug. 23, 2017.

constitutional state and obligated the State to focus urgently on the flagrant impairment of their human rights by promoting pertaining public policies.

5 Peru: constitutional silence and policy initiatives

1. The emergence and expansion of the right to equality took place somehow differently in Peru in a historical perspective.

In this regard, Article 9 of The Basis for the Political Constitution of 1822 foresaw a protection of equality before the law whether it rewards or punishes, the abolition of all hereditary employments and privileges, and the abolition of slave trade. A newly passed constitution implemented these provisions one year later by abolishing slavery and the aforementioned trade altogether in Article 11, while recognizing that "[…] all citizens are equal before the law, whether it rewards or punishes. All hereditary employments and privileges are hereby abolished" in Article 23. Few years later, the Constitution of 1826 restated this clause in Articles 142 and 147, and different constitutions guaranteed with a slightly similar language the right to equality before the law whether it rewards or punishes from then on (1828; 1834; 1839), proscription of slavery (1828; 1834; 1839; 1856; 1860; 1867; 1920; 1933),[137] abolition of all hereditary employments and privileges (1828; 1839; 1856; 1860; 1920),[138] and equal admission to all types of public employments (1834; 1856; 1860; 1867; 1920). Nevertheless, the Constitutions of 1856, 1860, 1867, and 1920 varied the language used to guarantee the right to equality, because they guaranteed that "[…] the laws equally protect and obligate everyone: there could be special laws because the nature of the objects requires it, but not based on the sole difference of people."

[137] The Constitution of 1920 added to the traditional proscription of slavery that "[…] nobody shall perform personal labor without free consent and due retribution." The Constitution of 1933 kept this clause, including its language, to emphasize the voluntary nature of personal work, especially after guaranteeing the liberty to work, which surfaced again in the Constitution of 1993.

[138] The Constitution of 1920 added a proscription of personal charts.

After the return of democracy, the Constitution of 1979 "gathered and tried to conjugate the best of [...] liberal tradition with the great ideas and accomplishments of the last thirty years, though trying to tone down the extremes."[139] It suggested a new approach to the right to equality by bringing together equality, discrimination, equal opportunities, and an active state role. Thus, Article 2.2. recognized to everyone "[...] the equality before the law without any discrimination for reason of sex, race, religion, opinion, and language. Men and women have equal opportunities and responsibilities. The law recognizes women no lesser rights than men", whereas Article 88 prescribed that "[...] the State rejects all form of [...] racial discrimination. [...]" Article 24 conferred upon the State an obligation regarding education, that is, the purpose of state educational plans, programs, and actions must be "to grant equal opportunities to everyone."

A coup *d´etat* orchestrated by former President Fujimori did away with this constitution in 1992, so a new constitution went into effect shortly thereafter. The Constitution of 1993 omitted any mention about the hierarchy of international human rights treaties in the national law and included a general clause about the right to equality, which language suggested a lesser scope for this right and a less active state role. Indeed, Article 2.2. recognizes only the right to equality before the law and prohibits any type of discrimination, as follows: "The equality before the law. Nobody should be discriminated against on grounds of origins, race, sex, language, religion, opinion, economic condition or of any other kind." Therefore, this constitution does not guarantee other manifestations of the right to equality and removes the state from addressing issues of material inequality.[140]

2. Nowadays it is fair to assert that the situation of affirmative action in Peru is paradoxical. This country moved from the Constitution of 1979

[139] GARCÍA, Domingo. El sistema constitucional peruano. In: GARCÍA B., Domingo; FERNÁNDEZ F. S.; HERNÁNDEZ, R. (Coord.). *Los Sistemas Constitucionales Iberoamericanos*. Madrid: Editorial Dykinson, 1992. p. 704.

[140] HUERTA, Luis G. El derecho a la igualdad. *Revista Pensamiento Constitutional*, Lima, v. 11, n. 1, p. 309, 2005. Available at: <http://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/7686/7932>. Access on: Aug. 20, 2017.

which envisioned an active expression of rights and policies geared towards the principle of equality, to a regulatory –if not regressive- constitution enacted in 1993 that suppresses any direct reference to the usual elements thereof comprised in previous constitutions. Consequently, it is a starting point to realize that the Constitution of 1993 neither mentions affirmative action as a public policy instrument, nor contains any clear-cut recognition thereof. As a matter of fact, there have been eight successive constitutional amendments since 1993 (i.e. 1995, 2000, 2002, 2004, 2005, 2009, 2015, and 2017) and several bill projects to write affirmative actions or some form thereof into the Constitution, but they were all to no avail.[141]

From this viewpoint, the Constitution of 1993 represents just a mere indication; after all, it suffices to say that it wiped out completely the clause on equal opportunities among men and women written in Article 2.2. in 1979, although the impact of this suppression was lessened somehow in 1997, after the enactment of Act No. 26,859 – the Organic Law on Elections- that established a gender quota of 25%, at least, for female candidates in the composition of electoral lists for congressional elections, although Act No. 27,387 of 2000 increased this quota to a 30%. By the same token, a constitutional amendment on regional decentralization passed in 2002 (Act No. 27,680) seems to suggest that the legislature may eventually introduce affirmative action for some specific purpose, as deduced from Article 191 that prescribes that "the law establishes minimal percentages to make accessible the representation of gender, native communities, and original peoples in the Regional Councils. The same treatment applies to Municipal Councils." Nonetheless, this is the only constitutional provision that mentions some form of affirmative action, like a gender quota, but only for subnational elections.

[141] HUERTA, Luis. El derecho a la igualdad. *Revista Pensamiento Constitutional*, Lima, v. 11, n. 1, p. 309-310, 2005. Available at: <http://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/7686/7932>. Access on: Aug. 20, 2017; EGUIGUREN, Francisco. Principio de Igualdad y derecho a la no discriminación. *Ius et Veritas*, Lima, n. 15, p. 68-69, 1997. Available at: <http://revistas.pucp.edu.pe/index.php/iusetveritas/article/view/15730/16166>. Access on: Aug. 20, 2017.

3. Notwithstanding this constitutional silence, the Constitutional Tribunal ruled out the possibility of challenging the constitutionality of affirmative action in the Case Docket Ruling No. 00261-2003-AA, for which purpose it laid down some conditions for its validity, as follows:

> [...] the notion of equality before the law is not rebuked by the existence of differentiating norms upon condition of evincing: a) the existence of distinct factual situations and, therefore, the relevance of the differentiation; b) a specific objective; c) reasonableness, that is, its admissibility from the perspective of the norms, values, and constitutional principles; d) rationality, that is, coherence between two factual subjects and the objective sought after; and e) the proportionality, that is, that the differentiating legal consequence is harmonious and corresponds with the factual assumptions and objective. (Motive 3.2).[142]

In other words, the constitutional principle of equality allows the constitutional interpreter to deduce some criteria, e.g. reasonableness, rationality, and proportionality, to validate some form of affirmative action passed by the legislature.

The Tribunal also reflected on the constitutionality of affirmative action based on Article 103 of the Constitution.[143] In that opportunity the Tribunal clarified the meaning of this provision by declaring that it admits two dimensions: on the one hand, an absolute prohibition with no exception, and on the other hand, a limit on legislative action that under no circumstance may block the state role to equalize people´s dignity and rights, even in in-

[142] PERU. *Sentencia del Tribunal Constitucional '00261-2003-AA'*. Available at: <https://tc.gob.pe/jurisprudencia/2003/00261-2003-AA.pdf>. Access on: Aug 25, 2017.

[143] Article 103 deals with the legislative function for which purpose it prescribes, as follows: "There may be issued special laws because it is required by the nature of things, but not based on the differences among people. The law, ever since it goes into effect, applies to the consequences of existing legal relationships and situations and does not have retroactive force or effects; except, in both cases, in criminal matters when it benefits the convicted person. The law is abrogated only by another law. It also has no effect by a sentence that declares its unconstitutionality. The Constitution does not protect the abuse of rights."

equality.[144] Thus, the Tribunal ruled in Motive 12 of the Case Docket Ruling No. 00003-2003-AI, as follows:

> [...] when article 103 of the Constitution foresees the impossibility of passing special laws "due to differences among people", it abounds on the necessary formal equality prescribed in paragraph 2 of article 2, according to which the legislator cannot generate social differences; but in any way it may be constructed to limit the right and obligation of the State, through "positive actions" or "reversal discrimination", to be a promoter of the substantial equality among individuals.[145]

Besides this decision, the Tribunal reflected further on affirmative action based on the principle of equality in Motive 11 of the Case Docket Ruling No. 00606-2004-AA, wherein it maintained that

> [...] the right to equality supposes not only a negative consequence, that is, to refrain from discriminatory treatments, but also a positive requirement by the State that begins with a recognition of the insufficiency of prohibitive mandates of discrimination and a need to equate situations that are, per se, unequal.[146]

It goes without saying that the implementation of affirmative action should follow some criteria, which the Constitutional Tribunal addressed in Motive 2 of the Case Docket Ruling No. 00018-2003-AI through two fundamental requisites, as follows: "a) Parity, uniformity, and accuracy of bestowal or recognition of rights before supposed facts or similar events, and b)

---

[144] HUERTA, Luis. El derecho a la igualdad. *Revista Pensamiento Constitutional*, Lima, v. 11, n. 1, p. 316, 2005. Available at: <http://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/7686/7932>. Access on: Aug. 20, 2017.

[145] HUERTA, Luis. El derecho a la igualdad. *Revista Pensamiento Constitutional*, Lima, v. 11, n. 1, p. 316, 331, 2005. Available at: <http://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/7686/7932>. Access on: Aug. 20, 2017; PERU. *Sentencia del Tribunal Constitucional '0003-2003-AI'*. Available at: <https://tc.gob.pe/jurisprudencia/2003/00001-2003-AI%2000003-2003-AI.pdf>. Access on: Aug. 25, 2017.

[146] PERU. *Sentencia del Tribunal Constitucional '0606-2004-AA'*. Available at: <https://tc.gob.pe/jurisprudencia/2005/00606-2004-AA.pdf>. Access on: Aug. 25, 2017.

Parity, uniformity, and accuracy of treatment or intersubjective relationship for persons subjected to identical circumstances and conditions."[147]

In any case, the Constitutional Tribunal seems to hold a clear position on the relevance of affirmative actions, because it understands that they are –as a matter of fact- a way to comply with the constitutional mandate of Article 2. Then, it is hardly surprising that it maintained in Motive 63 of the Case Docket Ruling No. 0048-2004-AI, as follows:

> [...] the State in some opportunities promotes differential treatment for a determined social group, bestowing upon them advantages, incentives or more favorable treatments in general. The objective of this action is nothing else but to legally make up for some groups that are marginalized in an economic, social, or cultural way so these groups may overcome the real inferiority in which they are.[148]

It goes without saying that the latter implies to admit a structural analysis on issues of inequality, as explained above.

4. There is evidence of affirmative actions in the legislation on women, persons with disabilities, and indigenous people, among others. This evidence suggests that constitutional omissions did not deter governments from implementing this type of policy; actually, they went beyond the *verbatim* of the Constitution as evinced by the ample use of quotas in favor of these human groups.

Regarding women, the ratification of CEDAW in 1982 drove Congress to create gender quotas for public offices, both popular and bureaucratic. Besides the gender quota for congressional elections, mentioned above, Congress passed Act No. 28,094 in 2003 which made mandatory a 30% gender quota for female candidates to party offices. Also, Act No. 28,983 of 2007 -the Law on Equal Opportunities among Men and Women- asserted

[147] PERU. *Sentencia del Tribunal Constitucional '00018-2003-AI'*. Available at: <https://tc.gob.pe/jurisprudencia/2004/00018-2003-AI.pdf>. Access on: Aug. 25, 2017.
[148] PERU. *Sentencia del Tribunal Constitucional '00018-2003-AI'*. Available at: <https://tc.gob.pe/jurisprudencia/2004/00018-2003-AI.pdf>. Access on: Aug. 25, 2017.

that the State must implement "temporary measures of affirmative action that take aim to accelerate factual equality of women and men, that shall not be deemed discriminatory." The National Plan for Gender Equality 2012-2017, enacted by the Ministry of the Woman and Vulnerable Populations in 2012, complimented that legislation by setting a 50% goal of gender quotas in decision making positions in both national public agencies and regional governments by 2017. Finally, Article 12 Paragraph 3 of the Law on Regional Elections of 2002 -Act No. 27,683- points out that the lists of proprietary candidates for regional councils must consider no less than 30% of men or women, among other requisites.

Regarding persons with disabilities, Act No. 29,973 -the General Law on the Person with Disability- passed in 2012 regulates the several ways in which persons with disabilities may achieve equality. Importantly enough, this law states in Article 8.2. that those positive measures that take aim at reaching factual equality for persons with disabilities are not deemed discriminatory, whereas Article 49 establishes an employment quota of 5%, at least, in public agencies and 3%, at least, in some private companies, precisely to favor their labor inclusion.

Regarding the participation of indigenous people in regional governments, it is also apparent the use of a quota instrument in their favor. Article 12 Paragraph 3 of the aforesaid Law on Regional Elections establishes that the lists of proprietary candidates for regional councils must consider: "3. A minimum of fifteen per cent (15%) of representatives of native communities and original peoples from each region where they exist, as determined by the National Jury of Elections."

Nevertheless, the constitutional silence on affirmative action makes difficult to determine whether or not exists a truly systematic state effort to consolidate this legal instrument or, instead, there are only some isolated initiatives that lack a common objective.

The Constitution of 1993 draws criticisms after walking away from developing the right to equality, including affirmative action. This circumstance makes the rejection of any type of discrimination insufficient, be-

cause the Constitution is silent about mechanisms to overcome deep-seated historical inequality.

5. The latter persuaded the Constitutional Tribunal to step in to construct the constitutional principle of equality so as to include affirmative action, as shown above. In so doing, it provided visibility to this policy means, made it interact argumentatively with other techniques of constitutional interpretation that lead to different results, and turned it into a functioning policy principle in the polity.

Notwithstanding this judicial development, it is advisable no to overlook two issues: on the one hand, it is apparent the unsatisfactory drafting technique used by constitution framers in 1993, who just stated a general principle of equality that left the determination of its scope to constitutional litigation over time; and on the other hand, that the legislation identified as example of affirmative action represents non-systematic state efforts to pursue real equality. Indeed, it is fair to maintain that international human rights treaties provide a justification for some actions implemented by the government in some subject areas, e.g. women discrimination, regardless of constitutional provisions.

In essence, there is a need for constitutional provisions that assume equality seriously insofar as equality is "established because we are different, understanding thus different in the sense of diversity of personal identities",[149] after all, the assertion that human beings are different implies that the objective of equality requires solutions that encompass that intrinsic diversity that characterizes human nature.

6 **Some tentative conclusions**

1. This first attempt to gauge the state of affirmative action in the four case studies analyzed herein permits to put forward only some tentative conclusions, after factoring in the limitations imposed by data sources

[149] FERRAJOLI, Luigi. La igualdad y sus garantías. *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, Madrid, n. 2, p. 311, 2009.

in some of these cases. However, these tentative conclusions should move researchers and analysts to reflect on strategies to introduce affirmative action and to figure out the possible objectives pursued by these policy means.

2. It is apparent that international human rights treaties, including human rights soft law, had a positive impact on the policy-making process that led to the passage, implementation, and enforcement of affirmative action policies and programs, especially in the absence of an explicit authorization for it. Indeed, international human rights law justified government activism in contexts of constitutional uncertainty or silence, besides underpinning a broad construction of the right to equality before the law by constitutional interpreters.

This positive impact of international human rights treaties depended on having government elites willing to abide by them under democracy and the rule of law, for which purpose the international law theory provided reasons about their validity and enforceability by national agencies, regardless of their incorporation into the constitutional block, like in Argentina and Colombia.

3. A constitutional authorization of affirmative action policies and programs prevented successful legal challenges before courts, e.g. Argentina and Colombia; after all, constitutional clarity is a better recipe for policy-making purposes than constitutional opacity.

However, two of the cases analyzed herein also show that constitutional uncertainty or silence did not prevent the legal community to validate affirmative action based on an evolutionary construction of the right to equality before the law that went beyond the *verbatim* of constitutional provisions, especially if appealing to a useful historical trajectory on this matter was readily available for judges and bureaucrats, e.g. Chile and Peru. Nevertheless, it is moot point if this type of construction of the right to equality is feasible in the absence of that historical trajectory.

4. In this regard, an evolutionary construction of the aforementioned right, precisely to validate affirmative action, requires relativizing further its scope to make room not only for individuals, but also for human groups, collectivities, ethnicities, and genders that share a common history of exclusion

and discrimination. The latter implies an act of recognition by policy-makers, whether judges, bureaucrats, or legislators, which should begin by conceiving their nation states as pluralist diverse, "in-the-making" polities.

It goes without saying that constructing the right to equality before the law in this way is much closer to the idea of structural inequality, as explained above. In that sense, the evidence reviewed above shows that constitutional interpreters may even use the concepts of reasonableness, rationality or proportionality to justify differential treatment among human groups based on their different location in the polity's social-and-political structure due to deeply-ingrained discriminatory practices, e.g. Chile and Peru. In these circumstances, the work of constitutional interpreters to address structural inequality is made easier when the constitution conceives the right to equality as a principle, e.g. Peru, or it imposes upon the State some duties or obligations regarding social integration and/or equal opportunities, e.g. Chile.

5. Analyzing the impact of affirmative action policies and programs requires dwelling on their goal and also on a conditioning factor.

Affirmative action pursues a removal of historical structural, taken-for-granted barriers that impair the effective participation and integration of certain human groups through transitory policies, programs, and measures; however, it is moot point if their transitory nature may effect that social transformation in term of equality of results, unless it is accompanied by policies to effect a cultural change regarding the full-fledged integration and participation of the very same groups at all levels of the political discourse, e.g. history, economy, legal, institutional, among others. Thus, the goal of affirmative action expresses itself – first and foremost – in an overall appreciation of social diversity in a pluralist polity, as required by the value of human dignity.

However, the efficacy of affirmative action policies and programs depends on their effective implementation by government bureaucracies, that is, strengthening and improving government capabilities are keys for their success. In that sense, a thorough analysis of the efficacy of affirmative action requires going beyond the traditional study of constitutions, legislation,

and judicial decisions, and focusing also on the administrative agencies and processes that preside over their materialization in most people´s daily life. In other words, government matters regarding affirmative action.

EFFECTIVENESS OF AFFIRMATIVE ACTIONS FOR THE SAFEGUARD OF HUMAN RIGHTS IN CENTRAL AMERICA

Amalia Patricia Cobos Campos[1]

Introduction

The affirmative actions are really instruments for the concretization of human rights. The discussion about the existence and justification are frequent in the scholars, jurisdictional, political and governmental ambits; these discussions arise that the affirmative actions have has a starting point to establish inequality for to reach the equality and establish too preferential selection.

In this paper, we analysed the theorical construction about these actions and the building about it in Central America with the finality to determine their suitability and scope and most importantly their shortcomings. Obviously, the arguments against those actions is part of the principle to equality and the State obligation to protect it. Nevertheless, the equality is consigned precisely for the inequality that affects several vulnerable groups.

For this motive, Alexy[2] says "if one reason for permission that unequal stent treatment is inexistent then an equal treatment is ordered" but he adds, "If one reason for a unequal treatments exist, then an unequal treatment is ordered."

The history was clarified the equality in the law not necessarily implies real equality. Also, doesn't need that all persons are treated exactly equal, that is the reason for the implementation of the affirmative actions and justify it fully and are one exception of the equality principle, that look

[1] Doctor in Law, member of National System of Researchers in Mexico, Full time professor and researcher in the University Autonomous of Chihuahua, Mexico; pcobos@uach.mx

[2] ALEXY, Robert. *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales, 1993. p. 409.

the equality since the compensation of the certain inequality as the gender or the migration problems. In front of these problems, we need equilibrium with the other groups of society that does not have these disadvantages.

Maybe we can say the equality it is a criterion that measure the grade of inequality legally permissible.[3]

We need to define some concept about affirmative actions, but before it, it is important to establish the different names with which these actions has been known, that are discriminative actions, inverse discrimination, positive actions, affirmative actions; the names with the word discrimination have been reviled, to consider inappropriate the use of it.

The term inverse discrimination emerges in the 30s says Ruiz Miguel[4] in India;

> As a policy accepted by the British settlers to try to overcome the sharp division into castes of that society. Its current knowledge and extent, however, comes from its introduction in the United States from the early 1970s. In Europe, its most well-known formulation is that of quotas in political party bodies, which are applied in Nordic countries since the early 1980s and in Spain since 1988.

However, according with Rosado:[5]

> Affirmative action emerged in the 1960s as a result of efforts by the civil rights movement to get America to honor its original contract, that "all [people] are created

[3] ROSENFELD, Michael. Conceptos clave y delimitación del ámbito de análisis de las acciones afirmativas. In: JUÁREZ, Mario Santiago (Coord.). *Acciones afirmativas*. CONAPRED, 2011. p. 24. Available at: <http://www.conapred.org.mx/ documentos _ cedoc / AA_MSJ. pdf>. Access on: Aug. 21, 2017.

[4] RUIZ MIGUEL, Alfonso. *La discrminación inversa y el caso Kalanke*. Proyecto de investigación núm. PB94-0193. Programa Sectorial de Promoción del Conocimiento de la DGICYT, 1995. p. 125. Available at: <www.cervantesvirtual.com/descargaPdf/la-discriminacin-inversa--y-el-caso-kalanke-0>. Access on: Aug 25, 2017.

[5] ROSADO, Caleb. *Affirmative Action*: A Time for Change? Sumati Reddy, editor. Workforce Diversity, Vol. 1: Concepts and Cases. Hyderabad, India: ICAFAI University, 2003. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi= 10. 1.1. 4 5 9. 4 1 3 7 & rep=rep1&-type=pdf>. Access on: Aug. 22, 2017.

> equal." In addition the Pledge of Allegiance promises "liberty and justice for all." This idealism is a promise of equal opportunity for all individuals regardless of color, national origin, race, religion, and sex, which up to this point in history had not been honored for people of color. While first addressed to the needs of African-Americans, later on the needs of American Indians, Asian-Americans, and Latinos were added. For this and other "unalienable rights," the founders and followers of the civil rights movement marched and died, and finally obtained the Civil Rights Act of 1964.

We must conclude the most accepted term is affirmative actions, since it is the more used for the scholars, organizations and the governments. The concept about it is based in the inequality, and "means positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded."[6]

The American Civil Liberties Union (ACLU), consider the affirmative actions "one of the most effective tools for redressing the injustices caused for our nation's historic discrimination against people of color and women."[7]

Campos[8] quoted by Burad[9] says in some circumstances is juridical valid to favour certain people in most proportion than other if these positive discriminations pretend to compensate and balance the inequitable marginalization or relegation inequality that falls on some people who benefit with it.

---

[6] Stanford Encyclopedia of Philosophy. The Metaphysics Research Lab, Center for the Study of Language and Information, Stanford University, 2013. Available at: <https://www-csli.stanford.edu/groups/stanford-encyclopedia-philosophy>. Access on: Sept. 22, 2017.

[7] THE AMERICAN CIVIL LIBERTIES UNION. *Affirmative actions*. Available at: <https://www.aclu.org/files/FilesPDFs/affirmative_action99.pdf>. Access on: Aug. 22, 2017.

[8] CAMPOS, Germán J. Bidart. *Manual de la Constitución Reformada*. Buenos Aires: Editorial Ediar, 1998. p. 533.

[9] BURAD, Viviana. *La discriminación inversa o positiva y el derecho a la igualdad para el colectivo sordo*. Mendoza: Cultura sorda, 2009. Available at: <http://www.cultura-sorda.org/la-discriminacion-inversa-o-positiva-y-%E2%80%A8el-derecho-a-la-igualdad-para-el-colectivo-sordo/>. Access on: Aug. 28, 2017.

Burad[10] concludes the discrimination inverse or positive consist in all distinction or preference adopted by the state with the aim of promotion the social integration or the individual development with the persons with some physical incapacity.

We consider this concept is inadequate since it does not include the group actions with focus in general terms when the incapacity is not physical such as the migrants, gender, etc. In this sense the concept of Bidart are more appropriate.

The legal support by the affirmative actions are the international treaties specially Universal Declaration of Human Rights, Convention of the Elimination of all forms of Discrimination against Women (CEDAW),[11] Declaration on the Rights of Indigenous Peoples, among other. In the national context, all Constitutions safeguard the human rights and establish the government obligation for its preservation; in consequence, the affirmative actions are in the law context.

1 Affirmative actions in Central America

Study the affirmative actions in Central America involves analysing the actions undertaken by the various states that comprise it to then Investigate the joint work done for it.

As we know, Central America is integrate to the following countries: Guatemala, Belize, Honduras, El Salvador, Nicaragua, Costa Rica and Panamá, that the present study we analysed in to this order. While the Central America has been seen as a whole, each country has its owns particularity's and we need to make one separate analysis, the need and the affirmative action's equally are different in them and the success about it are also different in each state.

[10] Idem.

[11] CEDAW. Concluding comments of the Committee on the Elimination of Discrimination against Women: Guatemala, Supplement No. 38. A/57/38. 2002. Available at: <http://www.un.org/womenwatch/daw/ cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Guatemala/Guatemala-CO-3-4_CO-5.pdf>. Access on: Aug. 29, 2017.

One important document who supports the need of the affirmative actions it is The Declaration of San Salvador on Citizen Security in the Americas in 2011 during the 41 Assembly of the OEA. In this declaration, the States make emphasis in the eight point:

"8. The determination to design public policies and educational programs with a view to achieve a cultural transformation aimed at eradicating domestic violence."[12]

In consequence, the States assume the compromise to create affirmative actions for education and protection particularly of women, who is normally the victim in the domestic violence, and they have obligation for that. That affirmation was supported by the Economic Commission for Latin America and the Caribbean (ECLAC), who has "estimates that up to 40 percent of women in the region have been victims of violence at some point during their lives."[13]

Other important agreement was the *Pertinence of affirmative actions and the interculturality competences by the effectiveness exercise of the Human Rights in Central America*, subscribed in Costa Rica in June 2016, this document was intituled with these terms for make emphasis in one thing: the affirmative action's alone do not solve the problems for which they need to be suitable. Besides the document analyse the most important affirmative actions was implemented in this countries, and values of the real effectiveness about the reasons of implementation of it.

1.1 **Guatemala**

In Guatemala the affirmative actions are centred specially in two vulnerable groups the indigenous and the gender problematic.

[12] ONU. *Declaration of San Salvador on Citizen Security in the Americas*. 2011.

[13] See: CEPAL. ¡Ni una más! Del dicho al hecho: Únete para poner fin a la violencia contra las mujeres. 2009. Available at: <ttps://www.cepal.org/mujer/noticias/noticias/2/37892/ Niunamas2009.pdf>. Access on: Sept. 18, 2017; GASMAN, Nadine; ALVAREZ, Gabriela. *Gender*: Violence against women. Americas Quarterly. Available at: <http://www.americasquarterly.org/node/1930>. Access on: Sept. 18, 2017.

In the first group the principal are the *Mayas.* They conforming the 40% of the total population of Guatemala, according to de government census. But the scholars and advocates says is the 60%[14] but in these case and under the premise of the 60%, the affirmative action's according with the 87% the population of Guatemala lives in poverty and the 67% are in the extreme poverty. Fischer and Hendrickson say also the affirmative actions in this case are undertaken without the government involvement, but in general, this Indians are poor.

However, Guatemala is not the poorer of the countries of Central America, since it, has more economic growth than Honduras, El Salvador and Nicaragua, for example, but in its population 87% of their Guatemala population lives in poverty and the 67% are in the extreme poverty.[15]

According with United Nations[16] the development programs for indigenous are integrated in the National Plan, but the discrimination is still part of their lives. The changes in the law are insufficient, the reason is that changes are not sufficient since important areas are absent in this law and the application of the existent regulations are not fast enough, discrimination exist not only in the current life, in polices also and in the resources distribution although those resources are public.

Wherever we recognized Guatemala, protect the equality in the Constitution. About the gender mater, exist several laws to protect the women human's rights; such as:

a) Law of Social Development;[17]
b) Law Against the Femicide and others forms of Violence against the women;[18]

[14] FISCHER, Edward F.; HENDRICKSON, Carol. *Tecpan Guatemala*: A modern Maya town in global and local context. Oxford: Westview Press, 2003. p. 26.
[15] Idem.
[16] UNITED NATIONS. Human Development Report 2000. Available at: <http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf>. Access on: Aug. 25, 2017.
[17] Law of Social Development (Decree 42-2001).
[18] Law Against the Femicide and others forms of Violence against the women (Decree 22-2008).

c) Act on the Prevention, Punishment and Eradication of Domestic Violence; Act on Dignity and Integral Promotion of Women;
d) National Policy relating to the Advancement and Integral Development of Guatemalan Women and Equity Opportunities Plan 2008-2023;
e) Act and Policy on Social Development and Population; Act on Urban and Rural Development Councils and Municipal Code.

For more concretization we may say that principal positive actions adopted in Guatemala are about gender and indigenous. In consequence, we will explore in this section the National Policy relating to the National Policy to Promotion and Development of Guatemalan and the Equality to opportunities Plan 1999-2001, other it was published in 2001-2006. Posteriorly the government issued The Women Advancement and Integral Development of Guatemalan Women and Equity Opportunities Plan 2008-2023[19] by consider that it's the most important document for the purpose of this paper.

According with the National Statistical Institute the population number in 2006 in Guatemala was 12 million nine hundred eighty thousands of which the 52 % are women and the 47.8% are men. In 2014, this institution says the population are 15,607,640 and the number of women is 7,927,951 persist more than 50 %;[20] in this context the affirmative actions for the women are essentials.[21]

This document has focus in the indigenous and mestizo's women's and recognize that 38 percent are indigenous, and it objective are the pro-

[19] PNPDIM. Government of Guatemala Republic, Woman Secretariat for Woman. 2009. Available at: <http://www.segeplan.gob.gt/downloads/clearinghouse/politicas_publicas/DerechosHumanos/PoliticaPromociónydesarrolloMujeres2008-2023.pdf>. Access on: Sept. 10, 2017.

[20] INSTITUTO NACIONAL DE ESTADÍSTICA. *República de Guatemala*: Estadísticas Demográficas y Vitales 2014. Guatemala, dic. 2015.

[21] INSTITUTO NACIONAL DE ESTADÍSTICA. *Estimaciones de Población por Departamento según Edad y Sexo 1990-2010 y Estimaciones de Población por Municipio según Sexo 1990-2005*. Guatemala. Available at: <https://www.ine.gob.gt/sistema/uploads/2014/02/26/L5pNHMXzxy5FFWmk9NHCrK9x7E5Qqvvy.pdf>. Access on: Aug. 30, 2017.

motion of integral development of women *Mayas*, *Garifuna's*, *Xinkas* and Mestizo in all spheres of the economic, social political and cultural life.[22]

The program was evaluated by the own government in 2013 and the diagnostic concluded the following:

a) Only the minority of the institutions takes actions in favour of women
b) Exist promotion to actions in favour of women but does not exist physical space for attention to women.
c) Recognize the women importance but do not have specific unit for her.
d) In the organigram has Undersecretary of Indigenous People Affairs
e) In the philosophy of work is the equality of gender: they seek to propitiate opportunities, especially peasant women and indigenous by means of its insertion in the public ambit as of their empowerment element.
f) Promote forum by the Law of Femicide Diffusion.

Although the commitment says in the document in analysis is especially in favour of the indigenous *Mayas*, *Garifuna's*, *Xinkas*, those actions do not have tracing about these groups, which make impossible to establish the grade of compliance about it.

We analysed the documents but need also to examine the reality by decide if these affirmative actions are adequate or not, and which is the real impact in the life of the people benefited by the programs.

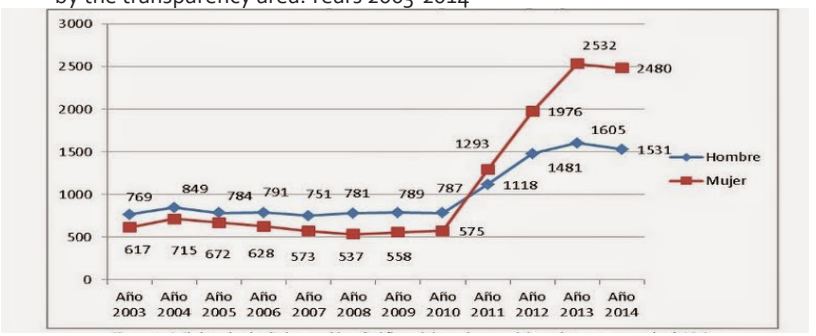
In this sense, we can conclude agreement with the Committee on the elimination of Discrimination against women in the exceptional session of August 2002, Guatemala:

[22] PNPDIM. Government of Guatemala Republic, Woman Secretariat for Woman. 2009. Available at: <http://www.segeplan.gob.gt/downloads/clearinghouse/politicas_publicas/DerechosHumanos/PoliticaPromociónydesarrolloMujeres2008-2023.pdf>. Access on: Sept. 10, 2017.

> [...] although some obstacles undoubtedly persisted, important achievements had been made, in particular those relating to women's reproductive health, rural women in the context of the strategy for poverty reduction and rural development, and emerging political participation by women.[23]

If is that true the information is since 2002, we consider for the information existent the situation of woman do not present advances in the maters mentioned by CEDAW, particularly in the rural women context the situation presents many difficulties for her, to believe our affirmations suffice the following figure:

Figure 1 – Disappearances for Gender Reports, font: Ministry of Government Graphic make by the transparency area. Years 2003-2014[24]



Source: Ministerio de Gobernación.

In the graphic, we can appreciate than the disappearances of women have seriously risen and present alarming numbers since 2003 until 2014 and are one important indicative about the situation of the women in Guatemala.

The affirmative actions are necessary in Guatemala, the actions implemented with the government and the no governmental Organizations are not enough for the eradication of the inequality is particularly in the case of women and indigenous.

[23] CEDAW (2002, op. cit.).

[24] Available at: <http://areadetransparencia.blogspot.mx/2015/04/25222-desapariciones-en--12-anos-en.html>. Access on: Aug. 30, 2017.

1.2 **Belize**

In 2016, the population in this country are 353,858 and the 50.15% are female, this numbers clarify the necessary affirmative actions in gender mater.[25]

We find programs to the ONG[26] IFAD,[27] this organization invest in affirmative actions since 1985 until 2005; the actions were the Toledo Small Farmers Development Project, which closed in 1995, and the Community-Initiated Agriculture and Resource Management Project, which closed in 2005. Same it implements the ongoing Rural Finance Programme is IFAD's. All action is focused in the rural needs, it is for the institutional objectives of the mentioned ONG.

In this sense, the government of Belize receive financial help of the EU[28] with co-financing projects far-reaching, such as the nationwide Belize Rural Development Program.

In 2006, the Executive Board of this organization help this country with affirmative action's amounting to US$100,000. "That focuses on: Consolidation of experiences involving rural financial services under the Community-Initiated Agriculture and Resource Management Project" and "the process of decentralization carried out by strengthening local governments and regional development coordination through the National Association of Village Councils."[29]

We can appreciate that support it is aimed at involving government in these actions, which undoubtedly yields better results.

In 1998 as part of the compromises assumed in the Heads of State wife's and government of the Americas Conference, was conformed the

[25] INDEX MUNDI. *Belize Demographics profile 2017*. Available at: <http://www.indexmundi.com/belize/demographics_profile.html>. Access on: Aug. 30, 2017.
[26] Not governmental Organization.
[27] The International Fund for Agricultural Development.
[28] European Union.
[29] IFAD. The Support Programme for Women. Available at: <https://www.ifad.org/topic/operations/region/pl/tags/gender/6207322>. Access on: Sept. 3, 2017.

National Committee of Belize to implement one pilot program to the rural woman with the objectives of Pademur.[30]

That program was not implemented until 2000 with the support of CIDER implementing affirmative actions between them capacitation of rural women in industrial process improve, quality control and marketing to products coming from the agro-industrial microenterprise's.

Wherever in the gender matter, according with the UN Committee Questions Role of Church, High Rates of HIV/AIDS, "women in Belize were protected from discrimination by the State's highest law, yet customs, traditions and culture impeded access to resources and opportunities."[31]

We consider the government need to pay attention in the implementation of more and better structured affirmative actions to overcome the serious problems in these areas.

In virtue of these problems, the inconformity has arrived until the Inter-American Court that is the case 12.053 Indigenous Mayas Communities of Toledo District vs Belize.

However, among the Belize achievements we can it find the support of the Caribbean Court of Justice of the indigenous *Mayas* of the village of *Santa Cruz* sustaining their rights on traditional lands in 2007. Recently in 2015 when the Court resolve "the 38 Q'eqchi and Mopan Maya Indigenous communities of southern Belize have rights to the lands they have customarily used and occupied. The court affirmed that these traditional land rights constitute property equal in legitimacy to any other form of property under Belizean law."[32] The indigenous same the women have now legal and judicial

[30] Gender Equally and Development Rural Women Hemispheric Program.

[31] UNITED NATIONS. *Customs impede women's opportunities in Belize, despite legal protection, women's anti-discrimination committee told*. WOM/1134. UN, Meetings Coverage and Press Releases, 1999. Available at: <https://www.un.org/press/en/1999/19990614.wom1134.html>. Access on: Sept. 5, 2017.

[32] DE LUCCA, Danielle. *Maya win unprecedented land rights in Belize at International Courts*. Cultural Survival. June, 2015. Available at: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maya-win-unprecedented-land-rights-belize-international>. Access on: Sept. 11, 2017; TAULI-CORPUZ, Victoria. United Nations Special Rapporteur on the Rights of Indigenous Peoples, Declarations and Communicated. 2015. Available at: <http://unsr.vtaulicorpuz.org/site/index.php/es/declaraciones-comunicados/72-belize-warns>. Access on: Sept. 11, 2017.

support but do not reach the real protection of their territory and the human rights relationship with it in the everyday reality.

1.3 **Honduras**

This country have many problems about gender questions and the public polices for this topic are few, especially in terms of the economic inequality, although discrimination is not openly given in the labour market by gender according with Perez et al.[33] who state that:

> [...] in Honduras that an equality of opportunities does not exist among those respondents who are older, have darker skin tones, reside in rural areas or have lower levels of education. Furthermore, the analyses included in this study reinforce the idea that the education level of one's mother determines opportunities such as education level and income. [...] For this, attitudes vary greatly, depending on the subject. Honduras has relatively low levels of agreement with the idea that men should have preference in the labor market. In contrast, Honduras is one of the top countries, after Paraguay, where citizens believe in the benefit of affirmative action in terms of racial quotas for education. However, Honduras, along with the United States and Haiti, has a low average level of agreement that the State should play a role in reducing economic inequality.

In consequence, the central problem apparently is the inequality in gender mater, despite the fact that in Honduras, its citizens support affirmative action, and 50.2% accept that;[34] nevertheless it is obvious that the inequality remains in gender mater and the affirmative actions in this sense

[33] PÉREZ, Orlando J. et al. *Political Culture of Democracy in Honduras 2012*: Towards the Equality of Opportunity in the Americas. Vanderbilt University/FOPRIEEH/Hagamos Democracia/Americas Barometer/ USAID, 2013.

[34] Ibid p. 31; and TELLES, Edward; STEELE, Liza. *Pigmentocracy in the Americas*: How is the attainment related to skin color? Latin American Public Opinion Project Insights series, 2012. Available at: <https://perla.princeton.edu/wp-content/uploads/ sites/17/2012/01/Pigmentocracy-Insights.pdf>. Access on: Sept. 14, 2017.

are scarce, but in the last times it is more and with focus in specifying problems such as the pregnancy in the teenagers.

We find in the National Women's Policy the II Plan of Gender Equality and Gender Equity of Honduras 2010-2022,[35] this document establish six central points of action. These actions are support in *the promotion, protection and guarantee*[36] of the:

a) Political participation;
b) Right to a peace and a life free of violence;
c) Healthy all of life, sexual and reproductive rights; education, cultural rights, interculturality and information right;
d) Economical rights, labour, employment, use, access and control of the own economic resources;
e) Access, use and control of the natural resources with focus in gender.

Other important program is the "City Woman,"[37] this program implements affirmative action's such as "I decided to fulfil my dreams"[38] which teach to the teenagers how made to project their life and the consequences of the early pregnancy in their lives.[39]

In 2017 the Minister of the INAM[40] Ana Aminta Madrid speak about the advances of the Regional Agenda of Gender in the framework of sustainable development by 2030, and she say the actions in process are:

a) Incorporation of gender focus for the general provisions of in 2017 budget, especially in provision of resources for the affirmative actions in equality mater.

[35] HONDURAS. II Plan de Igualdad y Equidad de Género de Honduras 2010-2022 (II PIEGH). National Women's Institute – INAM, 2010.
[36] Cursives are ours.
[37] Ciudad Mujer.
[38] Yo decido cumplir mis sueños.
[39] INAM. Available at: <http://www.inam.gob.hn/web/index.php>. Access on: Sept. 14, 2017.
[40] Nation Institute of Women for the acronym in Spanish.

b) The Observatory of Gender has been designed to monitor compliance to the public polices undertaken in the mater and the fulfilment of international Agreements.[41]

She also mentioned the programs before analysed and the legislation most relevant, such as the Inspection Labour Law, which supervised the labour of women who are pregnant or breastfeeding women and avoids discrimination for these reasons.[42]

It we do not find many programmes of social assistance to combat poverty although in this country the level of poverty it is high. In 2012 only 4.9 percent of the population received such assistance and the 68.9 % of the population considered in 2012 that the government must be implement public polices for the combat of poverty.[43]

The 42 % of the population in Honduras live in the extreme poverty and was considered for UNICEF the second poorest country of the American Continent, in consequence needs more and best efforts to combat this situation and the affirmative actions are a good way to it.

1.4 **El Salvador**

In this country, we find the same Rural Development project for the Central Region; this project is not of the government. It is of the ONG, IFAD – was mentioned before – and it was used to not only reveal the inequality of gender in El Salvador, also establish affirmative actions to reduce the inequalities specially focused in the rural women because they are in extreme poverty. Among these affirmative action's we find the "Support Program for Women", in which according to IFAD:

[41] CEPAL. República de Honduras. Quincuagésima Quinta Reunión de la Mesa Directiva de la Conferencia Regional sobre la Mujer de América Latina y el Caribe, Santiago, Chile, 25 y 26 de mayo de 2017. Available at: <https://www.cepal.org/sites/default/files/presentations/informe_de_honduras.pdf>. Access on: September 14, 2017.

[42] Idem.

[43] PEREZ et al. (op. cit., p. 28-30).

> Through an integral approach, the Support Program for Women addressed gender inequalities and the disadvantaged position of poor rural women in the project area. The idea behind this form of intervention was that although strengthening women's economic autonomy is important to reduce gender inequities, it is insufficient as an isolated strategy. Instead, women's leadership capacities, self-esteem and participation in family and communal decision-making need to simultaneously be increased.[44]

The government programs about affirmative actions in gender mater are exercised trough to Salvadoran Institute for the Advancement of Women (ISDEMU[45]) they have several programs such as City Women similar at the one with the same name function in Honduras.

There is also SOS Women 126; it is the help center against the violence to the women and the School by the substantive equality, this program seek to change the cultural costumes that harms the women and in many occasions, she is not aware of this damage.

El Salvador continues to be a country where the violence against the women is very frequent and unfortunately, the femicide is every day, inter 2004-2009 El Salvador has the higher incidence about it of 25 countries analysed[46] and only in 2016 were murdered 520 women, but only 324 were considered femicide.[47]

These numbers and investigations show the seriousness of the problem, the violence is not disappearing and the government must establish affirmative action with effectiveness for the real solution about it.

In addition, in the political participation of women, El Salvador has low advances, in 2013 only the 26.2 percent of the legislators in the low cam-

[44] IFAD (op. cit.)

[45] For the acronym in Spanish.

[46] ALVAZZI DEL FRATE, Anna. When the victim is a woman. In: Geneva Declaration Secretariat, 2011. p. 113-144. Available at: <http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011_CH4.pdf>. Access on: Sept. 15, 2017.

[47] MORÁN, Gloria Marisela. *El Salvador*: Feminicidios el riesgo de ser mujer. Resumen. Available at: <http://www.resumenlatinoamericano.org/2017/02/06/el-salvador-feminicidios-el--riesgo-de-ser-mujer/>. Access on: Sept. 15, 2017.

era were women.[48] This question it is very important for the equality and this country must create more affirmative actions in this sense.

1.5 **Nicaragua**

In the same circumstances of the others states of the region the most important problems mater of the affirmative actions in Nicaragua were gender and indigenous.

The Constitution of Nicaragua[49] establishes the equality and not discrimination in the article 4th, in the follow terms:

"The State shall promote and guarantee social and political progress in order to achieve the common good, assuming the task of promoting the human development of each Nicaraguan, protecting them against every form of exploitation, discrimination, and exclusion."

The equality among women and men can understand the implicit way in this constitutional precept, but the Constitution do not establish that equality expressly like others constitutions i.e., Mexico; however that omission is remedied for the Law 648 of Equality of Rights and Opportunities approved on February 14, 2008.

According with Mairena:[50]

> This law defines the necessary actions for the promotion of equal opportunities between men and women with the objective of eliminating all possible inequality and discrimination for reasons of gender in the economic, public, private, social and sexual spheres. It establishes actions and measures to promote empowerment and equity processes through the development

[48] ELLA evidencias y lecciones desde América Latina. *Acciones afirmativas para promover la equidad de género en la política: las cuotas de género en América Latina*. Available at: <www.solucionespracticas.org.pe/Descargar/587610/1779106>. Access on: Sept. 18, 2017.

[49] Constitution of Nicaragua (1978).

[50] MAIRENA, Eileen et al. *Gender and forests in Nicaragua's indigenous territories*. Working Paper 95, Center for International Forestry Research, Bogor, Indonesia, 2012. Available at: <http://theredddesk.org/sites/default/files/resources/pdf/2013/gender_and_forests_nicaragua.pdf>. Access on: Sept. 17, 2017.

> of employment policies, and resource and environment dispositions.[51]

Nevertheless, this country has many problems with the corruption and these questions affect the success of the affirmative actions. Other problem was the superficial resolution of the problems with these actions that do not exist the previous serious studies about it and how in other countries implement populist measures.

At respect, Mairena says:

> A response to the lack of substantial changes in inequitable gender relations has been the definition of national policies and mandates to incorporate the gender approach as a crosscutting focus in the actions of governmental and nongovernmental institutions. We found, however, that such actions are diluted into larger development processes or remain at a simple quantification of men and women incorporated into projects, called affirmative actions. These superficial indicators limit a deeper analysis of gender biases and inequity, and fail to seek solutions that would improve or change such relations. Incorporating gender analysis presents many challenges at the national level. Such challenges are even greater in the autonomous regions.[52]

Despite the above, this country has been recognized in 2012, to reach the 41 percent of representation of the women in electoral positions,[53] it derivate that affirmative action has known as "gender quotes". In the same question in 2003-2006 were only the 30 percent. The "Nicaraguan party that won a significant majority of seats (62 out of 90) had a voluntary party quota for women of 30 per cent. In the 2011 elections, more than 50 per cent of its seats were won by women."[54]

---

[51] Ibid (p. 11).

[52] Ibid (p. 45).

[53] UN WOMEN. *Women in Politics*: 2012. Available at: <http://www.ipu.org/pdf/publications/wmnmap12_en.pdf>. Access on: Sept. 18, 2017.

[54] Ibid (p. 11, 24).

One important point about this success is the voluntary participation of the parties that do not occurs in other countries, in which need of the law to obligate the political participation of women still evaded it.

The Constitution in the article 5th in the third paragraph recognize expressly the existence of the all-constitutional rights to indigenous people. Notwithstanding the foregoing, Nicaragua was demanded in the Interamerican Court of the Human Rights for the violation of these rights to the indigenous particularly for exclusion to candidates of the Yatama group. The claim was presented for the Center for Justice and international law (CEJIL) and the Nicaraguan Center for human rights (CENIDH), against the State of Nicaragua, for the exclusion of candidates of Yapti Tasba Masraka Nanih Asia Takanka (YATAMA) of the municipal elections of the year 2000.[55]

In the case about violence, the women has protested for the contents of the Law against the violence in 2013. According with Desmangles[56] "thousands of Nicaraguan women have taken to the streets and protested against the recent reforms made to the Comprehensive Law Against Violence Toward Women (Law 779), which could make women who have been victims of sexual crimes participate in face-to-face mediation with their abusers."

This law issued in 2012 is the example of the inadequate law and we appreciate the valid reason for the protest of the Nicaragua women, apparently instead of eliminate the discrimination foment it.

We can appreciate in this country the problem of the equality has been unsolved and the government needs the creation and application of the affirmative action for it; especially in the case of the violence against the women and the inequality for the indigenous.

[55] CEJIL. *Nicaragua llevada ante la Corte Interamericana por violación de los derechos de los pueblos indígenas de la Costa Atlántica*. 2010. Available at: <https://www.cejil.org/es/nicaragua-llevada-corte-interamericana-violacion-derechos-pueblos-indigenas-costa-atlantica>. Access on: Sept. 18, 2017.

[56] DESMANGLES, Elisha Kim. Nicaraguan Abusers to Face Female Victims. *The Borgen Project*, 2013. Available at: <https://borgenproject.org/violence-women-nicaragua-may-face-abusers/>. Access on: Sept. 18, 2017.

1.6 **Costa Rica**

In this country the advances in the gender mater are focused in the rural women, joining efforts with the National Institute of Women (INAMU) and the National Council of Productivity and other Ministries of the government and by this way empowerment the organizations pro the women.[57]

The affirmative action has put emphasis too in the electoral questions and the system of quotas. That system derived of the Law to promote social equality for the women in 1990, in this law forces to political parties to promote and secure the political participation of women and the modification of the Electoral Law in 1996 in which establish expressly the system of quotas for that. However, the 40% of women was completed for the political parties with simulation and the most inferior position and this procedure was backed up for the Supreme Tribunal of Elections. That situation oblige to create affirmative actions for the real protection of the political equality of women and the Supreme Tribunal of Elections change de criteria and consider that 40% must been in eligible positions. That change the political participation since 19.3% to 38% about women.[58]

The decision of the Court was consider affirmative actions, but the effects are not permanent and the criteria change and determine the alternation and the participation descend again, the front of the claims by the women the Tribunal says in the 2018 must been parity vertical and horizontal.[59]

Although there are advances, Costa Rica required to consolidating those advances and establishing affirmative actions for it.

[57] PADEMUR. Equidad de Género y Desarrollo de las Mujeres Rurales Informe 1999-2000.
[58] UNESCO. Pertinencia de las acciones afirmativas y las competencias interculturales para el efectivo ejercicio de los derechos humanos en Centroamérica. San José de Costa Rica, 2016. Available at: <http://unesdoc.unesco.org/images/0024/002459/245928S.pdf>. Access on: Sept. 16, 2017.
[59] Ibid (p. 20).

1.7 **Panamá**

If we analyse the principal problems mater of the affirmative actions, we would find the race and into this topic color of the skin and the indigenous and the gender as the most important, without being unaware of the existence of the others important problems such as age, migration, education, unemployment, etc.

Apparently, in this country the color of the skin is not a problem for education, that it is a good indicator if we speak about affirmative actions, at respect Telles and Steele[60] say:

> Panama is a clear exception where the mean dips for persons with skin colors of 4 and then trends upward from there to the point that the darkest Panamanians have equivalent levels of schooling as the lightest. This may reflect the especially low status of a sizeable indigenous and mestizo population in that country while afro-descendants, primarily those of West Indian background seem to have a relatively high status in that country, similar to those at the light end of the color spectrum.

In gender mater, the Facultative Protocol and Recommendations of the Committee CEDAW to Panamanian state 1998-2010, consider that Panama has not established the periodic informs of the anterior observances and the general recommendations of Committee. In the positive questions are the issue of the Law number Four of January 29 of 1999, which establish the equality of opportunities, condemns all forms of violence and not discrimination for women.

[60] TELLES, Edward; STEELE, Liza. *Pigmentocracy in the Americas*: How is the attainment related to skin color? Latin American Public Opinion Project Insights series, 2013. p. 10. Available at: <https://perla.princeton.edu/wp-content/uploads/sites/17/2012/01/Pigmentocracy-Insights.pdf>. Access on: Sept 14, 2017.

In this sense, the Committee considers the equality stay *de iure* but not *de facto* and for this reason must allocate financial resources for the reach of it in the daily reality of the panama women's.[61]

Other actions in the mater in this country were the reforms of the electoral legislation, labour an educational protection. The state implements National Plan for the prevention and attention of domestic violence and the Political of citizen coexistence; both with focus in gender.[62]

Panama create the National Institute of women in 2009. Despite being the seat of the Inter-American Court, there are still many challenges and it is clear that they are required to do so affirmative actions in gender mater especially.

We can see the changes are in the law, but that it is insufficient and the state requires more actions particularly affirmative actions for the consolidations of the equality.

2 What is required to do toward the future?

Quince Duncan[63] Presidential Commissioner for issues about Afro-descendants consider the affirmative actions as special measures, designed to achieve in the society, and he adds that a main question to reach it, is the inclusion and with that reach the power, that it's to say the people need empowerment to overcome inequality

We must understand the minority rights "not can be seen as a supplement on or specification of, general Human Rights[64] that is unfortunately the idea to some governments and that is highly damaging to the consolidation of these rights without the affirmative actions or with them.

---

[61] CEDAW, 2010.

[62] Ídem.

[63] UNESCO. Pertinencia de las acciones afirmativas y las competencias interculturales para el efectivo ejercicio de los derechos humanos en Centroamérica, San José de Costa Rica, 2016. Available at: <http://unesdoc.unesco.org/images/0024/002459/245928S.pdf>. Access on: Sept. 16, 2017.

[64] STOKE, Hugo; TOSTENSEN, Anne. *Human Rights in Development*: Yearbook 1999/2000. The Millennium Edition, 2000.

The States need to see the affirmative actions as a temporary remedy and not as the palliative for injustices and appear equality where is not existent and consider the affirmative action's mechanisms of the populism.

The corruption in the states of Central America disturbs the possibilities of the success in the affirmative actions, according with the Index of the perception of corruption (2016); Nicaragua is the State of Central America with more corruption, with 26 on a transparency in scale 0-100 and with the ranking 145/176 countries. The second is Guatemala with 28, place136/176 countries; follow by Honduras with 30, place123/176 countries; Panama 38, place 87 /176 countries; El Salvador with 39, place 95/176 countries and Costa Rica with 58, place 51/176 countries.[65]

In consequence, the corruption is one important enemy to defy consolidating the equality in Central America.

Conclusions

The needs are many, the solutions not easy, the governments of Central America must apply more and better affirmative actions if they want in reality to resolve the innumerable problems, especially in the gender and indigenous cases.

The analysis realized in the States of the Central America, show the multiplicity of the programs with the character of affirmative action's undertaken for it, but we should highlight this actions are insufficient until now for resolve the inequality. That does not implies the failures of this.

The caller of gender quotas have had success to reach more representation of the women in the electoral positions and permit to the women access at the parliaments of their countries. That is a good advancement in the affirmative actions and we hope the quotas to become unnecessary in the future and of the women empower to go up without them.

[65] International Amnesty, Index of perception of corruption, 2016.

We consider the undertaken actions had helped thousands of persons especially indigenous and women, which makes it undeniable to attribute a certain success to them.

The index of perception of corruption of International Amnesty for the first time to establish the interrelation between the corruption and the inequality. That circumstance reinforce our argument about the importance to combat the corruption in order to reach the equality, while this does not occurs the States need the affirmative actions to repair the inequalities but always should be in consideration the transitory about it and the need to change that reality with the law and justice.

However, the existence of affirmative actions in Central America are justified and we consider it must prevail for a long time.

CHAPTER II
AFFIRMATIVE ACTIONS IN UK, INDIA, SOUTH AFRICA AND CHINA

AFFIRMATIVE ACTION IN THE UK AND SOUTH AFRICA

Erica Howard[1]

Introduction

This paper examines the development of the legal provisions for affirmative action in the United Kingdom and analyses the possibility of taking such action under the current legislation. The legislation in Northern Ireland is different from that applying in England, Scotland and Wales as it has been shaped by the political history of the Protestant and Catholic communities there. Therefore, the Northern Ireland provisions will be examined as well. The legislation in the UK has also been shaped by European Union (EU) law and case law, which is clear from the fact that the explanatory notes to the current provisions in the British Equality Act 2010 (EA 2010) state that these sections extend the previous provisions to "what is possible to the extent permitted by European law".[2] Therefore, attention will be given to EU law and case law on this subject. This is followed by a discussion of the possibility of taking affirmative action measures in South Africa. A comparison will be made between the possibilities of taking affirmative action measures in the UK and in South Africa. Before the above is discussed, a brief introduction to different concepts of equality must be given because this can assist in

[1] Associate Professor in law. She taught European Union Law at the University of Hertfordshire. She holds a doctorate in law from the University of London on the subject of race and racial discrimination within the European Union. Her areas of research are equality and discrimination law, human rights and European law and she has published widely on topics within this area including racial discrimination, religious discrimination and freedom of religion, multiple discrimination and the right to equality. She has been involved in two projects for the British Equality and Human Rights Commission, a project on the right to freedom of religion or belief and its intersection with other rights for ILGA-Europe and two major European research projects on multiple discrimination. She recently wrote a research study for the EU Parliament Research Service on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief.

[2] Explanatory Notes with sections 158 and 159 EA 2010. The Equality Act 2010 is available at: <http://www.legislation.gov.uk/ukpga/2010/15/contents>. The Explanatory Notes to the Equality Act 2010 at: <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>.

explaining why affirmative action has been introduced in anti-discrimination law in many countries, the forms of permissible affirmative action and why it is often opposed.

It must be noted that UK and EU law and European academic references generally refer to "positive action" rather than "affirmative action". The exception to this is Northern Ireland, where the term "affirmative action" is used, as will become clear below. In the following, these two terms will be used interchangeably and as having the same meaning. O'Cinneide describes "positive action" as a concept that "involves the use of special measures to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in contemporary society."[3] In this paper, both terms "positive action" and "affirmative action" will refer to such special measures.

1 Affirmative action and concepts of equality

The first step in legislating against discrimination is often to declare that everyone is equal before the law and to prohibit different treatment of people in the same situation. This is referred to as formal equality or "equal treatment" and is based on the premise that like should be treated alike. This basic Aristotelian principle "forms the basis of our idea of equality. Its enduring strength lies in its resonance with our instinctive idea that fairness requires consistent treatment."[4]

However, the concept of formal equality has been criticised for not taking account of existing inequalities and social disadvantages, for not looking at any imbalances that have been created for certain groups in society by past discrimination and for not tackling these. In order to overcome this, a more substantive concept of equality has been suggested. This concept aims to compensate for the social inequalities and disadvantages suffered

[3] O'CINNEIDE, C. *Positive Action*. ERA, 2012. p. 1. Available at: <http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2012_Cinneide_EN.pdf>.

[4] FREDMAN, S. *Discrimination Law*. 2. ed. Oxford: Oxford University Press, 2011. p. 8.

by certain groups. It recognises that there are extra burdens and barriers to achieving equality for members of these disadvantaged groups. A substantive equality approach will try to correct this disadvantage. Whereas formal equality or equal treatment is often referred to as equality in law, substantive equality is referred to as factual equality or equality in practice. The latter term can be found in article 157(4) of the Treaty on the Functioning of the European Union (TFEU),[5] which allows affirmative action measures in the following terms:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Similar wording is used in EU Directives providing protection against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[6] From this it will be clear that, in the EU, affirmative action measures are considered necessary to "ensure full equality in practice".

Within the concept of substantive equality, two types are generally distinguished: equality of opportunity and equality of results. Anti-discrim-

---

[5] Treaty on the Functioning of the European Union. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

[6] Sex: Council Directive 2004/113/EC *Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services* [2004] OJ L 373/37: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF>; and, Council Directive 2006/54/EC on the *Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)* [2006] OJ L 204/23: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>; Racial and ethnic origin: Council Directive 2000/43/EC of 29 June 2000 *Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic origin*, OJ L 180/22: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>; Religion or belief, disability, age and sexual orientation: Council Directive 2000/78/EC of 27 November 2000 *Establishing a General Framework for Equal Treatment in Employment and Occupation* OJ L 303/16: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

ination measures which aim to achieve equality of opportunity concentrate on equalising the starting point for all, on giving everyone the same opportunities. Equality of opportunity recognises that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of "being alike" so that the right to like treatment becomes applicable. Thus, the anti-discrimination law tries to make up for these missed opportunities, and one way of doing this is through providing for affirmative action measures as discussed below.

The concept of equality of results also takes account of past or present discrimination but remedies this by equalising the result. It concentrates on correcting unequal distribution of goods and resources in society and on achieving a more representative participation of all groups in public life. In other words, whereas the concept of equality of opportunity aims to equalise the starting point of the competition, equality of results looks to the end results of competition and then raises questions about the rules of entry. Affirmative action measures could also fit in with this concept of equality, as will become clear below. Some authors refer to affirmative action measures which fit in with the concept of equality of results as "positive discrimination", while measures fitting in with the equality of opportunity concept are referred to as "positive action" or "affirmative action".[7] Davies and Robison write, "positive discrimination could be said to be a means of redressing historic disadvantage via a process of what may be called reverse discrimination."[8] This suggests that positive discrimination and reverse discrimination are the same. However, Szyszczak distinguishes between these two where she explains that:

> Positive action refers to a broad spectrum of policies and programmes which are aimed at targeted groups in order to redress inequalities which result from discriminatory practices, or the position of certain groups

[7] See, for example, DAVIES, C.; ROBISON, M. *Bridging the Gap*: an Exploration of the Use and Impact of Positive Action in the UK. 2016. p. 4. Available at: <https://core.ac.uk/download/pdf/33794901.pdf>; and BACIK, I. (1997). Combating Discrimination: The Affirmative Action Approach. In: BYRNE, R.; DUNCAN, W. (Ed.). *Developments in Discrimination Law in Ireland and Europe*. Dublin: Irish Centre for European Law, 1997. p. 120.

[8] DAVIES, C.; ROBISON, M. (supra note 6, p. 4).

> in a given society. The concept is sometimes called affirmative action. It should be distinguished from positive discrimination where certain individuals or groups are given preferential rights, for example, a fixed quota of posts is reserved for them, and also from reverse discrimination, where members of a dominant group or class are actively discriminated against in order to secure a more diverse workforce, education cohort or political composition of a public body or agency.[9]

It is suggested that the difference Szyszczak makes between "positive discrimination" and "reverse discrimination" is more apparent than real, because both give preferential treatment to certain minority groups and thus they treat the majority group less favourably than the minority group. Affirmative action measures are usually seen, as the EU does, as aiming at substantive equality and could fit in with both the equality of opportunity and the equality of results concepts, depending on what these measures permit. However, because in both concepts affirmative action means treating some groups more favourably than other groups (which are thus treated less favourably or unequally) it is also often said to be unfair and unjust and as going against the concept of formal equality. This appears the reason behind the use of the term "reverse discrimination" and accords with popular opinion of affirmative action, as McHarg and Nicolson explain:

> There seems to be a (deliberate or unconscious) popular association of affirmative action with 'reverse discrimination', 'positive discrimination' or 'preferential treatment', and a knee-jerk assumption that it creates 'innocent victims' and 'undeserving beneficiaries', and contravenes the merit principle, thereby lowering standards and stigmatizing its targets as inferior.[10]

---

[9] SZYSZCZAK, E. *Positive Action as a Tool for Promoting Access to Employment*. European Roma Rights Centre, 2006. Available at: <http://www.errc.org/article/positive-action-as-a-tool-in-promoting-access-to-employment/2539>.

[10] MCHARG, A.; NICOLSON, D. Justifying Affirmative Action: Perception and Reality. *Journal of Law and Society*, v. 33, n. 1, p. 9, 2006.

Therefore, there is a tension present when referring to affirmative action measures as these measures are felt to be unfair. Moreover, there is another related tension between these different concepts of equality when laid down in equality law. As O'Cinneide points out, affirmative action uses a factor such as a person's ethnicity, gender or religion, to define the groups who receive special assistance, but most anti-discrimination law tries to eliminate the use of such factors to distinguish between people.[11] The above already suggests that affirmative action is not without its problems. These issues and tensions will form part of the discussion below.

2 Affirmative Action in the United Kingdom

2.1 Great Britain

In 2010, a new equality act was adopted which brought together a number of separate anti-discrimination statutes and regulations. The Equality Act 2010 (EA 2010) applies to England, Scotland and Wales and covers nine discrimination grounds, referred to as protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It has two new sections covering "positive action: general" (section 158) and "positive action: recruitment and promotion" (section 159). The Explanatory Notes to both sections state that: "this section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics." The Notes also state that "there were positive action provisions in previous legislation, but these applied to different protected characteristics in different ways and in some cases were specific about the types of action they permitted." So what was allowed under previous legislation?

[11] O'CINNEIDE (supra note 2, p. 13).

2.2 **Previous legislation**

Sections 47-48 of the Sex Discrimination Act 1975 (SDA 1975) and sections 37-38 of the Race Relations Act 1976 (RRA 1976) permitted a form of affirmative action. These sections, worded in similar ways, allowed employers, training bodies, trade unions and employer associations to: encourage applications for jobs or membership from people of a particular sex or racial or ethnic group; and, to provide training to help fit them for particular work or posts where they had been disproportionately underrepresented at any time during the past twelve months. According to the Commission for Racial Equality (CRE),[12] which addressed positive (affirmative) action on the grounds of race, "the main aim of positive action is to make equal opportunity a reality" as ethnic minority employees and job applicants "still suffer the effects of past discrimination and disadvantage."[13] Therefore, positive (affirmative) action is "intended to accelerate the process whereby ethnic minority employees are encouraged to apply for work in which they have been underrepresented and, in such circumstances, to help them qualify on merit for appointment and promotion."[14] The CRE paper also points out that remedies "which purport to have no regard to ethnic origin, will often be inadequate" and that this was recognised in the drafting of the RRA 1976.[15] It reports that the White Paper preceding the RRA 1976 "argued that a principle of non-discrimination, interpreted 'too literally and inflexibly', might 'actually impede the elimination of invidious discrimination and the encouragement of equality of opportunity'."[16] The CRE paper makes very clear that

> Positive action does NOT [emphasis in original] mean: selecting a certain number of ethnic minority employ-

[12] The Commission for Racial Equality was a body set up under the RRA 1976, which aimed to address racial discrimination and promote racial equality. In October 2007, it became part of the Equality and Human Rights Commission.

[13] Commission for Racial Equality. *Positive Action and Equal Opportunity in Employment*. Revised Edition, 1991. p. 10.

[14] Ibid.

[15] Ibid. p. 11.

[16] Ibid.

> ees irrespective of merit, to give the organisation a good image, while ignoring action to remove racial discrimination in general; selecting a job applicant simply because he or she is of ethnic minority origin.... Discrimination in selection to achieve 'racial balance' is not permitted under the Race Relations Act 1976, and sections 37 and 38 do not provide for discrimination on racial grounds at the point of selection for employment.[17]

The same can be said for sections 47 and 48 SDA 1975, which, as mentioned, were formulated in similar terms. So the permitted affirmative action measures can be summed up as encouragement to apply for employment and training. In addition, outside the employment field, section 35 of the RRA 1976 permitted the provision of facilities and services to persons of a particular racial group to meet the special needs of persons of that group in regards to their education, training or welfare, or any ancillary benefits. However, treating a disabled person more favourably in comparison with a non-disabled person was and is not against the law (this has now been stated explicitly in section 13(3) EA 2010).

Hepple reports that the Cambridge Review in 2000 found that "these provisions were little used, and were out of date" because they were based on an outdated model of training. They were based on training for "particular work", but this was no longer appropriate because employers" training programmes were "linked to giving people specific competencies which may be needed for a variety of positions." They also did not allow for affirmative action for those on work experience or similar programmes.[18] Hepple also points out that they were overtaken by developments in EU law.[19] The developments at EU level will be discussed below. Under influence of EU law, Britain enacted regulations against religion or belief and sexual orientation

[17] Ibid. p. 13.

[18] HEPPLE, B. *Equality: the Legal Framework*. 2. ed. Oxford/Portland Oregon: Hart Publishing, 2014. p. 156-157. The *Cambridge Review*: HEPPLE, B.; COUSSEY, M.; CHOUDHURY, T. *Equality: A New Framework. Report from the Independent Review of the Enforcement of UK Anti-discrimination* Legislation. Oxford: Hart Publishing, 2000.

[19] HEPPLE, B. (supra note 17, p. 157).

discrimination in 2003, and against age discrimination in 2006. These regulations contained similar positive (affirmative) action provisions to the SDA 1975 and the RRA 1976 and allowed for encouragement to apply and training.[20]

In 2007, the British Government brought out the Discrimination Law Review, which assessed the then existing anti-discrimination legislation prior to proposing a new Equality Bill.[21] It expressed its opinion that the existing provisions for affirmative action measures all "fell within the range of measures permitted under European law - but they do not exhaust the possibilities of what it would permit"; and, that "there is scope to expand the measures to help address disadvantage, not only in the employment sphere but also in other areas such as education, the provision of goods, facilities and services, and the exercise of public functions." However, the Government also pointed out that "this would be subject to the limitations imposed by European law" and that "positive discrimination – such as quotas for recruitment or progression – would continue to be unlawful."[22] The Government went on to say that such affirmative action measures should, as a general principle, be permitted to prevent or compensate for disadvantage or to meet special needs linked to the protected ground. Any such measures would always have to be necessary, proportionate, and time-limited.[23]

2.3 **Equality Act 2010**

The new EA 2010 contains two sections (sections 158 and 159) on affirmative action, both applicable to all protected characteristics. Section

[20] Employment Equality (Religion or Belief) Regulations 2003, section 25(1) and (2); Employment Equality (Sexual Orientation) Regulations 2003, section 26(1) and (2); Employment Equality (Age) Regulations 2006, section 29(1) and (2). These regulations have been repealed by the EA 2010.

[21] DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT. *Discrimination Law Review*: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. London, 2007. Available at: <http://webarchive.nationalarchives.gov.uk/20120919212654/http://www.communities.gov.uk/documents/corporate/pdf/325332.pdf>.

[22] Ibid. all para. 4.44

[23] Ibid. para. 4.46.

158, which came into force on 1 October 2010, concerns general provisions and is not applicable to recruitment and promotion. It reads as follows:

> (1) This section applies if a person (P) reasonably thinks that—
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
> (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
> (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
> (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
> (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
> (b) meeting those needs, or
> (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

This section thus allows generally for the taking of affirmative action measures to alleviate disadvantage suffered by people who share one of the protected characteristics, or to reduce their underrepresentation or to meet their particular needs. It will be clear that any measures taken under this section must be a proportionate way to achieve a legitimate aim. The latter is usually referred to as a proportionality test. According to the Explanatory Notes to section 158, the extent to which the measure is proportionate will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or underrepresentation and the availability of other means of countering them. The first two issues suggest that the measure will no longer be proportionate if the disadvantage, the need or the underrepresentation is no longer there. In other words, these measures are time-limited: they should finish when the aim is achieved. The last issue, whether other means are available, means that a measure will generally not be considered proportionate if there are other, less discriminatory ways of achieving the legitimate aim. This is sometimes referred to as the requirement that the measure must be necessary to achieve the aim. Therefore,

this confirms the Government's statement in the review before the Bill was proposed that any such measures would always have to be necessary, proportionate, and time-limited.[24]

The Explanatory Notes to section 158 EA 2010 give the following examples of affirmative action which is allowed under this section: having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them; and, an NHS Primary Care Trust identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they are at an increased risk of breast cancer. Knowing this it could decide to establish local awareness campaigns for lesbians on the importance of cancer screening.

Section 159 EA 2010 deals with the issue of positive action in recruitment and promotion and came into force in 6 April 2011. This section states:

> (1) This section applies if a person (P) reasonably thinks that—
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
> (b) participation in an activity by persons who share a protected characteristic is disproportionately low.
> (2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
> (a) overcome or minimise that disadvantage, or
> (b) participate in that activity.
> (3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.
> (4) But subsection (2) applies only if—
> (a) A is as qualified as B to be recruited or promoted,
> (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
> (c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).

[24] Ibid. para. 4.46.

Paragraph 5 then gives a definition of "recruitment". Therefore, section 159 allows an employer to take into account a protected characteristic when deciding who to recruit or who to promote where people having the protected characteristic are at a disadvantage or are underrepresented. The employer can take affirmative action in favour of the disadvantaged candidate but this can only be done where the candidates are as qualified as each other and provided that the action taken is a proportionate means of achieving the aim of helping those disadvantaged to overcome or minimise that disadvantage or their underrepresentation. Therefore, here again, a proportionality test is required and what was said about this test above under section 158 EA 2010 applies here as well. According to the Explanatory Notes on section 159, an employer may not have a policy of automatically treating people who share a particular protected characteristic more favourably than those who do not have it and the qualifications and merits of each candidate must be taken into account. The section is intended to allow the maximum extent of flexibility to address disadvantage and underrepresentation where candidates are as good as each other, within the confines of European law. Preference can thus be given to a candidate with a specific protected characteristic in a so-called "tie-break" situation, where two candidates are as qualified as each other.

The Explanatory Notes on section 159 contain the following examples which indicate what is allowed and what is not allowed. The first example is: a police service which employs a disproportionately low number of people from a minority ethnic background identifies a number of candidates who are as qualified as each other for recruitment to a post, including a candidate from an underrepresented minority ethnic background. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration. The second example is: an employer offers a job to a woman on the basis that women are underrepresented in the company's workforce when there was a male candidate who was more qualified. This is not allowed and would be direct discrimination.

At the Equality Bill's Committee Stage in the House of Commons, so before the Bill was adopted and became the EA 2010, the then Solicitor-General, Vera Baird, emphasised the fact that the use of the provision in what is now section 158 was "entirely voluntary" and that it did not allow positive discrimination. As she stated: "positive discrimination would favour a person from a particular underrepresented or disadvantaged group solely because they come from that particular group irrespective of merit. In the main, positive discrimination is unlawful in the UK."[25] In relation to what is now section 159, she stated that the fourth paragraph of that section:

> is there to ensure that there is not a blanket policy favouring candidates because they have a protected characteristic, even if they are disadvantaged and underrepresented as a consequence. An employer has to ensure that the candidate that she wishes to prefer is as qualified for the job or promotion as another person.[26]

She also explained that "P does not have a policy" in paragraph 4(b) meant that "the person can use positive action as long as they use positive action only and do not have a policy of positive discrimination."[27] Therefore, affirmative action in recruitment and promotion can only be used if there is a "tie-break" situation between equally qualified candidates and it cannot be an automatic policy.

From the above it is clear that the use of both sections is entirely voluntary. There is no duty to take affirmative action measures under these provisions. The Government Equalities Office brought out a "Quick Start Guide to Using Positive Action in Recruitment and Promotion", in which it is pointed out that section 159 does not allow an employer to appoint a less suitable candidate.[28] The Guide also explains what "equal merit" ("as qualified") is

[25] HOUSE OF COMMONS DEBATES. *Public Bill Committee Stage*, column 603. Available at: <https://publications.parliament.uk/pa/cm200809/cmpublic/equality/090630/pm/90630s09.htm>.
[26] Ibid. column 609.
[27] Ibid. column 617.
[28] GOVERNMENT EQUALITIES OFFICE. *Equality Act 2010*: What do I Need to Know? A Quick Start Guide to Using Positive Action in Recruitment and Promotion, 2011. p. 4. Available at:

and how an employer can determine this. It suggests that an employer establishes a set of criteria against which candidates will be assessed. This can take account of "a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job." These criteria must not indirectly discriminate against people who share a protected characteristic. Employers must also consider "equal merit" in relation to the specific job or position and not in more general terms.[29]

Section 159(1) mentions that the section can be used when the employer "reasonably thinks" that people with a protected characteristic are underrepresented in the workforce, or suffer a disadvantage connected to that protected characteristic. The Guide explains that "some information or evidence will be required to indicate to the employer that one of those conditions exists – but it does not need to be sophisticated statistical data or research."[30] The Guide also clearly explains that "'proportionate' refers to the balancing of all the relevant factors." In determining this, the employer will need to take into account "the seriousness of the disadvantage suffered or the extent to which people with a protected characteristic are underrepresented against the impact that the proposed action may have on other people." The employer should also consider whether the same effect could be achieved by other measures which are "less likely to result in the less favourable treatment of other people."[31] This confirms what was said above about the proportionality test. The Guide also makes clear that positive discrimination, described as "recruiting or promoting a person solely because they have a relevant protected characteristic" or "the setting of quotas" is unlawful in Great Britain. However, it points out that "it is not unlawful for an employer to treat a disabled person more favourable in comparison with a non-disabled person."[32]

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85046/positive-action-recruitment.pdf>.

[29] All ibid. p. 6.

[30] Ibid. p. 7.

[31] Ibid. p. 8.

[32] Ibid. p. 9.

One more section of the EA 2010 needs to be discussed: section 104, which is part of the section on "special provisions for political parties". The history of this section is worth recounting here. In 1993, the Labour party introduced all women shortlists in a number of constituencies. All women shortlists meant that the list of candidates for an election contained only women candidates, thus ensuring that a woman was elected. The policy led to a threefold increase in the number of women Labour Members of Parliament after the general election in 1997. However, when the policy was challenged, an Employment Tribunal held that this was direct sex discrimination.[33] This led to the Sex Discrimination (Election Candidates) Act 2002, which allowed political parties to use all women shortlists in order to address the underrepresentation of women in their parties. The Act was meant to expire at the end of 2015, but sections 104(7) and 105 EA 2010 have extended the use of all women shortlists until 2030.[34] Section 104(4) allows political parties to make arrangements in the selection of candidates for elections to reduce inequality between the number of the party's candidates elected to be members of the body who share a protected characteristic, and the number of the party's candidates so elected who do not share that characteristic. This applies to all protected characteristics but it can only be done if it is a proportionate means to achieve this purpose. So, affirmative action is allowed for other protected characteristics. However, sections 104(6) and (7) make clear that only all women shortlists are allowed, but not shortlists with only, for example, ethnic minority people or only disabled people or only people with another protected characteristic. Moreover, all women shortlists do not have to satisfy the proportionality requirement.

As mentioned, sections 158 and 159 are entirely voluntary and the same is true for section 104. Whether the sections are actually used very much is doubtful. Davies writes that the fact that section 158 is not compul-

[33] *Jepson v The Labour Party* [1996] IRLR 116. See on this: RUSSELL, M.; O'CINNEIDE, C. Positive Action to Promote Women in Politics: Some European Comparisons. *International and Comparative Quarterly*, v. 52, n. 3, p. 587-614, 2003.

[34] See on this also Fredman (supra note 3, p. 239-240).

sory, "limits its impact very considerably".[35] And in relation to section 159, he writes that the fact that this provision is permissive "is likely to limit the utility of the provision, not least because employers may fear litigation from disappointed candidates."[36] Hepple writes that "in practice, little use has been made of section 159."[37] This is confirmed by Davies and Robison who report on a small scale qualitative study looking at the experiences of a purposive sample of public and private employers in relation to the affirmative action provisions of the EA 2010. Only 30% of respondents stated that their organisation had previously used affirmative action measures (all of these were public sector education institutions).[38] They also write:

> It would thus appear that, whilst employers who do attempt to use positive action feel comfortable with the less controversial measures involving outreach, encouragement and training in order to create equality of opportunity, they are far less willing to consider moving into the realms of preferential treatment as permitted by section 159.[39]

As reasons for this unwillingness, Davies and Robison mention "'fear of creating segregation and stigmatisation for those benefiting from the 'tie-break' measures."[40] In fact, many respondents in their research raised serious concerns regarding more direct preferential treatment. This often reflected "a highly sensitive risk-based approach towards any action that could expose their organisation to the possibility of 'reverse discrimination' legal liability."[41] Authors suggest "that the lack of clarity provided by section 159 (in particular) is failing to provide employers with the confidence they require." They also suggest that wider research in this area is needed.[42]

---

35 DAVIES, A. *Employment Law*. Harlow: Pearson, 2015. p. 202.
36 Ibid. p. 204.
37 HEPPLE, B. (supra note 17, p. 160).
38 DAVIES, C.; ROBISON, M. (supra note 6, p. 18-19).
39 Ibid. p. 20.
40 Ibid. p. 23.
41 Ibid.
42 Ibid.

Therefore, the fear of opening oneself up to a discrimination complaint plays an important role in the reluctance of employers to use section 159.

All-women shortlists, as permitted by section 104 EA 2010, have only been used by one British political party: the Labour party. Kelly and White report that the Labour party's use of all-women shortlists in the 2005, 2010 and 2015 elections have been important in increasing the number of women Members of Parliament (MPs).[43] Other British political parties have not used all-women shortlists although all have used encouragement and/or training measures to promote the number of women MPs.[44]

2.4 Northern Ireland

As McCrudden et al. write,

> Historically, Catholics and Protestants in Northern Ireland were typically highly segregated from each other in employment, with Catholics being concentrated in particular sectors of the labour market, and in particular firms, and suffering unemployment rates two or three times as high as those of Protestants.[45]

Because of these historical divisions, Northern Ireland's equality law developed in different ways from the legislation in the rest of the UK. The first Fair Employment (Northern Ireland) Act was adopted in 1976 and covered discrimination on the grounds of religious belief or political opinion. It "rejected the option of positive discrimination in the form of quotas or fixed ratios of Protestants and Roman Catholics in workplaces."[46] In 1989,

---

[43] KELLY, R.; WHITE, I., House of Commons Library Briefing Paper Number 5057. *All-women Shortlists*, v. 7, p. 15-16, Mar. 2016. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05057#fullreport>. For more information on this, see the authors referred to by Kelly and White.

[44] Ibid. p. 16-18.

[45] MCCRUDDEN, C. et al. Affirmative Action without Quotas in Northern Ireland. *Equal Rights Review*, v. 4, p. 7, 2009.

[46] EQUINET. *Positive Action Measures. The Experience of Equality Bodies*. 2014. p. 51. Available at: <http://www.equineteurope.org/IMG/pdf/positive_action_measures_final_with_cover.pdf>.

the new Fair Employment (Northern Ireland) Act 1989 introduced a duty on both public and private employers to actively practice equality and use affirmative action to achieve this where necessary. Barnard and Hepple write that "in Northern Ireland 'affirmative action' has been a cornerstone of the legislation against religious discrimination since the Fair Employment Act 1989."[47] The current provisions can be found in the Fair Employment (Northern Ireland) Order 1998 (FETO 1998).[48] Section 4 of determines:

> (5) (1) In this Order "affirmative action" means action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including—
> (a) the adoption of practices encouraging such participation; and
> (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

As Barnard and Hepple write, the FETO does not define "fair participation" but the Fair Employment Commission (FEC), which administered the legislation until 2000, when the Equality Commission for Northern Ireland (ECNI) took over this task, "adopted an interpretation which involves redressing imbalances and underrepresentation between the two Communities in Northern Ireland."[49]

Under the legislation, employers must carry out regular reviews of the composition of their workforce to determine whether there is fair employment and they must take remedial action where this is required. The reviews done by employers enable the FEC/ECNI to identify those employers whose workforce is insufficiently representative and then to initiate agreements for improvement. The FEC/ECNI also has significant powers to con-

[47] BARNARD, C.; HEPPLE, B. Substantive Equality. *Cambridge Law Journal*, v. 59 562-585, p. 565, 2000.
[48] Fair Employment (Northern Ireland) Order 1998. Available at: <http://www.legislation.gov.uk/nisi/1998/3162/contents/made>.
[49] BARNARD, C.; HEPPLE, B. (supra note 46, p. 565).

duct a formal investigation.[50] However, "no reverse discrimination or quotas was permitted or could be required by the FEC/ECNI."[51] Lawful positive action includes encouraging people to apply for jobs and training opportunities; offering training opportunities and facilities; adopting indirectly discriminatory redundancy selection procedures in order to protect the gains of affirmative action programmes; and, reserving job vacancies for persons who are unemployed.[52]

There are two main sorts of agreement the Commission can initiate: legally enforceable agreements and voluntary agreements negotiated with Commission staff. In practice around two-third of agreements have been voluntary ones.[53] According to McCrudden et al.,

> the Commission moved towards legally binding agreements when it was unable to secure a satisfactory voluntary agreement. Ultimately these legally binding agreements are backed up by sanctions although in practice the Commission has primarily employed persuasion rather than enforcement.[54]

The research done by McCrudden et al. found that the agreements were successful in that they led to improvements in fair employment and that voluntary agreements were more effective than legally enforceable agreements. Moreover, these improvements worked at all levels of employment, as they could be seen to boost employment as well as increase shares in managerial/professional occupations.[55] The conclusion of the research suggests that "reforms of the kind sought by the Commission [...] can potentially play a bigger role than reforms designed to eliminate discrimination at the point of application."[56] In other words, the research suggested that

[50] See McCrudden et al. (supra note 44, p. 8-9); and Equinet (supra note 45, p. 51-53).
[51] MCCRUDDEN, C. et al. (supra note 44, p. 9). A major exception is made for the police force in Northern Ireland, which will be discussed below.
[52] EQUINET (supra note 45, p. 53-54); MCHARG, A.; NICOLSON, D. (supra note 9, p. 4).
[53] MCCRUDDEN, C. et al. (supra note 44, p. 9).
[54] Ibid.
[55] Ibid. p. 11-14. See also, Equinet (supra note 45, p. 55).
[56] MCCRUDDEN et al. (supra note 44, p. 13).

these measures were more effective than the prohibition of discrimination. According to Equinet:

> Further research carried out by the Nuffield Foundation concluded that ... the positive action agreements had been successful in that, where employers had positive action agreements, there has been a shift towards employment equality and the overall composition of the workforce is now reflective of those available for work.[57]

An exception to the rule that no reverse discrimination or quotas are permitted could be found in section 46 of the Police (Northern Ireland) Act 2000,[58] which introduced a form of quota system for the recruitment of police trainees and support staff. The aim of this measure was to reverse the underrepresentation of Catholics in the police force, which was more than 90% Protestant at that time.[59] Section 46(1) required the appointment of one Catholic person for every person of another religion who was awarded a post (50-50 recruitment). The measure was originally meant to apply until the police service had between 29% and 34% Catholics.[60] The provision was put in place for three years, but it was extended a number of times until it ended on 28 March 2011. One of the reasons for ending it was that the percentage of Catholic police officers had gone up from 8% when the measure was put in place to almost 30% ten years later, a percentage which was within the range originally set out as goal. The measures was, however, less successful in relation to support staff whose numbers increased from 12% to just under 18%.[61] The Government consultation before the measure was ended showed that 94% of respondents were in favour of ending the

[57] Equinet (supra note 45, p. 55).
[58] Police (Northern Ireland) Act 2000: Available at: <https://www.legislation.gov.uk/ukpga/2000/32/contents>.
[59] See on this: MCCOLGAN, A. *Discrimination, Equality and the Law*. Oxford: Portland Oregon: Hart Publishing, 2014. p. 97.
[60] See: NORTHERN IRELAND OFFICE. *Consultation Paper Police (Northern Ireland) Act 2000 Review of temporary recruitment provisions*, p. 6, 2010: Available at:<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136382/50_50_consultation.pdf>.
[61] Ibid. p. 6 and 11.

provisions and of letting the recruitment of police officers be based solely on merit.[62] This again shows that many people see affirmative action as not being fair and just and many feel that recruitment should be on merit only.

3 **Affirmative action in EU law**

As mentioned, sections 158 and 159 EA 2010 will need to be interpreted in accordance with EU law which limits the extent to which the kind of action it permits will be allowed. And, article 157(4) TFEU allows for affirmative action to ensure "full equality in practice". The EU Anti-discrimination Directives determine that Member States can maintain or adopt specific measures to prevent and compensate for disadvantages linked to the grounds covered.[63] It will be clear that these provisions are not mandatory: Member States can, but do not have to, take such measures. EU law provisions on affirmative action have been largely developed through the case law of the Court of Justice of the European Union (CJEU). This Court has held, in relation to gender discrimination, that the provisions exclude programmes which involve automatic preferential treatment at the point of selection in employment.[64] In other words, the CJEU appears to allow positive (affirmative) action in employment in so-called "tie-break" situations: where two candidates are equally qualified, the employer can give preference to the candidate from the underrepresented group but this can only be done if the individual merits of both candidates are considered and an employer does not give automatic preference to a candidate from an un-

[62] NORTHERN IRELAND OFFICE. *Consultation Paper Police (Northern Ireland) Act 2000 Review of Temporary Recruitment Provisions, Summary of Responses to the Public Consultation*. 2011. p. 3. Available at: <http://cain.ulster.ac.uk/issues/politics/docs/nio/nio220311.pdf>.

[63] Article 6 Council Directive 2004/113/EC; article 3 Council Directive 2006/54/EC; article 5 Council Directive 2000/43/EC; article 7 Council Directive 2000/78/EC, all supra note 5.

[64] See, for example, the following cases C-450/93 *Kalanke v Freie Hansestadt Bremen*, ECLI:EU:C:1995:322; C-409/95 *Marschall v Land Nordrhein-Westfalen*, ECLI:EU:C:1997:533; C-158/97 *Badeck's Application*, ECLI:EU:C:2000:163; C-407/98 *Abrahamsson and Anderson v Fogelqvist*, ECLI:EU:C:2000:367; and, C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, ECLI:EU:C:2004:574. Para 23 of the latter case sums this up. All judgments of the CJEU can be found on: <https://curia.europa.eu/>.

der-represented group.[65] EU law does accept wide positive (affirmative) action measures prior to the point of selection, like encouraging people from underrepresented groups to apply or by providing training for those groups. Therefore, the positive (affirmative) action provisions in the EA 2010 conform to EU law.

The CJEU has also held that positive measures in relation to gender discrimination must be interpreted strictly because they are a derogation of the principle of equal treatment.[66] In *Lommers*, a case which also concerned affirmative action on the grounds of sex, the CJEU determined that:

> according to settled case-law, in determining the scope of any derogation from an individual right [...] due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.[67]

It is likely that the CJEU will apply the same rules to positive (affirmative) action on the other grounds of discrimination covered by EU law. Therefore, affirmative action measures under EU law (and as was pointed out above, in British law) are subject to a proportionality test. This would also suggest that such measures need to be limited in time and should not last beyond the time when "full equality in practice" has been achieved, as they would become disproportionate once that goal has been reached. The fact that the CJEU sees affirmative action measures as a derogation of the principle of equal treatment and thus interprets them narrowly, also supports this.[68]

---

[65] Ibid.

[66] See *Kalanke v Freie Hansestadt Bremen*, para. 21; *Marschall v Land Nordrhein-Westfalen*, para. 32, both supra note 64.

[67] Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:2002:183, para 39; see also: *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, supra note 63, para. 24.

[68] For a more extensive discussion of the development of EU law on affirmative action see: ELLIS E.; WATSON P. *EU Anti-discrimination Law*. 2. ed. Oxford: Oxford University Press, 2012. p. 420-437.

4 Affirmative action in South Africa

The South African approach to affirmative action is different from the approach in the UK and the EU in that it is a much more substantive equality approach. Affirmative action in South Africa has clear links with the history of apartheid. According to a research report for the EU Commission:

> Affirmative action was introduced after the dismantling of apartheid, by the subsequent government of South Africa, to redress the injustices and racial imbalances perceived to have been the result of the systematic impact of apartheid in the country. It was believed that affirmative action would ensure that the formerly disadvantaged population [...] of South Africa enjoyed the same benefits and opportunities guaranteed for all racial groups in the post-apartheid Constitution.[69]

Section 9(1) of the 1996 Constitution of South Africa[70] declares that "everyone is equal before the law and has the right to equal protection and benefit of the law." This is followed by section 9(2) which determines that: "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 might be taken." The following paragraphs of section 9 then prohibit unfair discrimination by the state (9(3)) and by any person (9(4)) and section 9(5) determines that discrimination is "unfair unless it is established that the discrimination is fair." The South African Constitution thus prohibits only "unfair" discrimination.

---

[69] EUROPEAN UNION COMMISSION, DIRECTORATE GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES. *International Perspectives on Positive Action Measures. A Comparative Analysis in the European Union, Canada, the United States and South Africa*. Luxembourg, Office for Official Publications of the European Communities, 2009. p. 46. Available at: <https://publications.europa.eu/en/publication-detail/-/publication/45515983-3e3e-4a24-bcbc-477f04f0ba04>.

[70] Constitution of South Africa 1996: Available at: <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

Section 9(2) of the Constitution thus provides for affirmative action measures. In *Minister of Finance v van Heerden,* Moseneke J, in the Constitutional Court, explained that this meant that the constitutional understanding of equality included "remedial or restitutionary equality" and that these measures were not:

> a deviation from, or an invasion of, the right of equality in the Constitution. They are not 'reverse discrimination' or 'positive discrimination' [...] They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complimentary; both contribute to the constitutional goal of achieving equality to ensure 'full equality and enjoyment of all rights'.[71]

However, in the same case, the Constitutional Court made clear that the remedial measures must be "reasonably capable of attaining the desired outcome."[72] So the Constitutional Court "requires a measure to meet the standard of reasonableness."[73] The South African government has pointed out that "the Constitution requires employers to move beyond formal equality to substantive equality by acknowledging the differences between employees and treating them differently on the basis of these differences."[74]

South Africa's anti-discrimination law, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA 2000),[75] builds on the Constitutional provisions. Section 1 states that discrimination means any act or omission, "which, directly or indirectly, (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds." The prohibited grounds are described as follows:

---

[71] *Minister of Finance v Van Heerden* (CCT 63/03) [2004] ZACC 3, para. 30.
[72] Ibid. para. 41. See also para. 42.
[73] FREDMAN, S. (supra note 3, p. 272).
[74] REPUBLIC OF SOUTH AFRICA. 482, *Government Gazette*, No. 267866, Pretoria, 4 Aug. 2009.
[75] Promotion of Equality and Prevention of Unfair Discrimination Act 2000. Available at: <http://www.justice.gov.za/legislation/acts/2000-004.pdf>.

a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
b) any other ground where discrimination based on that other ground-
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

The same section determines that "equality includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes." So, here again, a substantive approach to equality is clear. Section 6 PEPUDA 2000 prohibits unfair discrimination.

For the subject of this paper, Section 14 PEPUDA 2000 is important because it provides for affirmative action and determines that: "It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons." Section 14(2)(c) indicates that, in determining whether the respondents have proved that the discrimination is fair, an objective justification test applies: it must be taken into account "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned." The factors which are to be taken into account can be found in section 14(3) and these include the (likely) impact on the complainant, their position in society and whether they suffer from patterns of disadvantage or belong to a group that does so. O'Cinneide sums this up as follows:

> In South Africa, equality legislation prohibits 'unfair discrimination' rather than 'discrimination' and defines inequality not in terms of making classifications upon suspect grounds but as constituting a denial of dignity and the imposition of harmful and demeaning burdens upon particular groups. Therefore, positive action that

> uses 'suspect' ways of classifying people, such as their race, will be fair where it is directed towards removing group disadvantage and is objectively justified.[76]

Another South African Act that must be examined is the Employment Equity Act 1998 (EEA 1998),[77] which was "the first formalisation of affirmative action".[78] This Act imposes a duty on private employers with more than 50 employees and on public authorities to implement affirmative action measure for people from designated groups (black people (including black, coloured and Indian people), women and people with disabilities according to section 1) in order to achieve workplace equity. Employers or organisations which do not fall under the duty can volunteer to accept the same obligations and pursue affirmative action under this Act. Section 6(2)(a) of the Act clearly states that it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act. Section 15 determines that affirmative action measures are "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer." Under this Act, employers must consult with their employees (section 16); collect information and conduct an analysis (section 19); prepare an employment equity plan (section 20) and report annually or biannually (this depends on the size of the workforce) to the Director General of the Department of Labour on the progress made (section 21).[79]

---

[76] O'CINNEIDE, C. (supra note 2, p. 15).

[77] Employment Equity Act 1998. Available at: <http://www.labour.gov.za/DOL/downloads/legislation/acts/employment-equity/eegazette2015.pdf>.

[78] BURGER, R.; JAFTA, R. *Affirmative Action in South Africa*: an Empirical Assessment of the Impact on Labour Market Outcomes. Centre for Research on Inequality, Human Security and Ethnicity). Working Paper No. 76, p. 5, 2010. Available at: <https://emea01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F57a08b2ced915d622c000b5d%2Fworkingpaper76.pdf&data=02%7C01%7CE.Howard%40omdx.ac.uk%7C4c921adaf3e948d46de708d53750ffd7%7C38e37b88a3a148cf9f056537427fed24%7C0%7C1%7C636475743382145801&sdata=Q5vAfoz9nprOtYzw7LwoaDhr2M31Kp1pqGUW01ZbH7g%3D&reserved=0>.

[79] See also on this: Burger e Jafta (supra note 77, p. 5-7).

Section 15(3) explains that the affirmative action measures "include preferential treatment and numerical goals, but exclude quotas." However, the meaning of "quotas" is not defined in the EEA 1998. According to the research report for the EU Commission, the national expert from South Africa reported that section 15(1) "is frequently interpreted as implying quotas, although this is not expressly provided for within the legislation."[80]

The same report also states that "the Broad Based Black Economic Empowerment Act 2003 allows for quotas to be adopted in specific sectors via transformation charters and codes of practice."[81] The latter Act aims to facilitate economic empowerment of all black people.[82] Section 15(4) EEA 1998 determines that nothing in section 15 requires an employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups. The Act does not appear to be very clear on what is and what is not permitted. However, the case law suggest that the key distinction between quotas, which are not allowed, and numerical targets, which are allowed, turns on the flexibility of the mechanism: an equity plan based on designated groups filling specified percentages of the workforce which allows for deviations so that there is no absolute bar to present or continued employment or advancement of people who do not fall within the designated group would not be illegal, but an equity plan that does not cater for deviations would be against S 9(2) of the Constitution and Section 15 EEA 1998.[83] Burger and Jafta conclude that

> the effect of affirmative action policies in reducing the employment or wage gaps have been marginal at best, and were much less significant in bringing about changes in labour market outcomes than improved access to education for Africans, the remaining educational qual-

[80] European Union Commission (supra note 68, p. 30).

[81] Ibid.

[82] See also: Burger e Jafta (supra note 77, p. 7-8).

[83] See, for example: *Solidarity and Others v Department of Correctional Services and Others* (CCT78/15) [2016] ZACC 18; and, *Solidarity v Minister of Safety and Security and Others* (J879/12) [2016] ZALCJHB 107.

ity differential and the employment effects of accelerated economic growth.[84]

This suggests that the affirmative action measures in South Africa have had only limited success and that they should be supported by policies on education and economic growth. This also appears to be the case for the Broad Based Black Economic Empowerment Act 2003 (BEE). Iob, for example, reports that the latter law has its fair share of critics and that it seems to have led to fraud, has deterred black entrepreneurship and has given black South Africans a sense of entitlement. Iob also reports that the BEE should be combined with other policies focusing on economic growth, education and entrepreneurship.[85] The affirmative action policy of black economic empowerment has also led to complaints by white South Africans that they are facing discrimination.[86] This confirms what was stated above, that affirmative action measures are seen as unfair by the people who do not benefit from them and that this is also the case in South Africa.

Conclusion

In this paper, the development of legal provisions for affirmative action in Britain and in Northern Ireland, in the EU and in South Africa has been analysed. But how do these different provisions for affirmative action compare? Fredman[87] distinguishes three broad approaches to affirmative action: the first one is the "formal" approach which regards affirmative action as a breach of the right to equality. The second is the "derogation" approach which regards affirmative action as an exception to the prohibition against discrimination. Such action is thus constructed strictly but is legiti-

[84] BURGER, R.; JAFTA, R. (supra note 77, p. 23).
[85] IOB, E. *10 Years In, South African Affirmative Action Faces Criticism,* 29 October 2013. Available at: <https://www.voanews.com/a/south-african-affirmative-action-faces-criticism-on--tenth-anniversary/1779584.html>.
[86] CUDDIHY, M. *White South Africans Complain Affirmative Action Policy is Causing Them to Face Discrimination*. 2016.
[87] FREDMAN, S. (supra note 3, p. 237).

mate in certain defined circumstances. The final approach is the "substantive" approach which views affirmative action as an aspect of equality, as a legitimate means to fulfil the non-discrimination principle, provided it is proportional. Fredman suggests that the British framework fits into the "formal" approach, the EU framework fits in the "derogation" approach and the South African provisions fit in with the substantive approach.[88] Although it can be argued that the legislation on affirmative action in Britain since the coming into force of the EA 2010 is moving away from a formal approach towards the derogation approach more in line with the EU framework, it appears clear that the South African framework goes beyond both and sees affirmative action as part of the equality provisions. Whereas, British and EU law only allow giving preferential treatment in a "tie-break" situation, in a situation where the candidates for a job or promotion are equally qualified, the South African provisions allow for preferential treatment as long as the person of the designated group is "suitably qualified" (section 15(2)(d)(i) EEA 1998). The CJEU has rejected the latter in a case where an affirmative action scheme reserved some posts in Swedish universities for women provided that the women concerned had sufficient qualifications for the post and that the difference in qualifications between the candidate chosen and the candidate who would otherwise have been chosen was not so great as to be "contrary to the requirement of objectivity in the making of appointments."[89] Therefore, the British and EU affirmative action provisions only allow giving preference in tie-break situations, in cases where the candidates for a job or promotion are equally qualified, whereas the South African provisions also allow preferential treatment of candidates as long as they are suitably qualified even when there is a candidate from a non-designated group who is more qualified. What none of these frameworks appears to allow for is giving automatic preference without considering the individual

[88] Ibid.

[89] *Abrahamsson and Anderson v Fogelqvist* (supra note 63). See on this: Ellis and Watson (supra note 67, p. 434-436).

qualifications of each candidate or without any provision for deviating from this in certain circumstances.

HISTORICAL EVOLUTION AND CONTEMPORARY DEBATES ON AFFIRMATIVE ACTION MEASURES IN INDIA AND CHINA

Joshua Castellino[1]

Introduction

For states that are less than a hundred years from their most recent major transition, questions concerning the extent to which they have been able to consolidate that transition are becoming crucial in the contemporary era. The decades immediately prior to and the aftermath of the creation of the United Nations is easily the most significant moment in history in terms of state formation[2]. While these may have been built, transformed and been destroyed many times in centuries before, and possibly into the future, the transition in the aftermath of the 1940s is significant not only for the sheer volume of states that have come into being (circa 143), but also for the geographic territory that these states cover. In most of these states the state creation process was accompanied by an attempt at constructing a coherent "national" narrative in a bid to emphasize new threads

[1] Professor of Law & Dean of the School of Law, as well as the Business School at Middlesex University, London. He is also Adjunct Professor of Law at the Irish Centre for Human Rights, Galway, Ireland, and Visiting Professor at the College of Europe, Natolin, Poland. He has held visiting positions in Ireland, Spain, Hungary and Italy. He worked as a journalist in Mumbai, with the Indian Express Group, was awarded a Chevening Scholarship to pursue an MA in International Law & Politics in 1995, and completed his PhD in International Law in 1998. He has authored and edited eight books in international law and human rights law, on self-determination, title to territory and indigenous peoples rights, besides several articles on a range of these and other legal sub-topics. He was part of the EU-China Experts & Diplomatic Dialogue and Lawyers for the New Millennium: Support for the Arab Law Union. He regularly engages with multilateral organizations and with Law Societies and NGOs in Europe, Asia, the Middle East and Latin America, on issues of human rights advocacy and public international law. He is on the Leadership Council of the United Nations Sustainable Development Solutions Network where he co-chairs the Thematic Group on Social Inclusion, Gender and Human Rights. He was appointed Chair, by the United Nations Office of the High Commissioner for Human Rights of the 8th Forum on Minority Issues, an inter-governmental dialogue with civil society under the auspices of the United Nations Human Rights Council.

[2] See generally, RIGO-SUREDA A. The Evolution of the Right to Self Determination: A Study of the United Nations Practice. Leiden: Sijhoff, 1973.

that were envisaged as binding together disparate and sometimes competing communities, tribes, ethnicities, religions, and nations into one state.[3] For this process to work the national narrative was particularly important to those who would likely contest, dissent, resist, or even destroy the attempt at unity, usually on the grounds of their own distinction from the emerging narrative. Affirmative action measures, in this general landscape of inequalities, was one policy imperative often called upon, as a crucial bridge to combatting the gap between *de jure* and *de facto* equality.[4] This makes their study a key litmus test in assessing whether the state-building process has been successful, especially for groups that are far removed from sites of power.[5] This paper seeks to assess the general development of affirmative action measures, the underlying conceptual debates that underpin this, and the reasons for the contemporary critique of such measures in the world's two most populous states, China and India, both in the eighth decade since a major transition, and who collectively account for more than a third of the total global population.[6]

After several decades of neglect there has been an increasing focus on China as it plotted the economic miracle that enabled it to rise to becoming the world's second largest economy. The past neglect was caused by the general Eurocentricism that dominates academic literature, the lack of linguistic access to what is effectively the world's longest documented history, and simplistic narratives of "otherness" that viewed China as not significant.

---

3 See DEUTCH K. W.; FOLTZ W. J. *Nation Building*. American Political Science Association: Atherton Press, 1963;

4 For general reading, albeit set in am American context, see COSSON, M. J. *Affirmative Action*. Minnesota: ABDO Publishing, 2007; KELLOUGH, J. Edward. *Understanding Affirmative Action*: Politics, Discrimination and the Search for Justice. Washington DC: Georgetown University Press, 2006; and CAHN, Steven M. *The Affirmative Action Debate*. 2. ed. New York: Routledge, 2002.

5 For the extent to which these public policy measured can be considered a litmus test of a state's adherence to human rights, see CASTELLINO, Joshua. No Room at the International Table: The Importance of Designing Effective Litmus Tests to Protect Minorities at Home. *Human Rights Quarterly*, v. 35, i. 1, p. 201-228, 2013.

6 The work in this article is underpinned by research conducted as part of a project that resulted in the co-written book by CASTELLINO, Joshua; REDONDO, Elvira Dominguez. *Minority Rights in Asia*: A Comparative Legal Analysis. Oxford: Oxford University Press, 2006.

In social science and legal literature the difference of the Chinese system meant that it was often far beyond the interest of academics largely honed on "classics" derived from European culture.[7] The treatment of India was different mainly due to the British influence and the ease of access to literature in English. However legal literature on India was relatively light, with some similarity to the Chinese experience. Even though both countries feature more strongly in academics literature in the twenty-first century, comparisons between the two are scant, despite obvious similarities in size, stage of development, interchange between the two states and rising aspirations.

Studying India and China, especially in a comparative vein is particularly useful to understand how each of the states are responding to similar crises. This is important in the analysis of the direction of policy in each of the countries, and for the impact this policy making is likely to have on surrounding economies that come under their hegemonic aspirations. While this external dimension is important, the more important perhaps is the extent to which the policies adopted are having an impact within each of these two most populous countries. In more recent debates the questions concerning impact on minorities, most notably the Muslim populations in both states, has linked affirmative action measures to questions of peace and security, in a general age of Islamaphobia that has become a significant factor among the populations of both states.

Current discussions in both states show a rising tide of intolerance towards minorities, and both states share the primacy given to affirmative action measures, which have been an important facet of policy making, and have begun to come under pressure emanating from populism.[8] This is partly explained by the increased emphasis on economic competitiveness, by

[7] See COHEN, J. (Ed.). *Contemporary Chinese Law*: Research Problems & Perspectives. Cambridge, Mass.: Harvard University Press, 1970; BERNHARDT, K.; HUANG, P. C. C. (Ed.). *Civil Law in Qing and Republican China*. Stanford: Stanford University Press, 1994; HSU, S. (Ed.). *Understanding China's Legal System*: Essays in Honour of Jerome K. Cohen. New York: New York University Press, 2003, for notable exception in seeking to understand the Chinese legal system prior to the contemporary interest drawn from China's rise.

[8] See HUMAN RIGHTS WATCH. *The Dangerous Rise of Populism*: Global Attacks on Human Rights Values. World Report, 2017.

the creation of hyper-wealth often accruing only to people from a majoritarian background who may question and even sponsor "privileges" given to "the Other" in a bid to pacify those from their own communities who have not been able to reap significant benefits within the new economies. Increased mechanization that has shorn the economy of many jobs are another significant reason. Many of these jobs, in banks, in public services, office jobs in companies, were held by those from majoritarian communities. Their disappearance has meant that segments of populations that were accruing benefits from the economy now see their economies growing but with no clear stake for themselves in it. In this scenario it has become easy to find scapegoats, and minorities with their high visibility due to difference have become easy targets. The added attribution of "terrorism" collectively to a religious community, rather than to specific individuals who seek to use violence to effect change, has added a further layer of justification to the emerging xenophobia in both states.

Both states, vastly different in terms of their political governance system, have two leaders currently in power, who appear to have popular backing, and in both cases their actions and deeds suggest that previous regimes have been too lenient by providing affirmative action to minorities. There is instead a trend towards believing in the need for homogenization, to take an aggressive internationalist stance and to eliminate what are seen as "privileges" for particular groups, especially if they may also be deemed disloyal to the State. This sentiment appears to be growing in the popular imagination of both states creating downward pressure on affirmative action measures nurtured and designed over decades.

In order to provide insights into both countries in a bid to facilitate greater engagement with and comparison between the states on this important issue, this paper is divided into two sections and a conclusion. The first focuses on the historical evolution of affirmative action measures, highlighting the context in which these were framed, and how they determined the legislative agenda and structure of the new states in the aftermath of a crucial transition point for both in 1949 and 1947 respectively. The second section portrays key facets of the policies adopted while emphasizing the conceptual

issues that underpin these. The purpose of this section is to briefly identify the policies and the underlying ideology that dictated their general acceptance as a way forward in building the state. The paper concludes by putting the contemporary pressures on affirmative action measures into focus.

1 Historical Evolution of Affirmative Action Measures

It is important to state at the outset that both states under review in this chapter are modern states but ancient civilizations.[9] These civilizations were impacted by and impacted several others, including each other. Yet the lens of contemporary statehood in the case of India came only after its experience of British colonization. While Indian decolonization occurred in the United Nations era (1947), it was designed and negotiated largely in the period immediately before the outbreak of world war two.[10] Some argue that the outbreak of war strengthened India's claim by weakening the British, others suggest that the war slowed down the independence process – the transition material to this paper. By contrast the Chinese transition occurred in the aftermath of a civil war that led to the demise and expulsion from the territory that is modern China, of the forces aligned to the previous regime of the Kuonmintang,[11] with those forces forced to flee under the guidance of their leader Chang Kai-Shek, to take refuge on the island of Formosa, Taiwan, from where the claim was made to be ruler of all China.[12] Meanwhile the Community Party, which swept to power in Peking (now Beijing) pro-

[9] See e.g. LOEWE, Michael; SHAUGHNESSY, Edward L. *The Cambridge History of Ancient China*: From the Origins of Civilization to 221 BC. Cambridge: Cambridge University Press, 1999; and RAYCHAUDHURI, Hemchandra; MUKHERJEE, B. N. *Political History of Ancient India*: From the Accession of Parikshit to the Extinction of the Gupta Dynasty. 8. ed. Oxford: Oxford University Press, 1999.

[10] See MAHAJAN, Sucheta; BHATTACHARYA, Sabyasachi. *Towards Freedom*: Documents on the Movement for Independence in India, 1947. Oxford: Oxford University Press, 2015.

[11] See DESNOYERS, Charles. *Patterns of Modern Chinese History*. Oxford: Oxford University Press, 2016.

[12] See HENCKAERTS, Jean-Marie (Ed.). *The International Status of Taiwan in the New World Order*. London, The Hague, and Boston: Kluwer Law International, 1996.

claimed the Peoples' Republic of China in 1949.[13] To understand the genesis of the affirmative action policies adopted by the two incoming regimes, and their development by subsequent regimes, it is important to start with a brief synopsis of the history that was material to making the two entities the multicultural, multinational entities that they are, and to emphasize how certain communities came to reside far from sites of power. This is important to explaining the dynamics of identity and proximity to power, but also in why power was willing to compromise in order to achieve stability.

1.1 **Historical Antecedents and the Modern State**

Despite historical accounts that many, (especially contemporary challengers to power) portray as being definitive, it remains extremely difficult to determine the territorial parameters of modern China from its ancient history.[14] There were times when Chinese influence spread across all the territory under the jurisdiction of the state, extended northward into territory that is now Russian, southward into some of what are now independent sought east Asian states, westward into what are Central Asian republics, and even southwards into territory that is now within the state of India.[15] The question of the spread of this influence through trade and relationships between the leaders of these areas and the ruling parties in China is not questioned to any significant extent.[16] What is questioned however is the extent to which this relationship was one of sovereign-suzerain, a question that is difficult to determine despite the available of extensive records, since those records were often dictated and dominated by majoritarian nar-

[13] See GRAY, Jack. *Rebellions and Revolutions: China from the 1800s to 2000*. Oxford: Oxford University Press, 2003.

[14] See the Maps reproduced in DESNOYERS (op. cit. n. 10).

[15] See BOL, Peter K. Mapping China's History. *Verge*: Studies in Global Asias, v. 2, n. 2, p. 70-82, Fall 2016.

[16] BILLÉ, Franck. On Ideas of the Border in the Russian and Chinese Social Imaginaries. In: BILLÉ, Franck; DELAPLACE, Grégory; HUMPHREY, Caroline (Ed.). *Frontier Encounters*: Knowledge and Practice at the Russian, Chinese and Mongolian Border. Open Book Publishers, 2012.

ratives.[17] Since non Han Chinese nationalities often do not have as long a written tradition of history, their narratives, derived from legend and an oral tradition are not given the same weight in the historical narrative emerging of China through the ages.[18]

As a consequence three elements are most salient for an understanding of the impact of Chinese history on the structural schisms that generate the need for affirmative action measures in the current epoch. The first concerns the *territorial snapshot* of China in its current modern boundaries, which is considered as definitive and sacrosanct. While the government of China is willing to be scrutinized on its compliance with human rights standards, it is not willing to entertain any discussion that would impact the territorial integrity of the state. This means that any groups that have aspirations of self-determination, in the form that entails secession from the state will be met with robust defense.[19] The message to other nationalities living in China is that they need to be committed to Chinese unity, and in return will be able to participate in the public life within the state. Such a message

[17] DELAPLACE, Grégory. A Slightly Complicated Door: The Ethnography and Conceptualisation of North Asian Borders. In: BILLÉ, Franck; DELAPLACE, Grégory; HUMPHREY, Caroline (Ed.). *Frontier Encounters*: Knowledge and Practice at the Russian, Chinese and Mongolian Border. Open Book Publishers, 2012.

[18] For sources on Tibet see FRENCH, Patrick. *Tibet, Tibet*: A Personal History of a Lost Land. New Delhi: Harper Collins Publishers India, 2003; SHAKYA, Tsering, *The Dragon in the Snow*: A History of Modern Tibet since 1947. New York: Columbia University Press, 1999; SORENSEN, Theodore; PHILLIPS, David. *Legal Standards and Autonomy Options for Minorities in China*: The Tibetan Case. Cambridge: Belfer Centre for Science and International Affairs, John F. Kennedy School of Government, Harvard University, 2004; FISCHER, Andrew Martin. *Urban Fault Lines in Shangri-La*: Population and Economic Foundations of Inter-Ethnic Conflict in the Tibetan Areas of Western China. 2004. Available at: <http://www.crisisstates.com/Publications/wp/wp42.htm>. Access on: 30 Sept. 2005; SAUTMAN, Barry, Cultural Genocide and Tibet. *Texas Intentional Law Journal*, v. 38. n. 1, p. 173-247, 2003. For sources on the Uyghur see GLADNEY, Dru. Internal Colonialism and China's Uyghur Muslim Minority. *ISIM Newsletter*, v. 10, n. 1, 1998; GLADNEY, Dru. China's Minorities: The Case of Xinjiang and the Uyghur People. UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.16; MONEYHON, Matthew D. China's Great Western Development Project in Xinjiang: Economic Palliative, or Political Trojan Horse? *Denver Journal of International Law & Politics*, v. 31, n. 3, p. 491-519, 2003.

[19] The speech delivered by Xi Jinping is considered to be the marker of a new generation in Chinese law and politics. This is the theme of a new book forthcoming. Elizabeth Economy, *The Third Revolution*: Xi Jinping and the New Chinese State. Oxford: Oxford University Press, 2018, forthcoming. For his own writing and perspective see JINPING, Xi. *Xi Jinping, the Governance of China*. Beijing: Foreign Languages Press, 2014.

is at odds with the aspirations of some of the leadership of nations such as the Uyghurs, Tibetans and Mongolians though it remains hard to gauge the wishes of the people with any degree of accuracy due to political repression.

To scholars of international law the Chinese response to the threat of separatism is not unique. There is a famous saying that international law is not a suicide club for states. No state is willing to encourage conversations that could compromise the territorial integrity of the state itself. The state practice in the last decade alone, of states as varied as Spain,[20] the United Kingdom,[21] India,[22] Indonesia,[23] Iraq,[24] the Congo,[25] Ethiopia[26] and Russia[27] all reflect this position in the face of the threat of separatism, so overt criticism of China on this factor would be biased if a similar criticism is not labeled against these other states. What this facet does highlight however is that with the option of separatism ruled out, the onus shifts to the extent to which the state can provide adequate remedies and mechanisms to ensure that such peoples, alongside others who may be far from sites of power and experience structural inequalities, can have access to law on the same basis as those from the majoritarian community. This reinforces the need for affirmative action measures.

The second facet of China's history that is salient to the discussion on affirmative action measures is the legacy of trade and how it has expanded and contracted the Chinese sphere, but also on the extent to which this trade brought significant communities of *Others* to live within the boundar-

[20] See REZVANI, David A. *Surpassing the Sovereign State*: The Wealth, Self-Rule and Security Advantages of Partially Independent States. Oxford: Oxford University Press, 2016, and MARTIN, Ian. *Self-Determination in East Timor*: The United Nations, The Ballot and International Intervention. Boulder: Lynne Rienner Publishers, 2001.

[21] MICHAEL, Rosie. Scottish Referendum. *Scottish Affairs*, v. 23, i. 3, p. 275-279, Aug. 2014.

[22] BOSE, Sumantra. *Kashmir*: Roots of Conflict, Paths to Peace. Harvard University Press, 2003.

[23] KINGSBURY, Damien; AVELING, Harry (Ed.). *Autonomy and Disintegration in Indonesia*. London: Routledge, 2003.

[24] See MEISELAS, Susan. *Kurdistan*: In the Shadow of History. New York: Random House, 1997.

[25] GERARD-LIBOIS, Jules *Katanga Secession*. Madison: University of Wisconsin Press, 1966.

[26] GAYIM, Eyassu. *The Eritrean Question*: The Conflict between the Right of Self-Determination and the Interests of States. Uppsala: Iustus Forlag, 1993.

[27] AHRENS, Cherylyn Brandt. Chechnya and the Right to Self-Determination. *Columbia Journal of Transnational Law*, v. 42, i. 2, p. 575-615, Winter 2004.

ies of modern China. The current Chinese regime, in articulating its vision for China over the next decade, is reiterating the value of trade in the *One Belt One Road* vision of Chinese premier Xi Jinping.[28] This builds on the central reason in Chinese history for the existence of the many minority nationalities within China. Especially in the West, the spread of Chinese trade along the old Silk Route brought many communities and practices inside the Chinese frontiers,[29] though the extent to which this extension of commerce was also accompanied by the subjection of these communities to rule from the capital may be contested.

Linked to this is the third facet which needs to be understood from the perspective of Chinese history, which is the extent to which the government remains wary of movements that may threaten the stability of the State. The growth and ebb of various Chinese dynasties over China's long history suggests that change in governance has been a regular feature.[30] The Community Party as the current governors of China, have determined that eliminating such threats are fundamental to stability and thus while the rhetoric of Chinese policies emphasizes the need to curb "Han Chinese chauvinism" towards the other nationalities, in practice this level of tolerance and understanding breaks down into authoritative actions when faced with a threat. This has perpetrated a degree of fear and exclusion of certain groups, most notably the Uyghur. The more aggressive the stance taken towards asserting difference the harsher has been the response from the State. As a consequence while Chinese affirmative action policies are widespread and progressive in design, they have limited impact in some communities that seek far more than these offer.

Ancient Indian history testifies to the growth and demise of several kingdoms and dynasties only few of who managed to bring the entire

[28] See ZENG, Jinghan. Does Europe Matter? The Role of Europe in Chinese Narratives of 'One Belt One Road' and 'New Type of Great Power Relations'. *Journal of Common Market Studies*, v. 55, i. 5, p. 1162-1176 Sept. 2017, and FERDINAND, Peter. Westward Ho – the China Dream and 'One Belt One Road': China Foreign Policy under Xi Jinping. *International Affairs*, v. 92, i. 4, p. 941-957, July 2016.

[29] See HOLCROFT, Harry. *The Silk Route*: From Europe to China. London: Pavillion, 1999.

[30] See DESNOYERS (op. cit. n. 10).

territory that it currently India under its jurisdiction.[31] Traditionally Hindu over the ages, India is the birthplace to three major world religions,[32] and its history has been significantly altered by the arrival of Islam from what were Ottoman lands from the eleventh century onwards.[33] With religious communities having experienced significant freedoms throughout history the country that finally came under the British raj from 1800 onwards was already significantly diverse. In addition to this religious diversity, India was and is a language of languages, which created a further galvanizing force in the emergence of sub-national Indian identities.[34]

British rule from the 1800s mainly created to exploit the wealth of the country brought a significant focus on these differences. According to some narratives the differences were used, especially towards the time of independence,[35] to create divisions between the two largest communities the Muslims and the Hindus, which eventually led to the secession of Muslim majority areas from India to form the independent and theocratic Muslim state of Pakistan.[36] Other narratives of British rule focus on the extent to which British policy, in conjunction with key Indian reformers and activists,[37] sought to eradicate centuries old prejudices that came with the Indian caste system.[38] In any case modern India is characterized by hyper-diversity: its billion strong population consists six main ethnic groups, 52 major tribes, six major religions, 6,400 castes and sub-castes, 18 major languages and 1,600

[31] See CORBRIDGE, Stuary; HARRISS, John. *Reinventing India*: Liberalization, Hindu Nationalism and Popular Democracy. Cambridge: Polity Press, 2000.
[32] See LOPEZ, Donald D. (Ed.). *Religions of India in Practice*. Princeton University Press, 1995.
[33] See KABIR, Humayun. Islam and India. *Indo-Asian Culture*, v. 9, i. 3, p. 241, Jan. 1961.
[34] BVR Rao. *The Constitution and Language Politics of India*. Delhi: B.R. Publishing Corporation, 2003; also see KING, Robert. *Nehru and Language Politics of India*. Delhi: Oxford University Press, 1997.
[35] See THAROOR, Shashi. *Inglorius Empire*: What the British Did to India. London: Hurst and Co., 2017.
[36] See TALBOT, Ian (Ed.). *The Independence of India and Pakistan*: New Approaches and Reflections. Karachi: Oxford University Press, 2013.
[37] MAJOR, Andrea. *Sovereignty and Social Reform in India*: British Colonization and the Campaign against Sati 1830-1860. New York: Routledge, 2011.
[38] See POMOHACI, Maria Daniela. The Influence of the Political, Social and Religious Measures upon Caste during British India. *International Journal of Humanistic Ideology*, v. 6, i. 1, p. 105-128, 2013.

minor languages and dialects.[39] Despite this the domination of the majority Hindu party[40] has grown in recent decades, largely as a reaction to the perception that previous Indian regimes spent too much time "appeasing minorities".[41]

1.1.1 "Critical Date" Snapshot

In seeking to trace the evolution of affirmative action measures in two countries of the size and complexity of China and India, with long documented histories, it becomes important to restrict the assessment against definite parameters. The dates 1947 for India and 1949 for China suggest themselves as ideal since they are points of major transition, for India from British colonial rule to independence, and for China with the arrival in power of the Chinese Community Party at the end of the Chinese civil war. It is also instructive that there was explicit recognition, at the foundation of both states, of the need to adopt measures that would seek to build unity and ensure that groups far from sites of power, would be given the wherewithal to promote their own culture and realize their rights. Thus in both instances the "nation-building" imperative involved making significant overtures toward the diverse communities that would come to live within the vast frontiers of each state through measures that could be deemed affirmative actions.

Even though the decision to separate India into two entities on the grounds of religion has already been taken and yielded an independent state of Pakistan, the state of India was still, at the time, the world's largest Muslim state.[42] The events in the lead up to independence had been extremely

[39] This was summed up in the judgment of TMA Pai case. See *T. M. A. Pai Foundation and ors v State of Karnataka and ors*, WP (Civil) No 317/1993 (31 Oct. 2002) para 158.

[40] See BERENSCHLOT, Ward. Political Fixers and the Rise of Hindu Nationalism in Gujarat, India: Lubricating a Patronage Democracy. *South Asia*: Journal of South Asian Studies, v. 34, i. 3, p. 382-401, Dec. 2011.

[41] PUNIYANI, Ram. *Communal Politics*: Facts versus Myths. New Delhi: Sage, 2003.

[42] The Muslim population estimated at around 55 million would have made India the largest Muslim country in the world.

divisive and the significant loss of lives during partition[43]also meant that new wounds had been created between two of the largest communities on the India sub-continent. With the division of the state driven by the argument on the Pakistani side that Muslims would not be safe in Hindu India, the need to guarantee protection took on an added imperative. In addition India had other significant religious minorities whose own existence among the Hindu masses needed to be guaranteed. While the new Congress government sought to identify itself as "Indian" rather than Hindu, it was inevitably dominated not only by Hindus, but by Hindus from the highest castes.

A similar challenge manifest itself in relation to language. The princely states of India were often based on linguistic identity though these ebbed and flowed through histories.[44] The impact of the movement of peoples to areas dominated by others who spoke the same language meant that the reorganization of Indian states into linguistically homogenous entities would reap policy rewards and protect what became regional languages in India. This was particularly important in light of the decision to adopt Hindi, the language of India's largest state Uttar Pradesh, as the national language, though the maintenance of English as an official language was pragmatic, giving Indians continuity with the previous regime, while overcoming the resistance that would otherwise have been vocalized more strongly against the choice of Hindi ahead of languages perceived as more classical such as Bengali and Tamil.

The issue of caste however remained the most challenging problem. It had already been the subject of a major disagreement between Gandhi and Ambedkar, two key figures in the Indian independence movement, and it was clear that the existence of a large underclass, that had faced centuries of oppression by upper castes would prove a significant barrier to the achievement of Indian unity, if that quest unity was not inclusive. The *harijans*, as they had come to be known then, *Dalits* to use more accurate

[43] SINGH, Amritjit; IYER, Nalini; GAIROLA, Rahul (Ed.). *Revising India's Partition*: New Essays on Memory, Culture and Politics. Lanham: Lexington Books, 2016.

[44] BENEDIKTER, Thomas. *Language Policies and Linguistic Minorities in India*: An Appraisal of the Linguistic Rights of Minorities in India. Lit Verl, 2009.

and less pejorative identifier of today, had already gained significant rights from the British in overcoming centuries old segregation and exclusion, and thanks to the efforts of Ambedkar these formed the clearest affirmative action measures that came to be inserted into the Indian constitution, where they still exist and are, from time to time, cause for significant controversy.[45]

The ebb and flow of history had led to the presence of significant "nations" within the Chinese frontiers of 1949, which have been maintained to today. This is acknowledged in several Chinese governmental white papers which also emphasize the need for unity between the different Chinese nations, and call for curbing what is referred to as "Han chauvinism" in a bid to enable the other nationalities to see a positive future within the Chinese state.[46] The emphasis on equality between peoples and nations was one of the founding principles of the Chinese state, and there has been awareness throughout modern Chinese history of the need to create an egalitarian society through the mechanism of communism. While communism was traditionally seen as being in rivalry to capitalism, after the initial decades of strict adherence to doctrine, the Chinese state under Deng Xioaping began to adopt what was referred to in Western sources as "pragmatic communism"[47] which enabled the growth of small businesses as the state sector began to deregulate.[48] The emphasis on equality continued through various governmental policies especially targeted towards minority nationalities that sought to spread economic wealth.[49] However as the areas came under

[45] See AMBEDKAR, Bhimrao Ramji. *Pakistan or Partition of India*. Bombay: Thackers, 1946, and for the impact of Ambedkar see DHANANJAY, Keer. *B.R. Ambedkar*: Life and Mission. Bombay: Prakashan, 1962.

[46] See CHINESE ACADEMY OF SOCIAL SCIENCES. 'Nationalities' 3 *Information China*. Beijing: Pergamon Press, 1988. Editorial. p. 9-12; Common Programme of the Chinese People's Political Consultative Conference Concerning the Minority Nationalities [1949]. *Chinese Law and Government*, v. 14, i. 4, p. 11-12, 1981. Editorial; and HSIAO-T'UNG, Fei. *Towards a People's Anthology*. Beijing: New World Press, 1981.

[47] See WHITE, Gordon; HOWELL, Jude; XIAOYUAN, Shang. *In Search of Civil Society*: Market Reform and Social Change in Contemporary China. Oxford: Clarendon Press, 1996.

[48] CHUA, Amy L. Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development. *Yale Law Journal*, v. 108, n. 1, p. 1-106, 1998.

[49] LOLLAR, Xia Li. *China's Transition Toward a Market Economy, Civil Society and Democracy*. Bristol: Wyndham Hall Press, 1997.

pressure the minority agenda ebbed in the face of the growth and attraction of market-based capitalism. As a consequence the attempted replication of the economic model that served as the contemporary takeoff for the Chinese economy, the free trade areas in the east, looked and felt very different when attempted in China's Go West policy, which pertained to the western minority dominated area of the country.[50]

2 Uniting Nations into a State: The Role of Affirmative Action

2.1 China

The Peoples' Republic of China could be said to have the four key characteristics in its approach to affirmative action measures. The first of these is the recurring re-statement of their importance in building the unity of the Chinese nation. The Preamble to the 1982 Constitution, whose validity could legitimately be questioned, nonetheless declares:

> The People's Republic of China is a unitary multinational state built up jointly by the people of all its nationalities. Socialist relations of equality, unity and mutual assistance have been established among them and will continue to be strengthened. In the struggle to safeguard the unity of the nationalities, it is necessary to combat big-nation chauvinism, mainly Han chauvinism, and also necessary to combat local national chauvinism. The state does its utmost to promote the common prosperity of all nationalities in the country.[51]

Further prominence is given to this value in Article 4 which reiterates the prominence given to nationalities:

[50] See MONEYHON, Matthew D. China's Great Western Development Project in Xinjiang: Economic Palliative, or Political Trojan Horse? *Denver Journal of International Law & Politics*, v. 31, n. 3, p. 491-519, 2003.
[51] *Constitution Peoples Republic of China* (1982).

> (1) All nationalities in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity, and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.
> (2) Regional autonomy is practiced in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People's Republic of China.
> (3) The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.[52]

After stressing the importance of equality, paragraph (1) emphasizes the importance of state assistance in development and the need to focus on peculiarities (sic) of minority nationalities. Paragraph (2) clearly identifies regional autonomy as an option, governed by the *Autonomy* Law briefly discussed below. Paragraph (3) emphasizes the cultural and identity-based question of language and custom, though it does not explicitly identify a state obligation towards this.

A second clear characteristic underpinning the Chinese approach is one that identifies the groups that are deemed to be especially meritorious of such actions. China has identified 56 internal "nationalities", based on linguistic, ethnic, and religious features. Thus the identification of minorities becomes one of numbers: Han Chinese form a large majority, rendering the remaining 55 nationalities as "minority nationalities". These are officially in the following terms:

[52] *Constitution Peoples Republic of China* (1982).

> The People's Republic of China is a united multi-ethnic state founded jointly by the people of all its ethnic groups. So far, there are 56 ethnic groups identified and confirmed by the Central Government, namely, the Han, Mongolian, Hui, Tibetan, Uygur, Miao, Yi, Zhuang, Bouyei, Korean, Manchu, Dong, Yao, Bai, Tujia, Hani, Kazak, Dai, Li, Lisu, Va, She, Gaoshan, Lahu, Shui, Dongxiang, Naxi, Jingpo, Kirgiz, Tu, Daur, Mulam, Qiang, Blang, Salar, Maonan, Gelo, Xibe, Achang, Pumi, Tajik, Nu, Ozbek, Russian, Ewenki, Deang, Bonan, Yugur, Jing, Tatar, Drung, Oroqen, Hezhen, Moinba, Lhoba and Jino. As the majority of the population belongs to the Han ethnic group, China's other 55 ethnic groups are customarily referred to as the national minorities.[53]

The nationalities identified in this list have diverse practices and beliefs. Some such as the Hui and the Zhuang are closest in tradition and belief to the Han majority, while the Turkic peoples living in Western China including the Uygurs and the Kazaks, have closer links to the Middle East and the Central Asian Republics. The importance of the identity question to China's own growth and development can be emphasized by the fact that while only accounting for a small percentage of the total Chinese population, minorities occupy a land mass equivalent to close to 60 per cent of Chinese territory, mainly on account of the vast under-populated Western areas.

Rather than an official definition of a minority, the Chinese consider the following to be an understanding of "nationality": "A historically constituted community of people having a common territory, a common language, a common economic life and a common psychological makeup which expresses itself in a common culture."[54] There is relatively little infor-

[53] According to a Government White Paper, the fourth national census (1990) revealed that 91.96 per cent of the country's total population belonged to the Han ethnic group, and 8.04 per cent belong to minority ethnic groups. It also gives figures for a sample survey in 1995 suggesting a 0.94 percentage point increase over the 1990 figures for minorities. Information Office of the State Council of the People's Republic of China, Government White Paper National Minorities Policy and Its Practice in China (1999).

[54] This has been referred to as a "Stalinist" definition of minorities, See SAUTMAN, Barry Ethnic Law & Minority Rights in China: Progress and Constraints. *Law & Politics*, v. 21, n. 3, p. 283-314, 1999; (editorial) Common Programme of the Chinese People's Political Consulta-

mation and significant controversy for the precise terms on which the 56 nationalities were identified.

The two elements identified above have led to the third characteristic of the Chinese approach to affirmative action, namely the design of a wide range of measures to promote equality of opportunity and cultural autonomy within the strict frame of loyalty to the idea of One China and the Communist Party. Official government statements suggest a progressive attitude towards minority nationalities, and this is reflected in many measured discussed in great detail elsewhere.[55] Official policy opposes forced assimilation, grants territorially based nationalities autonomy (whether at regional, provincial, or township level), and creates provisions for the furtherance of minority participation whether in the educational, political, administrative, or cultural realm. The most striking aspect of Chinese policy towards minorities is the detailed arrangements vis-à-vis autonomy. This is based primarily on the *Law of the People's Republic of China on Regional National Autonomy*.[56]

The fourth and final characteristic, and one has gained increased prominence in the landscape on identity based equality is China's strict adherence to state unity. Like a majority of states, Chinese politics fiercely opposes secession, and the government has shown, on a number of occasions, that it is willing to use force to repel movements it considers as destabilizing to the state. China's attitude to minority rights can thus be summed up in the words of article 28: "The State maintains public order and suppresses treasonable and other criminal activities that endanger State security; it pe-

tive Conference Concerning the Minority Nationalities [1949]. *Chinese Law and Government*, v. 14, i. 4, p. 11-12, 1981. Editorial. For more discussion see DEAL, David. The Question of Nationalities in Twentieth Century China. *Journal of Ethnic Studies*, v. 12, i. 3, p. 23-53, 1984; GLADNEY, D. Representing Nationality in China: Refiguring Majority/Minority Identities. *Journal of Asian Studies*, v. 53, i. 1, p. 92-123, 1994.

[55] For more see CASTELLINO, Joshua; REDONDO, Elvira Dominguez. China. *Minority Rights in Asia*: A Comparative Legal Analysis. Oxford: Oxford University Press, 2006.

[56] Adopted at the Second Session of the Sixth National People's Congress, promulgated by Order No 13 of the President of the People's Republic of China on 31 May 1984, and effective as of 1 Oct. 1984. For a critique see HEBERER, Thomas. *China and its National Minorities*: Autonomy or Assimilation? Armonk: M. E. Sharpe, 1989.

nalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals."[57]

In conjunction with the qualifier vis-à-vis secession in article 4(1), this article highlights the importance attributed to public order and national unity. Thus, despite the relative sophistication in the legal design of measures to promote effective equality it could hardly be said that the rights of China's minorities are well respected. While the affirmative action measures are relatively well designed and widespread in the range of issues they seek to influence, their impact in gaining full participation for minorities is limited due to restrictions on the role of dissent in the state. Against this the significant improvements in raising populations out of poverty suggest that some of the affirmative action measures, especially the ones that focus on minorities of regional and sub-regional autonomy may have succeeded in combatting the most egregious of exclusions from socio-economic life. For more controversial nationalities however such as Tibetans and Uygurs there remain major obstacles owing to their perceived loyalty to "splittism" i.e. separation from the Chinese state. The increasingly militarized border where the minorities live, and their ever closer monitoring and surveillance also brings the value of these measures into sharp focus.

2.2 **India**

Five primary characteristics explain the contours of affirmative action measures in India. The first of these, which forms the bulwark to the entirety of India's equality framework, is the adoption and creation of a "national" narrative based on secularity in a bid to harmonize the different submerged nations and identities.[58] With the birth of the country accompanied by severance on the basis of religion into two states leaving a significant Muslim minority behind in India, it was imperative that the new State im-

[57] Constitution of the Peoples Republic of China (1982).
[58] See BHARGAVA, Rajeev. *The Promise of India's Secular Democracy*. New Delhi: Oxford University Press, 2010.

mediately provide guarantees for the security of this community. One of the most significant factors in distinguishing India from Pakistan at the birth of the two states, was the latter's goal to establish itself as a religious state for Muslims. As a consequence India's assertion of its secular credentials was crucial to not only allaying the fears of the remaining Muslims, but also to assert the need to protect the other religious communities that inhabited the state. This also emphasized the importance given to identity in the nation building process, and as a consequence justified many of the affirmative actions measures that have emanated in Indian public policy.[59]

The second characteristic of Indian policy in this regard was the reorganization of the map of India based on the need to promote and protect the linguistic rights of the different communities.[60] Rather than portray this as an affirmative action measures *per se* this crucial decision enabled the birth of a system of regional governance which facilitated the use of the regional language and the determination of state policy for a range of sectors including education, labour, political participation, local governance and others. The privileging of the use of the regional language and the accompanying cultural rights of the communities was crucial to making India more governable.

The acceptance of religious law to sit alongside national law and protect religious communities was a third important characteristic of the approach to affirmative action measures.[61] This form of non-territorial autonomy has given religious communities the right to preserve and pursue their values. Five religious communities in India can be governed by their own religious law in matters concerning marriage, divorce and inheritance. While conflicts inevitably arise between the salience of religious or national

[59] ENGINEER, Asgharali. *Communalism in Secular India*: A Minority Perspective. Gurgaon: Hope Publications, 2007.
[60] See SARANGI, Asha. *Language and Politics in India*. Oxford: Oxford University Press, 2010.
[61] See LARSON, Gerald James (Ed.). *Religion and Personal Law in Secular India*: A Call to Judgment. Bloomington: Indiana University Press, 2001. Also see FAUSTINA, Pereira. *The Fractured Scales*: The Search for a Uniform Personal Code. Calcutta: Stree Publishers, 2002.

law, the provision of personal autonomy was seen at the time of its design, as key to maintaining the autonomy of religious communities.[62]

The clearest example of affirmative action measures and by the far the one that has merited the most study has been India's regime of "reservations".[63] This derives from special protection afforded by the British during colonial rule to India's excluded communities, formerly referred to as *untouchable* owing to their outcaste status. With one of the key architects of the Indian constitution, its first Law Minister and most prominent Dr. B. R. Ambedkar, the measures gained significant prominence and have spawned the systemic use of quotas. These have also been subsequently extended to promote the participation of women in public life.[64] The current regime is extensive and spans a range of measures pertaining to political participation, public sector employment and education. The protections, deemed temporary, are enshrined in Indian administrative law have been regularly extended in time on the basis that parity remains distant. Their range in contemporary India extends to a class of persons defined in law as "SC/ST and OBC" which stands for Scheduled Castes and Scheduled Tribes as designated in the Indian constitution,[65] and "Other Backward Castes" a political extension to those meritorious of affirmative action, who may not have been listed in the Schedule, but are considered are from sites of power.[66]

With the state of India being created through the agglomeration of princely kingdoms the Indian constitutional design made provision for "spe-

[62] NARAIN, Vrinda. *Gender and Community*: Muslim Women's Rights in India. Toronto: Toronto University Press, 2001.

[63] See PANANDIKER, V. A. Pai (Ed.). *The Politics of Backwardness*: Reservation Policy in India. New Delhi: Konark Publishers, Private Limited, 1997. Also see PRAKASH, Louis. Scheduled Castes and Tribes: The Reservations Debate. *Economic and Political Weekly*, v. 38, i. 25, p. 2475-2478, Jun. 21-27, 2003, and GALANTER, Marc. *Competing Equalities*: Law and the Backward Classes in India. Berkeley: University of California Press, 1984.

[64] CHANDRA, Sudhir. *Enslaved Daughters*: Colonialism, Law & Women's Rights. New Delhi: Oxford University Press, 1999.

[65] This is enshrined in law by *The Constitution (Scheduled Castes) Order* (1950) which lists castes across India in its First Schedule, and the *Constitution (Scheduled Tribes) Order* (1950) which lists tribes across the Indian states in its First Schedule.

[66] See HASSAN, Zoya. Caste, Social Backwardness and OBC Reservations (Mandal I and II). *Politics of Inclusion*: Castes, Minorities and Affirmative Action. Oxford: Oxford University Press, 2009.

cial areas" in the Northeast of the country which were mainly inhabited by indigenous tribes.[67] Identified specifically in the fifth and sixth schedules to the Indian constitution, the basic thrust of the measures is to provide autonomy and special protection for indigenous communities to maintain their cultural distinctiveness through autonomous governance. These include specific protection for States deemed in the Sixth Schedule, to be tribal (Assam, Meghalaya, Tripura and Mizoram).

Conclusion

The raison d'etre and objectives of affirmative action measures in India and China bear striking similarities, despite the fact that they were articulated and implemented in states with very different political systems. In both cases the need for equality lay at the root of the quest for such measures, and in both cases they formed key elements to the nation building process. As both states move towards the ninth decade since their last key transition such measures have begun to come into sharp focus. With the states locked in a socio-economic competition of sorts to gain greater benefits, they also face questions about how participation in modern economic life can sustain a greater social agenda for inclusion. This comes in both cases in the face of increased urbanization and threats to national unity from the incomplete project of building socially inclusive states.

The design and efficacy of the measures developed in both countries is varied and meritorious of further study. They include measures for territorial autonomy, political participation, socio-economic and educational measured. The measures are also constructed to work in individual and collective settings in contrast the overt focus on individual rights in other jurisdictions. Yet the manner of the design of the measures is sometimes perceived as tokenistic and has, as a consequence often failed to overcome deep-seated

[67] See BARPUJARI, H. K. *North-East India*: Problems, Policies and Prospects since Independence. New Delhi: Spectrum Publications, 1998; JACOBS, Julian. *The Nagas*: Hill Peoples of Northeast India. London: Thames & Hudson, 1990.

and ingrained social attitudes towards those far from sites of power. As a consequence the most significant failure has been in educating the majority populations about the importance of such measures both in terms of the pragmatism of dampening conflict, and in terms of realizing the full economic potential that could be gained from the significant diversity of the "national minority" populations.

In the next decade both countries are likely to face the challenge of how to address the backlash towards affirmative action measures which are perceived as 'privileges' for populations that may be disloyal to the state. If their reaction to this challenge is to dismantle the systems rather than to focus on better implementation, they are likely to foster the exact forces of splittism and separatism that they fear. Addressing the fear of dismemberment through aggressive policies that commence with denial of difference and suppression of voice are likely to stoke rather than dampen the propensity to conflict. Realizing the pragmatic value of the minorities as key lynchpins and interlocutors in being able to address relations with each other and the wider world will likely be far more effective in realizing both states ambitious visions for domination of global commerce, both because this is likely to create a greater ambience of peace, but also because the minorities have approaches and comparative advantages that will likely benefit the states. In any case the debate on affirmative action on both states in worth following closely, since it affects a significant number of the global population and since the hegemony of both states is likely to grow with the rise in their economic importance.

CHAPTER III
AFFIRMATIVE ACTIONS AND THE UNITED NATIONS

THE UNITED NATIONS APPROACH TO TEMPORARY SPECIAL MEASURES

Elvira Domínguez-Redondo[1]

Introduction

This paper examines the role of the United Nations (UN) and its bodies, in addressing special measures aimed at redressing structural inequalities suffered by designated groups by increasing the proportion of members of these groups in relevant labour, academic, governmental or non-governmental positions where they are underrepresented. The following pages outline the jurisprudence of the main UN human rights bodies, and analyses its content. The research underpinning this paper seeks to explore the most proliferous and coherent actions adopted by some of the UN organs within a poorly delimited conceptual framework.

Conceptual issues arise from a lack of unified terminology or standardised criteria for the differentiation of treatment. Due to its negative

[1] Associate Professor of International Law at Middlesex University, London (UK) and Adjunct Lecturer of the Irish Center for Human Rights (NUI Galway, Ireland). She is a member of the Geneva (Switzerland) based think-tank Universal Rights Group. She is Programme Leader for the LLM, both at Middlesex University. In the past, Dr. Domínguez-Redondo held different academic positions, at the Transitional Justice Institute (University of Ulster, Northern Ireland); the Irish Centre for Human Rights (NUI University, Ireland); the University of Alcalá de Henares (Spain): and University of Carlos III de Madrid (Spain). She has worked as a consultant with the Special Rapporteur on torture at the Office of the High Commisisoner for Human Rights (Switzerland). She specialises in international law and human rights legal theory. Her current research focuses on the best strategies for the promotion and protection of human rights within International Organisations, the interlinkage between peace, development and human rights, the co-existence of multiple human rights mechanisms dealing with human rights communications at UN level, and territorial disputes in East-Asia. In addition to the Middlesex e-repository, the text of her publications can be found in the Websites of academia.edu and ssrn. She has been one of the five independent experts from the Americas and Europe to carry out an Observation Mission on the situation of human rights defenders in Mexico. The final report (in Spanish and English) can be found here. She has participated in the European Union-China, Irish-Chinese and German-Chinese human rights dialogues. She was also engaged with the Latin-American and European Human Rights Network. Among other projects under her responsibility she led the British Council DelPHE-Iraq project implementing the first Human Rights Masters programme in Iraq, at Duhok University.

connotation and the self-contradiction involved, the expression "positive/reverse discrimination" has practically disappeared from the vocabulary of States, inter-governmental and civil society organisations. The terminology "affirmative action", "special measures", "remedial measures" and "positive action" (the latter one particularly popular in Europe) are often used as synonyms, although strictly speaking, "affirmative actions" does not always involve a differentiation of treatment for the groups not affected by the measure. For instance, the existence of lifts for persons with mobility impairments does not involve a "discriminatory/differentiated" treatment for persons not facing mobility barriers. The colourful spectrum of terminology in any field usually denotes lack of consensus over basics. Despite the well argued rationale supporting their existence, the protracted history of these measures at national, regional and international level has complicated rather than clarified the controversy associated with their design and implementation. While so-called "soft" measures, such as the portrayal of women in the marketing materials of the Science Department of a University to combat gender stereotypes may be relatively well received, "harder" measures such as imposing obligatory quotas for the employment of women in the same department will probably be fiercely contested, using arguments defending academic freedom and merit over gender.

The objective pursued through the adoption of special measures is *de facto* equality. However this suffers from the same lack of agreement over semantics, and has been referred to as "equal opportunities", "effective equality" or "substantive equality". The fragmented approach to special measures within the UN reflects the diversity of policies, legislation and administrative practices across jurisdictions. State practice reveals great variety of affirmative action measures in terms of identification of the groups benefiting from them, the "soft" or "hard" approach adopted, the legal framework embedding special measures and the forms of implementation. It is however possible to identify some common guidelines in the outcomes of the different UN Treaty and Charter bodies over the years. Part I of this article will look into the jurisprudence developed by the human rights committees in charge of monitoring treaties. Part II examines the more disperse

and difficult to compile practice developed by the UN "charter-bodies". This category includes the Human Rights Council and its subsidiary bodies, in particular, public special procedures and the Universal Periodic Review. The final section will outline the conclusions emanating by the practice so far.

1 The UN Treaty-bodies contribution

1.1 Overview

The organs of experts, known as "committees", established by the "core international human right instruments" are referred to, in UN terminology, as "treaty bodies". These committees monitor the implementation of the provisions included in the nine international human rights treaties belonging to this category. The core international human rights instruments comprise: the International Covenant on Economic, Social and Cultural Rights,[2] International Covenant on Civil and Political Rights[3] the International Convention on the Elimination of All Forms of Racial Discrimination,[4] the Convention on the Elimination of All Forms of Discrimination against Women,[5] the Convention against Torture and Other Cruel, Inhuman or Degrad-

[2] Adopted on 16 December 1966, entry into force 3 January 1976. The Optional Protocol to this Covenant conferring the monitoring committee (Committee on Economic, Social and Cultural Rights) competence to receive and consider individual communications was adopted on 10 December 2008 (entry into force 5 May 2013).

[3] Adopted on 16 December 1966, entry into force 23 March 1976. Its first Optional Protocol conferring the monitoring committee (Human Rights Committee) of this treaty, competence to receive and consider individual communications was adopted on 16 December 1966 (entry into force 23 March 1976). A Second Optional Protocol aimed at the abolition of death penalty was adopted on 15 December 1989 (entry into force 11 July 1991).

[4] Adopted on 21 December 1965, entry into force 4 January 1969.

[5] Adopted on 18 December 1979, entry into force 3 September 1981. Its Optional Protocol conferring to the Committee monitoring this treaty competence to deal with individual complaints was adopted on 10 December 1999 (entered into force 22 December 2000).

ing Treatment or Punishment,[6] the Convention on the Rights of the Child,[7] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[8] the Convention on the Rights of Persons with Disabilities (and its Optional Protocol)[9] and the International Convention for the Protection of All Persons against Enforced Disappearances.[10] Each Committee is composed of independent experts, ranging in number from 10 to 23 members.

By ratifying or accessing the core treaties named above, States parties agree to be bound by a range of monitoring systems. Firstly, all treaty bodies are mandated to receive and consider reports submitted by State parties explaining the judicial, legislative, administrative or other measures adopted to implement the relevant treaty within their jurisdiction. The Committees issue their own commentaries and conclusions on these reports which have included, at times, recommendations on special measures. While some treaties offer the possibility of inter-governmental complaints to allow a State party to raise the possible breach of the treaty provisions by another State party, this has never been used.[11] As a third monitoring mechanism, all core treaties and accompanying protocols (except the Committee on the Rights of the Child)[12] have competence, subject to the specific consent of the State parties, to assess individual complaints from individuals claiming

[6] Adopted on 10 December 1984, entry into force 16 June 1987. Its Optional Protocol was adopted on 18 December 2002 (entry into force 22 June 2006) establishing a system of preventive visits.

[7] Adopted on 20 November 1989 (entry into force 2 September 1990). Two additional Protocols to this Convention were adopted on 25 May 2000 on the rights on the sale of children, child prostitution and child pornography; and on the involvement of children in armed conflict. Both Protocols entered into force in 2002. A third protocol, allowing individual communications was adopted in 2014 but is not yet in force.

[8] Adopted on 18 December 1990 (entered into force 1 July 2003).

[9] Adopted on 13 December 2006 (entered into force 12 May 2008).

[10] Adopted on 20 December 2006 (entered into force 23 December 2010).

[11] All State parties to the International Covenant on the Elimination of All Forms of Racial Discrimination are bound by this procedure (articles 11-13). All the other treaties setting up this procedure require the specific consent of the state parties, i.e., the International Covenant on Civil and Political Rights [art. 41(1)]; the Convention Against Torture (art. 21) and the International Convention on Migrant Workers (art. 75).

[12] This will change with the entry into force of the third Protocol to this Convention (see above fn 6).

to be victims of violations of the rights set forth in the concerned treaty. It is also possible to find specific references to special measures in the jurisprudence emanating from the analysis of individual complaints. Other monitoring mechanisms included in the core treaties include confidential enquiries, the establishment of domestic mechanisms of prevention and early warning measures, but these will are less relevant to the purpose of this paper.

All treaty bodies publish "general comments", referred to as general recommendations by the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Elimination of Discrimination of All Forms of Racial Discrimination (CERD). General comments are authoritative interpretations of the provisions included in the treaties, combining legal analysis with policy and practice guidelines. While only CEDAW and CERD have issued general recommendations focused exclusively on special measures,[13] commentaries addressing affirmative actions can be found in the general comments of other Committees.[14]

The decisions of the Committees are not legally binding and their efficacy depends on the co-operation of the State parties and, in great measure, their susceptibility to feel "shamed" by the publicised conclusions of the different groups of experts. The special authority of decisions and general comments emanating from Committees was acknowledged by the International Court of Justice in the *Diallo* case.[15] Referring specifically to the Human Rights Committee, the International Court of Justice stated that its practice should be given "great weight" because it "was established specifically to supervise the application of that treaty."[16]

---

[13] CERD General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009), CEDAW General Recommendation No. 5 (1998) and General Recommendation No. 25 (2004).

[14] General Comments/Recommendations are available on the Office of the United Nations High Commissioner for Human Rights Website at <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>. Access on: 8 Dec. 2017.

[15] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo*) ICJ Reports (2010-2011) 611, paragraph 66.

[16] Ibid.

1.2 Treaty provisions on special measures

Already in 1981 the Human Rights Committee stated that articles 3, 2.1 and 26 of the Covenant on Civil and Political Rights required affirmative action measures by States designed to ensure the positive enjoyment of rights.[17] The oldest of the core human rights treaties, the Convention on the Elimination of All forms of Racial Discrimination, clarifies from its first article that special measures aimed at ensuring the development and protection of certain racial groups or individuals belonging to them with the aim of guaranteeing them the full and equal enjoyment of human rights, do not constitute discrimination.[18] This is complemented by the obligation to adopt special measures under certain circumstances, enshrined in article 2.2 that states:

> States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Similar provisions can be found in the text of the Convention on the Elimination of All Forms of Discrimination Against Women regarding posi-

[17] ICCPR General Comment 4, *Article 3: Equality Between the Sexes* (1981) paragraph 2.

[18] Article 1(4) states: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights or different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

tive obligations of the States (article 3)[19] and express obligations regarding special measures, enshrined in article 4:

> 1. Adoption by State Parties of temporary special measures aimed at accelerating *de facto* equality between mean and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
> 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

It is thus unsurprising that both Committees monitoring these Conventions, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) have been the most active treaty-bodies in articulating the meaning and scope of special measures. They have addressed the issue in their reports and jurisprudence, including specific general recommendations on the subject matter. This has modelled the practice followed by other committees and clarified the criteria to identify legitimate criteria for different treatment, beneficiaries of the measures and their scope. The Convention on the Rights of People with Disability is the third core human rights treaty regulating affirmative action, in this context named "specific measures" to avoid the term "special" due to its obvious connotations for people with disabilities. Since this is a relatively new Convention, the Committee on the Rights of People with Disability (CRDP) has not adopted to date a general comment on this field, although it has referred to affirmative action measures in its jurisprudence.

[19] "State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

1.3 **Definition and objectives of special measures**

Treaty-bodies have insisted on the importance of the objective pursued with the design and implementation of special measures. Therefore, any definition is intrinsically linked to the purpose sought with the policies and practices aimed at advancing effective equality through affirmative action.[20] While special measures are generally conceived as remedial actions to address *de facto* inequality of certain groups, the Committee on Economic, Social and Cultural Rights (CESCR) has adopted a more ambitious stance. In its General Comments 16 (2005) and 20 (2009) this body has understood affirmative action as means to suppress conditions that perpetuate discrimination, implying that these measures should tackle the underlying causes of discrimination. By stating that special measures should bring "disadvantaged or marginalized persons or groups of persons to the same substantive level as others" it has implied that the objective of such provisions should be the achievement of equality of results.[21] While both CEDAW and CERD's position is that obligations of state parties towards achieving effective equality are independent of proof of past discrimination, CEDAW also takes a more progressive view on the objective of affirmative actions and conceives them as a means to transform structural, social and cultural changes underpinning past and current discrimination associating them to equality of results.[22]

In the context of the Convention it monitors, CERD has articulated the most complete definition of the meaning of measures falling within the category. According to this Committee:

> 'Measures' includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as

[20] See for instance CESCR General Comment No 13, UN doc. E/C.12/1999/10 paragraph 32 or ICCPR General Comment No. 18 on non-discrimination (1990) paragraph 10.

[21] TEKLÈ, Tzehainesh. An international perspective on affirmative action. In: DUPPER, Ockert; SANKARAN, Kamala (Ed.). Affirmative Action: A Perspective from the Global South. *Sun Press*, v. 89, p. 101, 2014.

[22] Ibid. p. 99-100.

> plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life of disfavoured groups, devised and implemented on the basis of such instruments.[23]

These measures are to be introduced as temporary and be discontinued once the desired results have been achieved. The adjective "special" denotes that the measures are designed to serve a specific goal.[24]

1.4 State obligations: temporary special measures vs. permanent rights derived from equality

Treaty-bodies have interpreted the right to effective equality to enjoy the human rights articulated in their texts, as creating a positive obligation on the State, to incorporate as required provisions on "special measures in their legal system, whether through general legislation or legislation directed to specific sector [...] as well as through plans, programmes and other policy initiatives [...] at national, regional and local level."[25] CERD has clarified that this obligation "is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject

[23] General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) paragraph 13. See also CEDAW General Recommendation 0. 25 on Temporary Special Measures (2004), paragraph 22.

[24] CEDAW General Recommendation No. 25 on Temporary Special Measures (2004) paragraphs 20-22.

[25] CERD General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) paragraph 13. See also general comments of the Human Rights Committee regarding the implementation of the International Covenant on Civil and Political Rights: IICCPR General Comment No. 18 on non-discrimination (1990) paragraph 173 and No. 25 on the right to participate in public affairs, voting rights and the right to equal access to public services (1996) paragraph 23. For an early reminder of the obligation contained in the Convention, see CEDAW General Recommendation No. 5 (1988).

to their jurisdiction."[26] Special measures are temporary and therefore, they are also different from permanent rights enjoyed by specific categories of persons or community such as minorities or indigenous peoples.[27] The difference between non-identical treatment of a temporary and permanent nature is also explained by CEDAW in its General Recommendation No. 25 to clarify the relationship between paragraphs 1 and 2 of article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women:[28]

> 15. There is a clear difference between the purpose of the 'special measures' under article 4, paragraph 1, and those of paragraph 2. The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their *de facto* or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of temporary nature.
> 16. Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge [...] would warrant a review.[29]

Nonetheless, the confusion between temporary special measures and permanent positive obligations of the states is still manifest in the General Comment of the CESCR in 2009, when it states that:

> In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or sup-

[26] General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) paragraph 14

[27] General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) paragraph 15.

[28] CEDAW General Recommendation 25, *Article 4, Paragraph 1: Temporary special Measures* (2004)

[29] Ibid. paragraphs 15 & 16.

> press conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.[30]

The Committees have also commented on the need and adequacy of special measures adopted by specific countries in their reviews of country reports. CEDAW has issued the largest number and most detailed concluding observations on the pertinence of the obligation to introduce affirmative actions to accelerate the *de facto* equality of women, including within the private sector.[31] For instance, in recent concluding observations, CEDAW has commended the successful implementation of quotas for the participation of women by Norway in the field of education, and Rwanda and the Seychelles in the area of representation of women in government. These, among others were considered positive steps undertaken by States to implement the rights of the Convention through special measures.[32] States more reluctant to adopt these kind of measures have been urged by CEDAW to:

> [...] adopt effective measures in the formal labour market, including temporary special measures, to increase female participation and eliminate both horizontal and vertical occupational segregation, to narrow and close

[30] ICESCR General Comment No. 20, *Non-discrimination in economic, social and cultural rights (art. 2, para.2, of the International Covenant on Economic, Social and Cultural Rights*) UN doc. E/C.12/GC/20 paragraph 9.

[31] The compilation of such concluding observations covering the period between 1994 and 2001 can be found in the *United Nations Human Rights Treaties* Website maintained by Prof. Bayefsky at <http://www.bayefsky.com/bytheme.php/index/theme>. Access on: Dec. 8, 2017.

[32] These conclusions are compiled and summarised by Connie De La Vega, Kokeb Zeleke, and Esther Wilch, 'The Promotion of Economic, Social, and Cultural Rights of Vulnerable Groups in Africa Pursuant to Treaty Obligations: CRC, CEDAW, CERD, & CRPD' 14 *Wash. U. Global Stud. L. Rev*. 213 (2015). Available at: <http://openscholarship.wustl.edu/law_globalstudies/vol14/iss2/5>. Access on: Dec. 8, 2017.

> the wage gap between women and men, and to ensure the application of the principle of equal remuneration for work of equal value, as well as equal opportunities at work.[33]

Focusing on periodic reports reviewed by CEDAW in 2013, Mayra Gómez identifies recommendations made by the Committee regarding the adoption of special measures addressed to Andorra (to strengthen the capacity of women entrepreneurs) Benin (to ensure that women participate in the decision-making process and management of resources, in particular land, water and forestry); Moldova (to encourage young women to choose non-traditional fields of study and professions) and Seychelles (in the area of employment).[34]

CERD has repeatedly called for the introduction of affirmative actions in the areas of education, employment, housing, land rights, health services and other sectors in its concluding observations pertaining a wide range of countries, including Australia, Bangladesh, Bulgaria, Croatia, Colombia, Costa Rica, Cuba, Denmark, Fiji, Finland, France, Guatemala, Hungary, Ireland, India, Macedonia, Mexico, Namibia, Nigeria, Nepal, Netherlands, Portugal, Romania, Russian Federation, Slovakia, New Zealand, United Kingdom, United States of America, Uruguay and Zimbabwe.[35] Between 1993 and 2005, the Human Rights Committee recommended the adoption of affirmative actions to Ireland, Bulgaria, Slovenia, United States of America, Ukraine, Russian Federation, Mauritius, Zambia, Chile, Lesotho,

[33] See CEDAW, *Concluding observations on the combined initial and second reports of Afghanistan*, UN. Doc. CEDAW/C/AFG/CO/1-2 (July 2013) paragraph 35 (a). Referring to women living in rural areas, Roma women and women with disabilities, CEDAW recommended Hungary to apply temporary special measures to facilitate access to education and employment; equally the CEDAW has requested Norway to consider the extension of quotas to academia (UN Doc. CEDAW/C/NOR/CO/8, 2012).

[34] GÓMEZ, Mayra. *Women in Economic and Social Life. Background Paper for the Working Group on the issue of discrimination against women in law and in practice*. 2014. p. 25-26. Available at: <www.ohchr.org/Documents/Issues/Women/WG/ESL/BackgroundPaper1.doc>. Access on: Dec 8, 2017.

[35] The compilation of such concluding observations covering the period between 1991 and 2005 can be found in the *United Nations Human Rights Treaties* Website maintained by Prof. Bayefsky at <http://www.bayefsky.com/bytheme.php/index/theme>. Access on: Dec 8, 2017.

Venezuela, Croatia, Check Republic and Guatemala.[36] The CESCR and the Committee on the Rights of the Child (CRC) have also covered affirmative actions in their concluding observations.[37]

1.5 **Conditions and criteria for the adoption of special measures**

In 1993, CERD explained the required conditions to implement special measures, stating that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate of fall within the scope of article 1, paragraph 4."[38] In regard to education, the CESCR has clarified:

> [...] that special measures intended to bring about *de facto* equality for men and women, and disadvantaged groups, is not a violation of the right to non-discrimination [...] so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.[39]

The 2009 General Recommendation 32 by CERD has outlined the conditions required for the adoption and implementation of special measures, in particular, the requirement to assess the socio-economic and cultural status and circumstances of various groups in the population and their participation in the social and economic development of the country. This assessment must be based on disaggregated data, incorporating a gender

[36] Ibid.

[37] For relevant concluding observations issued by ICESCR and CRC between 1998 and 2005, see Ibid.

[38] CERD General Recommendation XIV (March 1993) UN doc A/48/18. A similar statement can be found in CERD General Recommendation XXX on discrimination against non-citizens (2005) paragraph 4.

[39] See ICESCR General Comment No. 19 (1999) paragraph 32; see also ICESCR General Comment No. 16, *Article 3L The Equal Right of Men and Women to the Enjoyment to the Enjoymnet of all Economic, Social and Cultural Rights* (2005) paragraphs 10, 15, 21, 35 and 36.

perspective, by race, colour, descent and ethnic or national origin.[40] Beneficiaries of special measures should be consulted and have an active role in their design and implementation. In all cases the special measures should be tailored to the situation they are trying to change, necessary in a democratic society and respect the principles of fairness and proportionality.

Special measures must be temporary and therefore they require continuous follow-up, which in turn, requires revision of the data justifying their introduction in the first place. Therefore, CERD requests States to include in their periodic reports information about:

> [...] the terminology applied to the special measures [...]; the justification for the special measures being adopted, including relevant data and statistics and information about the general situation the beneficiaries find themselves in; a brief description of how the disparities that need remedying arose and the expected results of applying the measures; who the beneficiaries of the affirmative action will be; the series of consultations which led to the measures being adopted, including those with the beneficiaries and civilian society in general; the nature of the measures and how they promote progress, development and protection for the groups and individuals they apply to; areas of action or sectors where the special measures have been adopted, and the institutions responsible for evaluation of the measures and the reasons why these mechanism are considered adequate, together with involvement of the beneficiaries in the institutions applying the measures; and provisional results of application, plans for adopting new measures and the justification therefore, and information about the reasons why measures have not been adopted in view of the situations which seemed to justify their being adopted.[41]

[40] General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) paragraph 17.

[41] See Pastor MARTÍNEZ, E. Murillo. Affirmative Action Measures or Special Measures: For Redressing Historical Injustices and Structural Discrimination against Afro-Descendants. *Summary of the 10th Session of Afro-Descendants Work Team*. Geneva, March 2011. p. 6.

However, CERD has rarely expressed concern over the longevity of existing special measures in its concluding observations.[42]

1.6 **Growing consensus on (some) beneficiaries of special measures**

Disadvantage associated with structural and individual realities of discrimination in a given society, proven by reliable disaggregated data, must be the basis for identifying beneficiaries of measures that involve a differential treatment. People suffering from racial discrimination, women and persons with disability are already identified as potential beneficiaries of such measures in the text of the Conventions examined above. The economic, social and cultural realities of different countries and regions prevents the prescription of measures that may redress inequalities of any group worldwide, including those considered in need of international protection by a treaty. This assumes that national legislation will normally identify who benefits from affirmative action provisions.[43] While treaty bodies have identified general beneficiaries of special measures through their engagement with individual communications and country reports, it remains unusual for them to identify specific communities fitting within this category universally. The Human Rights Committee took a different approach in its general comment on persons belonging to minorities in 1994.[44] Under the expression "positive measures" both general obligations of the state and temporary special measures were addressed as a tool to advance the material equality of minority groups and persons belonging to minorities. In 2002, CERD reaffirmed that States had to adopt special measures as one of the tools to eliminate descent-based discrimination and remedy its consequences. The vagueness

[42] See UN doc. A/HRC/28/81 (2015) summarizing the expert presentation and initial discussion on the topic of "Special measures, including affirmative or positive measures, strategies or actions, to prevent, combat and eradicate all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance," Section B, paragraph 44.

[43] *The Concept and Practice of Affirmative Action. Final report submitted by Mr. Marc Bossuyt, Special Rapporteur in accordance with Sub-Commission resolution 1998/5*, UN doc. E/CN.4/SUB.2/2002/21 (2002) paragraph 9.

[44] CCPR/C/21/Rev.1/Add.5 (1994).

of the disadvantaged groups under consideration, "minorities" and descent-based communities, probably facilitated this approach.

The strong language and content of CERD's General Recommendation 34 is exceptional. It calls for urgent special measures around the globe and to educate and raise public awareness on their importance in addressing structural discrimination that affects people of African descent.[45] A few years earlier CERD advocated such measures for Roma.[46] CEDAW has identified rural women, in particular landless rural women, as a group that needs to be addressed and prioritised in the design and implementation of special measures globally.[47] Rather cursory mention to special measures can also be found in the CEDAW general recommendations on older women or disabled women.[48] The identification of beneficiaries of special measures represents a new approach by the Committees. Former general recommendations addressing other groups such as indigenous people, unpaid women workers in rural areas, refugees and displaced people and women migrant workers do not contain a general recommendation for the implementation of special measures. This suggests a growing universal consensus on the need of affirmative action for the groups identified above, as confirmed by the practice of some Charter-bodies, which will be assessed next.

2 UN Charter-bodies

2.1 Overview

Human rights monitoring mechanisms established by the decision of an inter-governmental organ of the UN are known as "charter-based" bodies. In practice, the term is used to designate those mechanisms created by the now defunct UN Commission on Human Rights, replaced since March

[45] See CERD/C/CG/34 (2011) paragraphs 7, 18-20, 25, 45, 59 & 64.
[46] CERD General Recommendation No. 27 (2000) paragraphs 28, 29 & 41.
[47] CEDAW General Recommendation No. 35, CEDAW/C/CG/34 (2016) paragraphs 4, 17(b), 20, 21, 57, 78(d) & 94.
[48] CEDAW General Recommendations No.18 (1991) and No. 27 (2010) respectively.

2006, by the Human Rights Council, i.e. the public special procedures and the "complaint procedure". In 2008, the Universal Periodic Review became a new Charter-based procedure. With the exception of the Universal Periodic Review, these organs are led by experts whose work is governed by the principles of impartiality and independence from political interference.

The Human Rights Council, a subsidiary body of the General Assembly, is the only intergovernmental body of the system of the UN devoted exclusively to the promotion and protection of human rights. It consists of representatives of 47 different countries following equitable geographical distribution.[49] The Council has inherited the main mechanisms from its predecessor: the public special procedures along with a confidential complaint procedure and other subsidiary bodies focused on standard-setting or other specific thematic issues such as development or the effective implementation of the Durban Declaration and Programme of Action. The Council meets no fewer than three times per year for a total period of no less than ten weeks. In addition, it can hold Special sessions when the emergency of the situation requires it.[50]

The Human Right Council mandate includes promotional and protective human rights powers. Its meetings are public and any State Members, observers and member of the organised civil society with consultative status can participate in the discussions.

The wide range of mechanisms undertaken by both expert and political bodies results in a fragmented and sometimes incongruous treatment of any human rights issue, including affirmative actions. However, it is also possible to identify a growing consensus over the need of temporary special measures, particularly for people of African descent.

[49] Created in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC) it consisted of representatives of 53 States and used to meet publicly once a year.

[50] By 1 January 2017, 13 Special Sessions had been held on the situation of the following territories: occupied Palestinian territories, Lebanon, Myanmar, Darfur, Democratic Republic

2.2 **Conceptual framework**

In 1998 the Sub-Commission on the Promotion and Protection of Human Rights (former subsidiary body of experts of the now extinct Commission on Human Rights) appointed Marc Bossuyt as Special Rapporteur to prepare a study on the concept of affirmative action. His final report, submitted in 2002,[51] outlines the concept of affirmative action, the criteria to justify their design and implementation and different forms of affirmative action.

Acknowledging the absence of a legal definition generally accepted at national or international level, the Bossuyt adopted the following working definition of affirmative action: "Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."[52]

The approach of the Special Rapporteur focused on the criteria of identifying the groups sufficiently disadvantaged to deserve special treatment, emphasising the need of a sufficient connection between the aim sought with affirmative actions and the means to achieve such purpose. The report highlights "the importance of not basing affirmative action solely on group membership, but of taking other factors, such as socio-economic factors into account to very if someone qualifies or affirmative action."[53] As for the grounds justifying the introduction of affirmative actions for specific groups Bossuyt listed the following: a) remedying or redressing historic injustices; b) remedying social/structural discrimination; c) creation of diversity or proportional group representation; d) social utility generated by increasing the well-being of people; e) pre-emption of social unrest; f) better efficiency of the socio-economic system; and g) as a means of nation building.

---

of Congo, Sri Lanka, Haiti, Cote d'Ivoire, Libya, Central African Republic, Burundi, Syria and South Sudan.

[51] *The Concept and Practice of Affirmative Action. Final report submitted by Mr. Marc Bossuyt, Special Rapporteur in accordance with Sub-Commission resolution 1998/5*, UN doc. E/CN.4/SUB.2/2002/21 (2002).

[52] Ibid. paragraph 6.

[53] Ibid. paragraph 15.

The emphasis on meritocracy permeating the report, the disregard for the impact of historic discrimination in present generation and the neglect towards updating the meaning of equality sought with the 2001 Durban Conference have been criticised:

> The individualistic perspective was uncritically adopted. The realities of racism and human suffering were diluted in a discourse that centered on an unencumbered competence [...] The reconciliation of the positive and negative components of equality that affirmative action can bring about is lost in a shallow rhetoric contradicted by the global realities of marginalization brought about by racism and inequalities [...] The Special Rapporteur's strictly formalistic approach to affirmative action supports critical racial theorists' idea that hegemonic discourses deny the existence of systemic dominance.

The Special Rapporteur failed to recognize that affirmative mobilization and fairness programs often cannot alter entrenched networks of discriminatory practices. The fact is that discrimination is so entrenched in systems of meritocracy that the promotion of equality requires profound transformation on a supra-individual level.[54]

2.3 **Public Special procedures**

Public Special Procedures are human rights monitoring mechanisms endorsed to individual experts ("Special Rapporteurs", "Special Representatives" and "Independent Experts") since 1967, whose common mandate is the investigation and reporting of human rights situations either in a specific territory (country mandates) or with regard to a phenomena of violations (thematic mandates).[55] These procedures owe their existence to resolu-

[54] ROMANY, Celina; CHU, Joo-Beom. Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions. *Conneticut Law Review*, v. 36, p. 831, 859-860, 2004.

[55] The list of existing special procedures is available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>. Access on: Dec 8, 2017.

tions adopted by majority in the Human Rights Council and are not subject to specific consent of any State. The scope of their action is universal:[56] all the States of the world are monitored by these bodies and they cover civil, political, economic, social and cultural rights as well as "rights of solidarity" such as issues related to development and the environment. Individual as well as collective rights are under scrutiny. Mandate holders have developed flexible methods of work and their activities go beyond reporting on their activities and findings. Most of them accept complaints on human rights violations to which they can react expeditiously thorough "urgent appeals". Mandate holders carry out country visits to investigate the situation of human rights in a given domestic context.[57] This requires the consent of the State to be visited, but is premised on complete freedom of movement and respect for the immunity and independence of the experts. As of December 2017, 118 States have issued standing invitations allowing any Rapporteur to visit their countries.

The universal scope of special procedures and their easy accessibility are particularly valuable in a world where many States are not covered by specific regional system of protection of human rights;[58] may not have ratified all the UN core international human rights instruments, or may have ratified them only partially (with reservations or accepting limited monitoring procedures), or have failed to implement them. Many special procedures cover rights (such as food, health, housing, poverty) or groups (minorities, indigenous peoples) for which international channels are limited or non-ex-

[56] Obviously this is not the case for country mandates whose competence is limited to the territory under study, although the usual practice is that any country mandate can monitor the situation of the country with regard to any human right.

[57] On the origins and development of these procedures see DOMINGUEZ-REDONDO, Elvira. History of Special Procedures: A 'Learning by Doing' Approach to Human Rights Implementation. In: FREEDMAN, Nolan; MURPHY, Thérèse (Ed.). *The UN special procedures system*. Brill, 2017.

[58] Regional systems of protection exist in Europe, America and Africa, but still the majority of the world population do not reside in countries bound by regional systems, mainly due to the lack of regional institutions in Asia.

istent. Access to special procedures is also characterized by the lack of formal requirement, enabling swiftness and flexibility.[59]

Conversely, their pronouncements are not legally binding. The importance acquired by the special procedures is rooted in the publicity of their work under the stamp of the UN. First of all, the debates, resolutions and decisions within the Human Rights Council concerning these procedures are public. More decisively, the possibility of using publicity as a channel of information and as a tool to exercise pressure over States and other concerned actors is one of the most significant achievements in the work of these mechanisms, particularly during the past decade.

The work of special procedures on affirmative action illustrates the difficulties of assessing the effectiveness of interventions by human rights mechanisms. While many make references to special measures/affirmative actions in their report, their databases (particularly the *Universal Human Rights Index*)[60] do not yield comprehensive results in the area, partially due to the diverse terminology used to refer to them. In any case, it is possible to state that special procedures have been particularly supportive of temporary special measures when they target persons of Afro-descendent origin, with the Working Group of Experts on People of African Descent being the most vocal about their necessity. This includes expressing support for the introduction of quotas, undoubtedly the most controversial among them. For instance, the Working Group considered the adoption of the *Quota law* by Brazil in 2012 as "a landmark step towards equality in education" and recommended the provision of sufficient support to enact legislative measures "for further affirmative action, particularly in creating quotas in government."[61] The Working Group has expressed its strong stance in favour of:

[59] For an overview of the work of special procedures see publications available at the OHCHR website at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Publications.aspx>. Access on: Dec 8, 2017.

[60] Available n the UN Office of the High Commissioner for Human Rights Website at: <http://uhri.ohchr.org/en>. Access on: Dec 8, 2017.

[61] *Report of the Working Group of Experts on People of African Descent on its mission to Brazil (4-14 December 2013)* UN doc. A/HRC/27/68/Add.1 (2014) paragraph 107 b) & e).

> [...] an action plan that will include special measures-such as the full span of legislative, executive, administrative, budgetary and regulatory instruments at every level in the State apparatus, as well as plans, policies, programs and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavored groups, devised and implemented on the basis of such instruments.[62]

However, this clear language is not typically found in the reports of other mandate holders of special procedures where general recommendations regarding the convenience to adopt temporary special measures without specifying their nature is the norm.[63]

The Working Group on People of African Descent has also provided guidelines on the requirements that special measures should met. First of all they should be part of "goal-directed programs" aiming at alleviating and remedying disparities in the enjoyment of human rights, targeted narrowly to avoid the perception or actual introduction of reverse discrimination. The operationalization of such programs is envisaged as follows:

a) States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and perma-

[62] *See Perspectives of the Working Group on positive action, presentation by Monorama Biswas, 10th session of the Working Group of Experts on People of African Descent (28th March-1 April 2011)*. Available at: <www2.ohchr.org/english/issues/racism/groups/african/docs/WGPAD_10th_AUV.doc>. Access on: Dec 8, 2017.

[63] See for instance: Report of the Special Rapporteur on violence against women. Mission to the United Kingdom and Northern Ireland (30 March-15 April 2014), UN doc. A/HRC/29/27/Add.2 (2015), paragraphs 81 & 107. Other Special Rapporteurs have provided some timid guidelines on the range of possible measures, e.g. the Special Rapporteur on the right to education has reminded states that affirmative actions are highly important and they range from the establishment of enrolment quotas to the offer of financial incentives targeted to particularly vulnerable groups (UN doc. A/HRC/17/29, 2011, paragraph 61). Similarly, the Special Rapporteur on the rights of indigenous people emphasized the pertinence and necessity of adopting special measures to overcome discrimination against indigenous peoples in 2014 (UN doc. A/69/267, paragraphs 23-29 & 85).

nent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.

b) Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.
c) The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.
d) Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, color, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.
e) State parties should ensure that special measures are designed and implemented don the basis of prior consultation with affected communities and the active participation of such communities.[64]

2.4 **Universal Periodic Review**

The only substantial change in the mandate of the Human Rights Council from that of its predecessor, is the existence of a periodic review mechanism to evaluate the fulfilment of human rights obligations by all States: the so-called Universal Periodic Review (henceforth UPR). While all countries are under scrutiny by public special procedures regarding the issues under their competence, few country mandates exist, and some countries have always been immune to specific country actions within UN intergovernmental forums. The introduction of a UPR is the most dramatic answer to this criticism in a bid to overcome the application of double

[64] See *Perspectives of the Working Group on positive action, presentation by Monorama Biswas*. 10th session of the Working Group of Experts on People of African Descent (28th March-1 April 2011).

standards and selectivity within the Council.[65] Under the UPR, all countries are reviewed, required to report on the situation of human rights in their country and to engage in an interactive dialogue with Member States on the Council and others wanting to take the floor. In its current configuration, NGOs and National Human Rights Institutions can attend the interactive dialogue, provide reliable information as a basis for review, and take the floor before the adoption of the final outcome report of this process. However, the interactive dialogue among States and a non-confrontational approach remains the central feature of this mechanism.

The UPR is the only international mechanism with 100% State participation, resulting in unprecedented volumes and quality of data about international legal compliance. In its short life, the UPR has become the main forum to assess human rights situations around the globe. Governed by principles of universality, dialogue between equals and co-operation, it has addressed social, economic, cultural, civil, political rights, development vulnerable groups, human rights defenders and gender, including the question of sexual orientation. Respect for human rights standards while countering terrorism, State responsibility for activities of its armed forces overseas, questions about extraordinary renditions and secret places of detention, and non-ratification by Western European States of the Convention on Migrant Workers have all been raised.

By December 2017, 25 States under review have received recommendations on affirmative action mainly concerning the situation of women, indigenous peoples and minorities. It is remarkable that all these recommendations were accepted.[66] Another 26 States received requests to introduce or reinforce temporary special measures (mostly addressing women's rights). Except for Bhutan, Japan, Mauritius and Libya who "noted" these recom-

[65] DOMÍNGUEZ-REDONDO, Elvira. The Universal Periodic Review of the UN Human Rights Council: An assessment of the First Session. *Chinese Journal of International Law*, v. 7, i. 3, p. 721-734.

[66] See database available at upr_info Website at: <https://www.upr-info.org/database/>. Access on: Dec. 8, 2018.

mendations, the other States under review accepted the recommendations, confirming the widespread consensus endorsing affirmative actions.[67]

Conclusions

The Human rights regime appeared to be moving away from the anti-racist agenda that were crucial to the foundations of the human rights discourse. Recent pressures and critiques of the rights agenda however, seem to be signalling a return to the anti-racist foundation of the doctrine.[68] At a time of increased global scrutiny and critique of the human rights system: with voices criticising every aspect of its conceptual, philosophical and legal framework, including by the countries that led their universalisation in the past, the human rights community seems to be reflecting on the basis of its creation.

It has been argued that the articulation of human rights as legal obligations necessarily means that some degree of penalty ought to be associated with compliance failures and lack of remedies for victims, leading to what it has been called "judicial fetishism".[69] This approach to human rights prioritizes adjudication as the most perfect model and, inevitably the focus on individual rights and individual perpetrators that, in turn, facilitates the criminalisation of human rights violation. Such fetishism permeates in the work of many relevant commentators who consider the courts as the best bodies for assessing the validity of special measures.[70] Contributing to the overuse of the metaphor "can't see the forest for the trees", an overt focus on saving individual trees and prosecuting tree surgeons, the attempt to address the structural causes of deforestation have lost the central stage that

[67] Ibid.

[68] As criticised by Celina ROMANY, Celina; CHU, Joo-Beom. Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions. *Conneticut Law Review*, v. 36, p. 831-860, 2004.

[69] DOMÍNGUEZ-REDONDO, Elvira. Is there life beyond naming and Shaming in human rights implementation? *New Zealand Law Review*, v. 4, p. 673, 2012.

[70] See *The Concept and Practice of Affirmative Action. Final report submitted by Mr. Marc Bossuyt, Special Rapporteur in accordance with Sub-Commission resolution 1998/5*, UN doc. E/CN.4/SUB.2/2002/21 (2002) paragraph 100 and UN doc. A/HRC/28/81, paragraph 84.

it deserves. From the analysis above it would appear that the importance given to temporary special measures by most human rights bodies reveals a change of lenses towards addressing structural issues rather than focussing exclusively on individuals, in particular, in the acknowledgement of the need to tackle discrimination of women and of people based on descent, particularly African descent. This development seems concomitant to the progressive acceptance of an autonomous right to "equality" rather than its understanding as a principle underpinning the human rights agenda or as an accessory to the enjoyment of other rights, although the scope and concrete meaning of such a right remains controversial.

Whether this advancement bears fruits in terms of a more effective enjoyment of human rights, or in saving the human rights discourse currently under attack, remains uncertain. The growing consensus on the need for special measures, its conceptual contours, and the beneficiary groups is still not supported by enough reliable data to prove the necessity of introducing such provisions, or of gauging their effectiveness in the short, medium and long-term.[71] Even when evidence exists, it is either ignored by policy-makers or rejected by the majority of the population. In the words of a member of the Working Group of Experts on People of African Descent, "what most people think they know about affirmative isn't right, and what is right about affirmative action most people don't know."[72] A statement made by the British Chancellor Philip Hammond in December 2017 is symbolic of the ignorance that permeates among policy-making circles. While explaining the 2017 budget to the UK Common Treasury committee, he concluded that affirmative actions were linked to "low levels of productivity" in the UK though this was not backed by any empirical data. In his own words:

[71] See for instance, UN doc. A/HRC/28/81, paragraph 82 acknowledging that, while a compilation of special measures introduced by countries around the world was possible, neither such compilation nor quantitative assessment on their efficiency exist.

[72] *See Perspectives of the Working Group on positive action, presentation by Monorama Biswas, 10th session of the Working Group of Experts on People of African Descent (28th March-1 April 2011)*.

> It is almost certainly the case that by increasing participation in the workforce, including far higher levels of participation by marginal groups and very high levels of engagement in the workforce, for example of disabled people –something we should be extremely proud of— may have had an impact on overall productivity measurements.[73]

Easily available data demonstrates the benefits of cash transfer programmes in alleviating poverty.[74] Yet, it is common to come across strong resistance towards these programmes from people from all walks of life.[75] The data and programmes of awareness aimed at debunking myths behind such resistance have not proven to be particularly successful.[76] In 2011, a member of CERD, Pastor Elias Murillo Martinez, portrayed a similar picture in Europe, highlighting that the gap between men and women in managerial posts had hardly changed in the past fifty years. The "soft" measures introduced in Luxembourg, Portugal, Malta, Germany or Finland have not made a substantial difference (with women in managerial positions not breaching the 5% mark), while the introduction of quotas in Norway through its *Equality Law* (2003) resulted in a dramatic increase of women holding posts of responsibility (from 22% in 2004 to 43% by 2009). Nonetheless data revealed that Europeans preferred educational measures for promoting gender equality with only 19% favouring compulsory measures.[77] These discus-

---

[73] FORRESTER, Kate. Philip Hammond: UK Productivity Rates Low Because More Disabled People Are In Work. *Huffington Post*, 6 Dec. 2017. Available at: <http://www.huffingtonpost.co.uk/entry/philip-hammond-uk-productivity-rates-low-because-more-disabled-people-are-in-work_uk_5a281714e4b044d16726b7bd>. Access on: Dec. 8, 2017.

[74] SEGURA-PÉREZ, Sofía; GRAJEDA, Rubén; PÉREZ-ESCAMILLA, Rafael. Conditional cash transfer programs and the health and nutrition of Latin American children. *Revista Panamericana de Salud Pública*, v. 40, i. 2, p. 124-137, 2016; BASTAGLI, Francesca et al. *Cash transfers*: what does the evidence say? A rigorous review of programme impact and of the role of design and implementation features. Overseas Development Institute, 2006.

[75] See also for instance *Report of the Working Group of Experts on People of African Descent on its mission to Brazil (4-14 December 2013)* UN doc. A/HRC/27/68/Add.1 (2014) paragraphs 55 & 56.

[76] See, e.g. BANERJEE, Ahbhijit V. et al. Debunking the Stereotype of the Lazy Welfare Recipient: Evidence from Cash Transfer Programs. *The World Bank Research Observer*, v. 32, i. 2, p. 155, 2017. Available at: <https://doi.org/10.1093/wbro/lkx002>. Access on: Dec. 8, 2017.

[77] Although the number was much higher in some countries. In Spain the acceptance margin for compulsory measures was reported to be 50%. See Pastor MARTÍNEZ, E. Murillo. Affirma-

sions highlight that while consensus on the need for affirmative action may have been reached, and that these are discernible in state practice around the world, key challenges that remain include a deeper education of policy makers and those who operate in the public realm. As it currently stands law appears to be a lead indicator of change, based on the quest to bridge the gap between *de jure* and *de facto* equality. If political sentiment and education fail to challenge long held assumptions among polities, the benefits made could be lost.

tive Action Measures or Special Measures: For Redressing Historical Injustices and Structural Discrimination against Afro-Descendants. *Summary of the 10th Session of Afro-Descendants Work Team*. Geneva, March 2011. p. 2.