

## Chapter 4 Efficacy of Affirmative Action Measures in the United Kingdom and South Africa

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### Introduction

This book shows that there is a growing international agreement on the principle of equality of opportunity for all, a principle which, as Kennedy-Dubourdieu writes, underpins a stable and just society.<sup>1</sup> She continues that this raises the question how best to achieve equality and that ‘one of the great innovations in social policy in recent times has been that of “affirmative action”, set up in various parts of the world’.<sup>2</sup> Such affirmative action measures in the United Kingdom (UK), the EU and South Africa are the focus of this chapter. It begins with a short overview of the origins and evolution of affirmative action in the UK, Northern Ireland, the European Union (EU) and South Africa as explored in a previous publication.<sup>3</sup> This paper builds on that research in which it was explained that affirmative action is, in the UK and the EU, generally referred to as positive action. It explained these measures in Great Britain (England, Scotland and Wales) and Northern Ireland (where the term ‘affirmative action’ is used), which has different provisions due to its history. The terms ‘affirmative action’ and ‘positive action’ will be used as interchangeable and will be understood as referring to a

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<sup>1</sup> Kennedy-Dubourdieu, E. Introduction. In: Kennedy-Dubourdieu, E. (Ed.) *Race and inequality*. London/New York: Routledge/Taylor & Francis Group, 2006. P. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Howard, E. Affirmative action in the UK and in South Africa. In: Baez, N; Dominguez Redondo, E. (Eds.) *The existence and efficacy of affirmative action measures in UK, South Africa, India, China, Latin America and Brazil*. Joacaba: Editora UNOESC, 2018. P. 185-214.

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’.<sup>4</sup>

The overview of the legislation is followed by an assessment of the implementation and efficacy of the affirmative action measures. Then, the obstacles to their implementation and their contestation are examined. The next part focuses on a specific form of affirmative action for disabled people: duties of reasonable accommodation. The conclusion includes the suggestion of another measure, mainstreaming equality, which can complement affirmative action measures in working towards more equality in practice. Mainstreaming is further analysed in a case study in Part III of this book.

Overview of the origin and evolution of affirmative action measures in the UK and South Africa

England, Scotland and Wales

In England, Scotland and Wales, sections 158 and 159 of the Equality Act 2010 (EA 2010)<sup>5</sup> on positive action apply. Section 158 concerns general provisions and is not applicable to recruitment and promotion. This section allows generally for the taking of affirmative action measures to alleviate disadvantage suffered by people who share one of the protected

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<sup>4</sup> O’Cinneide, C. (2012) *Positive action*. ERA, 2012. P. 1: [http://www.era-comm.eu/oldoku/SNLLaw/04\\_Positive\\_action/2012\\_Cinneide\\_EN.pdf](http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2012_Cinneide_EN.pdf) (all websites accessed 16 January 2020 unless otherwise stated).

<sup>5</sup> Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>

characteristics, or to reduce their underrepresentation or to meet their particular needs. Any measures taken under this section are subject to a proportionality test which means that the measure must be a proportionate way to achieve one of the legitimate aims mentioned in the section. When assessing proportionality, the seriousness of the relevant disadvantage, the extremity of need or underrepresentation and the availability of other means of countering them are taken into account. This means, first, that these measures are time-limited and should finish when the aim is achieved as they will then no longer be proportionate. Second, the measure will generally not be considered proportionate if there are other, less discriminatory ways of achieving the aim.

Section 159 EA 2010 allows for positive action measures in recruitment and promotion. So an employer can take a protected characteristic into account when deciding who to recruit or who to promote where people having the protected characteristic are at a disadvantage or are underrepresented. However, the employer can only do so where the candidates for recruitment or promotion are as qualified as each other – in other words, this can only be done in a so-called ‘tie break’ situation – and the employer cannot have a policy which automatically treats all persons who share a particular protected characteristic more favourably than others, as the merits and qualifications of each candidate have to be considered. Moreover, the actions adopted under this section are subjected to the same proportionality test applied to section 158.

Sections 158 and 159 EA 2010 conform to European Union (EU) law, where the same rules were established through the case law on positive action in relation to sex discrimination. EU law allows for positive action measures in article 157(4) TFEU (Treaty on the Functioning of

the European Union) and in the Anti-Discrimination Directives.<sup>6</sup> For gender discrimination, this is also laid down in article 23 of the EU Charter of Fundamental Rights, which determines that ‘the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex’. Both the TFEU and the Directives mention that positive action measures are allowed ‘to ensure full equality in practice’. The Court of Justice of the European Union (CJEU) has held that the provisions exclude programmes which involve automatic preferential treatment at the point of selection in employment.<sup>7</sup> The CJEU allows positive (affirmative) action in employment where two candidates are equally qualified.<sup>8</sup> The CJEU has also held that positive measures in relation to gender discrimination must be interpreted strictly because they are a derogation

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<sup>6</sup> Article 5 Council Directive 2000/43/EC of 29 June 2000 *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L 180/22; article 7 Council Directive 2000/78/EC of 27 November 2000 [2000] OJ L 303/16; article 6 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; article 3 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.

<sup>7</sup> 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; 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. For all judgments of the CJEU: <http://curia.europa.eu/juris/recherche.jsf?language=en> For a more extensive discussion of the development of positive action in EU law see: Ellis, E; Watson, P. *EU anti-discrimination law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2012. P. 420-437.

<sup>8</sup> See the cases in the previous footnote.

of the principle of equal treatment.<sup>9</sup> Moreover, the CJEU has determined that a proportionality test applies to positive action measures.<sup>10</sup> Therefore, such measures should not last beyond the time when “full equality in practice” has been achieved.

Section 104 EA 2010 = allows political parties, in order to address the underrepresentation of women, to use all women shortlists in local and national elections – in other words, they can have a list with only women, thus guaranteeing that a woman is elected. This can be done until 2030. However, political parties cannot use shortlists with, for example, only ethnic minority candidates, despite the fact that this group is also severely underrepresented in Parliament.<sup>11</sup>

It must be noted that the use of sections 104, 158 and 159 EA 2010 and of positive action measures in the EU is entirely voluntary and there is no duty to take such measures under these provisions. An individual cannot, therefore, claim against their employer for failing to take positive action measures.

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<sup>9</sup> See *Kalanke v Freie Hansestadt Bremen*, para. 21; *Marschall v Land Nordrhein-Westfalen*, para. 32. (both: supra note 7).

<sup>10</sup> 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 7, para. 24).

<sup>11</sup> Browning, S. and Uberoi, E. (2019) *Ethnic diversity in politics and public life*, House of Commons Library, Briefing paper number SN01156. 19 September 2019: <https://commonslibrary.parliament.uk/research-briefings/sn01156/>

## Northern Ireland

Northern Ireland's equality laws have developed in a different way from the legislation in the rest of the UK due to the historical situation there with Catholics and Protestants highly segregated from each other in employment. Catholics were concentrated in particular sectors of the labour market and in particular firms and they suffered unemployment rates which were two or three times as high as those for Protestants.<sup>12</sup> As McColgan writes,

in Northern Ireland, having actual or perceived status as Catholic has traditionally been associated with systemic disadvantage and oppression as a result of the creation of a Protestant state in the early part of the twentieth century and a robust approach to its maintenance at least until the mid 1970s.<sup>13</sup>

Due to this historical situation, discrimination on the grounds of religion or belief has been prohibited in Northern Ireland since 1976, when the first Fair Employment (Northern Ireland) Act was adopted. However, that legislation 'rejected, the option of positive discrimination in the form of quotas or fixed ratios for Protestants and Catholics in workplaces'.<sup>14</sup> Thirteen years later, the new Fair Employment (Northern Ireland) Act 1989 introduced a duty on both

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<sup>12</sup> McCrudden, C; Muttarak, R; Hamill, H; Heath, A. Affirmative action without quotas in Northern Ireland. 4 *Equal Rights Review* (2009) P. 7.

<sup>13</sup> McColgan, A. *Discrimination, equality and the law*. Oxford and Portland Oregon: Hart Publishing, 2014. P. 67.

<sup>14</sup> Equinet (2014) *Positive action measures. The experience of equality bodies*. P. 51: <http://www.archive.equineteurope.org/Positive-Action-Measures>

public and private employers to actively practice equality and use affirmative action to achieve fair employment between Catholics and Protestants where necessary. The current provisions can be found in section 4 of the Fair Employment (Northern Ireland) Order 1998 (FETO 1998).<sup>15</sup> The aim of this section is to ensure fair participation, to redress imbalances and underrepresentation. 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, including affirmative action, where this is required. Lawful affirmative 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.

There was, between 2000 and 2011, a special provision for the police service in Northern Ireland, which could be found in section 46 of the Police (Northern Ireland) Act 2000<sup>16</sup>, and which aimed at increasing the number of Catholic police officers and support staff. This section required the appointment of one Catholic person for every person of another religion who was awarded a post (50-50 recruitment). This section would have been incompatible with EU law, and, thus, article 15 of Directive 2000/78/EC contained a specific exception for this.<sup>17</sup> The measure ended on 28 March 2011.

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<sup>15</sup> Fair Employment (Northern Ireland) Order 1998: <http://www.legislation.gov.uk/nisi/1998/3162/contents/made>

<sup>16</sup> Police (Northern Ireland) Act 2000: <https://www.legislation.gov.uk/ukpga/2000/32/contents>

<sup>17</sup> Article 15 Directive 2000/78/EC is headed 'Northern Ireland' and determines that: 'In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not

## South Africa

Affirmative action in South Africa has clear links with the history of apartheid. Section 9(2) of the 1996 Constitution of South Africa<sup>18</sup> explicitly provides for affirmative action measures, defined as ‘measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’. The South African Constitution prohibits only ‘unfair’ discrimination and this is the same for South Africa’s anti-discrimination law, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA 2000).<sup>19</sup> The latter builds on the Constitutional provisions and provides, in section 14, for affirmative action measures. Moreover, the Employment Equity Act 1998 (EEA 1998)<sup>20</sup> imposes a duty on private employers with more than 50 employees and on public authorities to implement affirmative action measures for people from designated groups, namely, black people (including black, coloured and Indian people), women and people with disabilities according to section 1, in order to achieve workplace equity. Section 15(3) explains that the affirmative action measures ‘include preferential treatment and numerical goals, but exclude quotas’. 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

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constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation’.

<sup>18</sup> Constitution of South Africa 1996: <https://www.gov.za/documents/constitution-republic-south-africa-1996>

<sup>19</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 2000: <http://www.justice.gov.za/legislation/acts/2000-004.pdf>

<sup>20</sup> Employment Equity Act 1998: <https://www.ilo.org/dyn/natlex/docs/webtext/51169/65139/e98zaf01.htm>

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 suggests 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 is allowed as long as it allows for deviations; in other words, as long as there is no absolute bar to present or continued employment or advancement of people who do not fall within the designated group. However, an equity plan that does not cater for deviations would be against section 9(2) of the Constitution and section 15 EEA 1998.<sup>21</sup>

## Comparison

After comparing the normative framework regarding affirmative actions in the UK and in South Africa,<sup>22</sup> we concluded that the South African approach was a more substantive equality approach than the approach in the UK and in the EU. A substantive equality approach goes beyond formal equality: whereas formal equality consists of treating everyone in the same way, substantive equality is more sensitive to inequalities caused by past discrimination. The approach to affirmative action in the UK and the EU goes beyond mere formal equality, but represents a ‘derogation approach’ which regards affirmative action as an exception to the prohibition against discrimination. Such action is thus construed strictly but is legitimate in certain defined circumstances. In contrast, in South Africa, affirmative action

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<sup>21</sup> See, for example: *Solidarity and Others v Department of Correctional Services and Others* (CCT78/15) [2016] ZACC 18; *Solidarity v Minister of Safety and Security and Others* (J879/12) [2016] ZALCJHB 107.

<sup>22</sup> See: Howard, E. (supra note 3).

is seen as an integral aspect of the equality guarantee in the Constitution and thus as a legitimate means to fulfil the non-discrimination principle.<sup>23</sup>

The difference between British and EU law on the one hand and South African law on the other is that, whereas the former only allow for 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’ even when there is a candidate from a non-designated group who is more qualified (section 15(2)(d)(i) EEA 1998).<sup>24</sup> The CJEU has clearly rejected the latter.<sup>25</sup> What none of these frameworks appears to allow for is giving automatic preference without considering the individual qualifications of each candidate or without any provision for deviating from this in certain circumstances.

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<sup>23</sup> Ibid. See also on the South African approach: Ngcobo, S. (2003) The meaning of Article 4(1) of the UN Convention on the Elimination of All Discrimination Against Women: a South African perspective. In: Boerefijn, I; Coomans, F; Goldschmidt, J; Holtmaat, R; Wolleswinkel, R. (Eds.) *Temporary special measures*. Antwerp/Oxford/New York: Intersentia, 2003. P. 189; Dupper, O. Restraint, deference and reasonableness affirmative action in South Africa. In: Dupper, O; Sankaran, K. (eds.) *Affirmative action, a view from the global South*. Stellenbosch: Sun Press, 2014. P. 255.

<sup>24</sup> Howard, E. (supra note 3, p. 213-214).

<sup>25</sup> *Abrahamsson and Anderson v Fogelqvist* (supra note 7). See on this: Ellis, E; Watson, P. (supra note 7, P. 434-436).

## Implementation and efficacy

Affirmative action is provided for in the legislation of all jurisdictions examined in this Chapter. All these measures are aimed at achieving equality in practice and all take account of the disadvantage that the targeted groups experience because of past and ongoing discrimination. All aim at dealing with the underrepresentation of these groups in employment and in other areas of life. However, are these measures being used and achieving these aims? This is examined in this part of the Chapter.

### England, Scotland and Wales

In the Discrimination Law Review in 2007, which assessed the then existing anti-discrimination legislation prior to proposing a new Equality Bill, the British Government clearly stated that:

There is a very important distinction *between positive action and positive discrimination*. Positive *action means offering targeted* assistance to people, so that they can *take full and equal advantage of* particular opportunities. Positive discrimination *means explicitly treating* people more favourably on the grounds of *race, sex, religion or belief*, etc. by, for example, appointing *someone to a job just because they are male or just because they are female*, irrespective of merit.

Positive discrimination is prohibited under British and European law and we do not believe it provides a solution to addressing disadvantage.<sup>26</sup>

The Government then explained that positive action measures are permitted ‘to compensate for disadvantage or to meet the special needs arising from membership of a protected group’ and that ‘they are designed to create a level playing field so that disadvantaged groups can compete on equal terms for jobs access to services etc. or to provide services to meet their special needs’.<sup>27</sup> The Government announced that it was going to propose such measures in the new Equality Bill and also stated that it was important to provide clarity about what was and what was not allowed.<sup>28</sup> The explanatory notes to section 159 of the Equality Act 2010 make clear that this is an expansion of what was allowed before, as previous legislation ‘did not allow employers to take any form of positive action at the actual point of recruitment or promotion’.<sup>29</sup> Therefore the provisions in the Equality Act 2010 were meant to expand and clarify the existing positive action measures.

However, has the Equality Act brought clarity and made it easier to use positive action measures? Are sections 158 and 159 of the Equality Act 2010 being used more frequently

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<sup>26</sup> *Discrimination Law Review: A Framework for fairness: proposals for a single equality bill for Great Britain* (London, Department for Communities and Local Government, 2007) Part 2. Para. 7: <http://webarchive.nationalarchives.gov.uk/20120919212654/http://www.communities.gov.uk/documents/corporate/pdf/325332.pdf>

<sup>27</sup> Ibid. Chapter 4. Para. 4.15.

<sup>28</sup> Ibid. Para. 4.46.

<sup>29</sup> Explanatory notes section 159: <https://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

than previous provisions? As mentioned, the use of these sections is entirely voluntary. Davies points out that this is likely to limit their impact and their utility very considerably.<sup>30</sup> Evidence suggests that these sections are indeed little used.<sup>31</sup> For example, Johns *et al* write that there has been ‘a relatively muted response’.<sup>32</sup> And, Davies and Robison write that the indications are ‘that employers prefer to avoid the use of not only these measures in the recruitment and selection procedure, but also positive action measures in general’ and that ‘it appears that these provisions are relied on just as infrequently as the more limited provisions of the antecedent legislation’.<sup>33</sup> The latter authors also point out that it from their research that employers, who do try to use positive action measures, are more comfortable with measures involving outreach and encouragement, which both aim at attracting more applications from the disadvantaged group, and training than with preferential treatment as

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<sup>30</sup> Davies, A. *Employment law*. Harlow: Pearson, 2015. P. 202 and 204.

<sup>31</sup> See, for example, Hepple, B. *Equality: the legal framework*, 2<sup>nd</sup> ed., Oxford/Portland Oregon: Hart Publishing, 2014. P. 160; Johns, N; MacBride-Stewart, S; Powell, M; Green, A. When is positive action not positive action? Exploring the conceptual meaning and implications of the tie-break criterion in the UK Equality Act 2010. *Equality, Diversity and Inclusion: an International Journal*. (2014) p. 98; Davies, A. (supra note 30); Davies, C; Robison, M. Shifting the starting blocks: an exploration of the use and impact of positive action in the UK. In: *Beyond 2015 shaping the future of equality, human rights and social justice*. Equality and Diversity Forum, 2015. P. 65 and 70: [http://www.edf.org.uk/wp-content/uploads/2015/04/EDFJ3259\\_Beyond\\_2015\\_publication\\_22.07.15\\_WEB.pdf](http://www.edf.org.uk/wp-content/uploads/2015/04/EDFJ3259_Beyond_2015_publication_22.07.15_WEB.pdf) This article explains why empirical evidence is needed of how the positive action measures in the Equality Act 2010 work in practice. The results of authors’ study can be found in: Davies, C; Robison, M. *Bridging the gap: an exploration of the use and impact of positive action in the UK*. 2016. P. 4: <https://core.ac.uk/download/pdf/33794901.pdf>

<sup>32</sup> Johns, N. *et al*. (supra note 31, p. 98).

<sup>33</sup> Davies, C; Robison, M. (2015) (supra note 31, p. 70).

allowed by section 159.<sup>34</sup> The reasons for this reluctance are analysed in the next part of this Chapter.

An exception to this is the changes brought to the selection process for judges by the Judicial Appointments Commission (JAC) by the Crime and Courts Act 2013.<sup>35</sup> This Act introduced an ‘equal merit provision’. This means that, where two or more candidates for a position as judge are assessed as being of equal merit, the JAC can select a candidate for the purpose of increasing judicial diversity. This has been applied since 1 July 2014. The JAC stresses that ‘recommendations for appointments continue to be made on merit’.<sup>36</sup> The JAC reports the number of instances where an individual has been selected following application of the policy in its annual Official Statistics bulletins.<sup>37</sup> The statistics show that between 1 April 2014 and 31 March 2015, 11 out of 305 recommendations were made using the equal merit provision.<sup>38</sup> In the same period in 2015-2016, this was 14 out of 308 recommendations.<sup>39</sup> In 2016-2017, 12 recommendations were made using the equal merit provision (10 for women and 2 for black, Asian and minority ethnic candidates). In that period, there were also 12 instances where candidates were considered to be of equal merit, but the provision was not applied as all candidates shared the same diversity characteristic, for example, both were women.<sup>40</sup>

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<sup>34</sup> Ibid. P. 20.

<sup>35</sup> See Schedule 13 of the Crime and Courts Act 2013: <http://www.legislation.gov.uk/ukpga/2013/22/enacted>

<sup>36</sup> See: [https://www.judicialappointments.gov.uk/sites/default/files/sync/about\\_the\\_jac/equal-merit-provision-policy-mar2017.pdf](https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/equal-merit-provision-policy-mar2017.pdf)

<sup>37</sup> For these statistics bulletins see: <https://www.judicialappointments.gov.uk/jac-official-statistics>

<sup>38</sup> JAC Statistics Bulletin. 1 April 2014 to 31 March 2015. P. 4.

<sup>39</sup> JAC Statistics Bulletin. 1 April 2015 to 31 March 2016. P. 11.

<sup>40</sup> JAC Statistics Bulletin. 1 April 2016 to 31 March 2017. P. 12.

Between 1 April 2017 and 31 March 2018, 3 recommendations (all for women) were made following the application of the equal merit provision. In no other instances were candidates considered to be of equal merit for the purpose of this provision, as the recommended candidates were all demonstrably more meritorious than the remaining candidates.<sup>41</sup>

Section 104 of the Equality Act 2010, allowing for all-women shortlists for political parties, has only been used by 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).<sup>42</sup> Other political parties introduced alternative methods to address the gender imbalance on their benches, for example twinning (constituencies paired and with one man and one woman as candidates) and zipping (men and women alternate on the lists of candidates).<sup>43</sup> However, after the 2019 General Elections, 34% of Members of the House of Commons are women (up from 29.4% after the general elections in 2015) and 27% of the House of Lords. Scotland and Wales do better, as 36% of the Scottish Parliament and 47% of the Welsh Assembly are female.<sup>44</sup>

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<sup>41</sup> JAC Statistics Bulletin. 1 April 2017 to 31 March 2018. P. 10.

<sup>42</sup> Kelly, R; White, I. House of Commons Library Briefing Paper Number 5057. *All-women shortlists*. 7 March 2016. P. 15-16: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05057#fullreport> For more information on this, see the authors referred to by Kelly and White.

<sup>43</sup> Ibid. P. 14.

<sup>44</sup> Uberoi, E; Watson, C; Kirk-Wade, E. House of Commons Library Briefing Paper Number SN01250. *Women in Parliament and Government*. 25 February 2020: <https://commonslibrary.parliament.uk/research-briefings/sn01250/> (accessed 11 March 2020).

Therefore, it appears that section 104, but also other measures, have had some success in increasing the number of female Members of Parliament but a 50-50% representation has still not been achieved.

## Northern Ireland

The provisions for affirmative action in Northern Ireland have been in place since 1989 and aimed at fair participation of Catholics and Protestants in employment. Employers must carry out regular reviews of the composition of their workforce and, if necessary, take remedial action to ensure fair participation. The Equality Commission Northern Ireland can use the reviews and make voluntary or legally enforceable agreements with employers when necessary. According to McCrudden *et al* and Equinet, these agreements were successful and resulted in improvements in fair employment at all levels, including managerial and professional occupations, with voluntary agreements proving to be more effective than legally enforceable agreements.<sup>45</sup> Hinds and O’Kelly wrote in 2006 that after the introduction of these measures, ‘the Catholic employment share rose from 38% in 1990 to 41% in 1999, leading to a fall in the employment gap between Catholics and Protestants from 3% to less than 1% during the 1990s’.<sup>46</sup> These authors suggest that ‘it does seem that directed affirmative action programmes were having a considerable impact’.<sup>47</sup> In 2016, the employment rate for Protestants was 71%, with a 5% unemployment rate, while that for

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<sup>45</sup> McCrudden, C. *et al.* (supra note 12, p. 7); Equinet (supra note 14, p. 51).

<sup>46</sup> Hinds, B; O’Kelly, C. Affirmative action in Northern Ireland. In: Kennedy-Dubourdieu, E. (supra note 1, p. 121).

<sup>47</sup> *Ibid.* P. 122.

Catholics was 68% with a 7% unemployment rate.<sup>48</sup> This does, indeed, suggest that the affirmative action measures in Northern Ireland have been successful in raising the employment rate of Catholics in Northern Ireland to almost the same level as that of Protestants.

The quota introduced by section 46 of the Police (Northern Ireland) Act 2000 aimed at a representation between 29 and 34% of Catholics in the police force: both of police officers and of support staff.<sup>49</sup> At the time this measure was introduced, the police force was over 90% Protestant.<sup>50</sup> This provision had mixed success: the number of Catholic police officers rose from 8% in 2000 to nearly 30% in 2011, so the aim of the provision was reached for this group; however, the quota was less successful in relation to police support staff, with numbers rising from 12% in 2000 to only 18% in 2011.<sup>51</sup> Despite not meeting the number of support staff aimed for, the measure ended in 2011. The Government consulted on the measures and this showed that 94% of respondents were in favour of ending the provisions

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<sup>48</sup> Northern Ireland Statistics and Research Agency. Labour Force Survey Religion Report 2016, annual update – January 2018. P. 3: <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/lfs-religion-report-2016.pdf>

<sup>49</sup> See: Northern Ireland Office. *Consultation paper Police (Northern Ireland) Act 2000 Review of temporary recruitment provisions.* 2010. P. 6: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136382/50\\_50\\_consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136382/50_50_consultation.pdf)

<sup>50</sup> See on this: McColgan, A. *Discrimination, equality and the law.* Oxford/Portland Oregon: Hart Publishing, 2014. P. 97.

<sup>51</sup> Northern Ireland Office. (supra note 49, p. 4).

and of letting the recruitment of police officers be based solely on merit.<sup>52</sup> The Government concluded that, with the transformation in the Police Service Northern Ireland, the use of special measures was no longer justified.<sup>53</sup>

## South Africa

Affirmative action is provided for in the South African Constitution and is part of the principle of equality. As Ngcobo writes, the guarantee of equality has a twofold purpose: to prohibit discrimination and to remedy the historical disadvantage which was the result of the policy of Apartheid.<sup>54</sup> Building on the Constitution, the EEA 1998 and the PEPUDA 2000 also provide for affirmative action. These statutes recognise that ‘systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes’ and that this undermines ‘the aspiration of our constitutional democracy’.<sup>55</sup> Have these affirmative action provisions been successful in dealing with the historical disadvantage in South African society? A mixed picture emerges here. Ncgobo, who looks at the advancement of women, writes that, compared to the pre-1994 period, there has been significant progress in relation to the number of women in Parliament, due to affirmative action but also to the Constitutional requirement, in section 195(1)(i), that all public institutions must be broadly representative of the South African people.<sup>56</sup> Dupper writes that

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<sup>52</sup> Ibid. P. 3.

<sup>53</sup> Ibid. P. 6.

<sup>54</sup> Ngcobo, S. (supra note 23, p. 189).

<sup>55</sup> Ibid. P. 190

<sup>56</sup> Ibid. P. 186 and 192.

the public service has become broadly reflective of national racial demographics, but that this is, according to many, because people who were not suitably qualified were appointed.<sup>57</sup> This will be discussed in more detail in the next section of this chapter.

On the other hand, Thaver, who looked at affirmative action in three sectors: in the economy, in public services and in higher education, concludes that ‘the implementation of affirmative action is rather uneven across the three sectors and somewhat small in scale’.<sup>58</sup> She continues that there is some movement in the public service towards a more representative bureaucracy that reflects the demographics of society, but women, and especially black women, continue to be under represented.<sup>59</sup> She also explains that, in public service, ‘there continues to be an over representation of white males in the middle to senior level occupational categories’.<sup>60</sup> The affirmative action in higher education to address the representation of designated groups among both students and staff had some success in relation to students, but were less successful in relation to staff.<sup>61</sup> Thaver points out that affirmative action is taking the form of black advancement that seeks to promote the participation and contribution of black people in the economy, but that more research is needed to show the scale of the impact in terms of the

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<sup>57</sup> Dupper, O. (supra note 23, 272-273).

<sup>58</sup> Thaver, B. Affirmative action in South Africa. In: Kennedy-Dubourdieu, E. (supra note 1, p. 170).

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. P. 166.

<sup>61</sup> Ibid. P.164-165. Thaver was writing in 2006. More recent figures of student and staff numbers in the four categories: African, Coloured, Indian and White, can be found in: Council for Higher Education. Vital Statistics Public Higher Education 2016, published 2018: [http://www.che.ac.za/sites/default/files/publications/CHE\\_VitalStats\\_2016%20webversion\\_0.pdf](http://www.che.ac.za/sites/default/files/publications/CHE_VitalStats_2016%20webversion_0.pdf)

different sections of society.<sup>62</sup> Archibong and Adejumo report that perceptions of the impact or even benefit of affirmative action in South Africa seem to vary from person to person.<sup>63</sup> Participants in their research believed ‘that affirmative action is effective only in terms of meeting numerical targets as quality has not been emphasized in the implementation’ and saw the attempts by the Government in this area as not effective enough.<sup>64</sup> Burger and Jafta come to the conclusion that ‘the effect of affirmative action policies in reducing the employment or wage gaps have been marginal at best’ and point out that improved access to education has been more successful.<sup>65</sup>

The Annual Report for 2017-2018 of the Commission for Employment Equity shows that there is still a long way to go. The conclusions are: first, there is a lack of equitable representation at the top and senior management level, which means that the workplace continues not to be inclusive and representative of the demographic population groups, especially in relation to the African and coloured population groups, and in relation to gender and disability. Second, the representation of persons with disabilities remains at 1% of the total workforce and their representation at all occupational levels remains low. Third, at all the critical occupational levels, the governmental sector appears to be more transformed than

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<sup>62</sup> Thaver, B. (supra note 58, p. 171).

<sup>63</sup> Archibong, U; Adejumo, O. Affirmative action in South Africa Are we creating new casualties? 3, 51 *Journal of Psychological Issues in Organizational Culture* (2013) P. 14.

<sup>64</sup> Ibid. P. 20.

<sup>65</sup> Burger, R; Jafta, R. Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes, CRISE (Centre for Research on Inequality, Human Security and Ethnicity) Working Paper No. 76. (2010) P. 23:  
<https://assets.publishing.service.gov.uk/media/57a08b2ced915d622c000b5d/workingpaper76.pdf>

the private sector, particularly in terms of the representativeness of the designated groups. Fourth, the white population group and the Indian population group appear to do well in the private sector, particularly at the upper-four occupational levels. And, last, the representation of the male group also remains dominant in the private sector.<sup>66</sup>

From the above it is clear that, with the exception of the measures for the police force in Northern Ireland, all affirmative action provisions are still in force and none of them have yet achieved what they set out to do. In fact, it can be concluded that these measures, when they have been used, have had limited and varied success in achieving a more equal and equitable society. A number of reasons have been given for this and these will be examined next.

#### Obstacles to implementation: contestation

A number of reasons for the limited use and/or the ineffectiveness of affirmative action measures have been given. Many of these reasons have been put forward in both the UK and in South Africa, but some are more applicable to one of the jurisdictions than to the others. Where this is the case, it will be pointed out.

One of the reasons given for the limited use of the positive action provisions in the British Equality Act 2010 is the lack of obligation on employers to take such measures. It must be

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<sup>66</sup> Department of Labour, South Africa, 18<sup>th</sup> Commission for Employment Equity Annual Report 2017-2018, RP 220/2018. P. 55: <https://www.abp.org.za/wp-content/uploads/2018/07/Commission-for-Employment-Equity-18th-Annual-Report.pdf> This report contains information on the workforce distribution amongst the population groups.

noted that the positive action provisions in EU law are also permissive rather than mandatory. The provisions are thus entirely voluntary and this, coupled with a lack of awareness of the provisions and a lack of understanding about what action can be taken, means that employers in Britain are not using affirmative action very often. Davies and Robison found that 25% of the employers in their study were not even aware of sections 158 and 159 of the Equality Act 2010 and only 30% reported that they had used the provisions (all of these were public sector education institutions).<sup>67</sup> Johns *et al* point out the limited publicity and the limited public discussion which the tie-break provision in section 159 of the Equality Act 2010 has received.<sup>68</sup> They also comment on the ‘way in which it has been “sold” to the general public as having a potentially unfair outcome for the rejected candidate’.<sup>69</sup> This was echoed for the EU in a report, which mentioned that ‘negative attitudes held by mainstream society as well as stereotypes and prejudices perpetuated by the media were thought to problematize positive action and render any positive action outcomes as tokenistic’.<sup>70</sup> Therefore, the way these measures were reported on in the media has been rather negative and often based on stereotypes and prejudice and this has not encouraged employers to use them.

This ‘potential unfair outcome for the rejected candidate’ leads to a fear among employers of laying themselves open to a legal challenge of discrimination against an unsuccessful

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<sup>67</sup> Davies, C; Robison, M. (2016) (*supra* note 31, p. 18-19).

<sup>68</sup> Johns, N *et al* (*supra* note 31, page 99).

<sup>69</sup> *Ibid*.

<sup>70</sup> European Commission. *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. 42: <https://publications.europa.eu/en/publication-detail/-/publication/45515983-3e3e-4a24-bcbc-477f04f0ba04>

candidate. As Fredman writes, ‘the line between invidious discrimination and appropriate steps to achieve equality might not always be clear’.<sup>71</sup> Because of this lack of clarity as to what is and what is not allowed, employers are often reluctant to use affirmative action measures. This is compounded by a dearth of case law or good practice examples. Davies and Robison conclude:

it may be that the lack of clarity provided by section 159 (in particular) is failing to provide employers with the confidence they require. Arguably, it may be more appropriate to provide clearer legislative tools in this regard and more overtly remove the risk of ‘reverse discrimination’.<sup>72</sup>

This, in turn, is linked to the fact that affirmative action is often seen as going against the principle of equal treatment and thus as unfair for the group who is not given preferential treatment. These measures mean that some groups are given preferential treatment over other groups and are thus treated unequally. This argument is probably the most widely and universally used argument against affirmative action measures. The term ‘reverse discrimination’ is often used in relation to this both the UK and South Africa.<sup>73</sup> This is also often how the public and the press see affirmative action. McHarg and Nicolson write that

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<sup>71</sup> Fredman, S. *Discrimination law* (2<sup>nd</sup> ed. Oxford: Oxford University Press, 2011) p. 259.

<sup>72</sup> Davies, C; Robison, M. (2016) (supra note 31, p. 23).

<sup>73</sup> See, for example, McHarg, A; Nicolson, D. Justifying affirmative action: perception and reality. 33, 1 *Journal of Law and Society* (2006) P. 9; Thaver. (supra note 58, P. 169); Archibong; Adejumo. (supra note 63, p. 24).

affirmative action is presumed to create ‘innocent victims’.<sup>74</sup> The groups that cannot benefit from affirmative action thus often see affirmative action as discriminating against them.<sup>75</sup>

Another reason for the unwillingness of employers to use affirmative action is, according to Davies and Robison, ‘fear of creating segregation and stigmatisation for those benefiting from the “tie-break” measures’.<sup>76</sup> Again, this is an argument used in both the UK and South Africa. O’Cinneide explains the segregation argument in the following way: the use of special measures to help disadvantaged groups ‘maintains social distinctions between groups and contributes to the fracturing of society along religious, ethnic, racial or social lines’.<sup>77</sup> Moreover, it can also accentuate or create resentment and hostility between those who are given preferential treatment and those who are not, so it could, for example, lead to racial hostility.

Affirmative action is also said to contravene the merit principle and thus it lowers standards and stigmatises the people benefitting from the measures. A number of interrelated issues are at work here. First, the ‘merit’ principle, the principle that people should be selected for promotion or for a job because of merit and not because they have a certain protected characteristic, is often brought forward against affirmative action measures. The problem with this is that what merit is tends to be subjective and is likely to be measured against

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<sup>74</sup> McHarg, A; Nicolson, D. (supra note 73, p. 9).

<sup>75</sup> See, for example, Cuddihy, M. (2016) *White South Africans complain affirmative action policy is causing them to face discrimination*: <http://www.abc.net.au/news/2016-08-01/white-south-africans-complain-of-a-reverse-apartheid/7676764>

<sup>76</sup> Ibid. P. 23.

<sup>77</sup> O’Cinneide, C. (supra note 4, p. 13).

conventional norms of society, which tends to be those of the dominant group, like white males. It also ignores that some groups, because of past discrimination, have not been able to ‘obtain’ merit, for example, they could not get higher educational qualifications. As McHarg and Nicolson write, ‘supporters of affirmative action are not arguing for the abandonment of merit, but for different means of identifying merit or different criteria of what constitutes merit’.<sup>78</sup> And, of course, affirmative action measures often involve training for those people who did not get the opportunity, through past discrimination, to attain educational qualifications. It is suggested that the importance attached to selection on merit is the reason why both UK and EU law only allow preferential treatment when two candidates for employment or for promotion are equally qualified.

Second, if those who are, for example, selected for a job, have inferior qualities but were selected because they have a protected characteristic, those selected feel patronised and stigmatised. They are seen as ‘undeserving beneficiaries’<sup>79</sup> and this has an impact on them: they feel they did not succeed on their own merits. They do not want to be selected because of their characteristics, but because they are the best person for the job. For example, Gani reports on the thoughts of a number of female candidates for parliamentary elections in 2014. Candidates said: I don’t want to see women just gifted safe seats on a plate; if you can’t do the job you do a disservice to women in parliament; the women elected on all-women shortlists were not terribly effective; I want to be there on my own merits, not because I am a woman; are we picked because we are good enough, or just because it is an all women

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<sup>78</sup> McHarg A; Nicolson, D. (supra note 73, p. 14).

<sup>79</sup> Ibid. P. 9.

shortlist?<sup>80</sup> Thaver writes that ‘in South Africa, affirmative action practices are fraught with tension regarding the best candidate for the job’. She continues that the appointment of a black candidate is seen as an equity, or affirmative action, appointment, with the denotation of tokenism, while the appointment of a white candidate is viewed to be one of merit with the denotation of excellence.<sup>81</sup> Goldschmidt, writing about affirmative action for women in general, confirms that those who are given preferential treatment are stigmatised where she writes that ‘it seems to be quite common that women who have been appointed as a result of preferential treatment are perceived as not really good enough and certainly less qualified than the best male candidate’. She points out that the decision as to who has the best qualifications for the job is often influenced, consciously and intentionally or even unconsciously and unintentionally, by stereotyped perceptions.<sup>82</sup> This links back to what was said above about who decides what merit is.

Third and clearly connected with the second point, if people with inferior qualities are selected, this could lead to a lowering of standards. As was mentioned, Dupper writes that the South African public service is now broadly reflective of national racial demographics but that many have argued that this ‘accelerated drive to transform the public service has often led to the appointment of people who did not have the qualifications, experience,

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<sup>80</sup> Gani, A. Should there be all-women shortlists? *The Guardian*, 22 August 2014: <https://www.theguardian.com/politics/2014/aug/22/-sp-should-there-be-all-women-shortlists>

<sup>81</sup> Thaver, B. (supra note 58, p. 169-170).

<sup>82</sup> Goldschmidt, J. Ms Goldschmidt is it true that you are deaf? That would really help us to meet the quota! Positive discrimination revisited... In: Van Den Brink, M; Burri, S; Goldschmidt, J. (Eds.) *Equality and human rights, nothing but trouble?* Utrecht: SIM/Utrecht University, SIM Special 38, 2015. P. 349: <https://dspace.library.uu.nl/handle/1874/328046>

commitment or culture of service needed to be productive and loyal public servants’, in other words, who were not ‘suitably qualified’. This has been, as even the State admitted, ‘severe and even counter-productive’ as it has ‘led to a skills exodus’ – Archibong and Adejumo refer to a ‘brain drain’<sup>83</sup> - and has ‘impeded the State’s ability to spend revenue and deliver effective services, something that impacts most adversely on the poorest and most marginalised of the citizenry’.<sup>84</sup> Dupper points out that, under the South African EEA 1998, employers must require at least a ‘threshold of performance’: a candidate must at least be suitably qualified. Appointing someone who is not ‘may lead to a level of performance below the threshold, and surely reinforce rather than change stereotypical and prejudicial views towards members of the disadvantaged group’.<sup>85</sup> Archibong and Adejumo report that ‘the process [of affirmative action] allows unqualified people to hold key positions based on gender and race’. It is suggested that this reason lies behind the requirement in the legislation in South Africa that a candidate is at least ‘suitably qualified’, and behind the condition in UK and EU law that preferential treatment can only be given where candidates are ‘equally qualified’.

Fourth, there is evidence that the people who benefit most from affirmative action are the more privileged persons within the designated group and, thus, this would not promote equality of the disadvantaged group as a whole. For example, Archibong and Adejumo write that the application of the Broad Based Black Economic Empowerment Act 2003, which aims to help those previously disadvantaged to commence their own trade or to become part

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<sup>83</sup> Archibong, U; Adejumo, O. (supra note 63, p. 20).

<sup>84</sup> Dupper, O. (supra note 23, p. 273-274).

<sup>85</sup> Ibid. P. 273.

of existing businesses, 'has been criticized as benefiting the Black elite, while the majority of the Black population is yet to tap into and realize the opportunities available'.<sup>86</sup> They also point out that 'the African population has benefited the most in contrast to other racialized groups categorized as black';<sup>87</sup> and, that a number of groups are not benefiting, such as disabled people, LGBT people, religious groups, age groups and low socio-economic groups.<sup>88</sup>

All these issues are aggravated in case of quotas, which prescribe a certain number to be reached within a certain time. For example, a legal obligation on all employers with 50 or more employees to employ at least 5% of disabled people by a given date. This raises a number of questions: should an employer, if they cannot create new jobs, make some employees redundant and replace them with disabled employees? Would this then not lead to a legal challenge from the employees who are made redundant? What if there are not enough disabled people qualified and suitable to do the jobs required, should the employer appoint candidates who are not qualified? This would lead to the disabled people being stigmatised and would create resentment against them from other employees. It is submitted that this is the reason why the legislation in the UK, Northern Ireland, the EU and South Africa, does not allow for the setting of quotas.

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<sup>86</sup> Archibong, U; Adejumo, O. (supra note 63, p. 16).

<sup>87</sup> Ibid. P. 17.

<sup>88</sup> Ibid. P. 21.

## Special focus: disability

This section examines the duty to make reasonable adjustments for disabled people, as laid down in the British Equality Act 2010. Section 20 of the Act imposes a duty on both employers and service providers to make reasonable adjustments for disabled persons. This provision can be seen as a form of affirmative action for disabled people. It must be noted that section 13(3) of the Act determines that treating a disabled person more favourably than a non-disabled person does not constitute discrimination. Moreover, sections 158 and 159 of the Act on positive action are both applicable to disability as well. In EU law, there is a duty of reasonable accommodation and the latter term is used in many other jurisdictions, e.g. the US and Canada. Here, these terms will be used as having the same meaning. It must be noted that, contrary to sections 158 and 159 which are entirely voluntary, section 20 imposes a clear duty on employers and service providers to provide reasonable adjustments if certain circumstances are present.

This duty to make reasonable adjustments in section 20 of the Equality Act 2010 arises where a disabled person is put at a substantial disadvantage compared with a person who is not disabled. Reasonable steps must be taken to avoid this disadvantage in three situations. The first covers changes in the way things are done, for example, providing sign-language interpreters or an induction loop at conferences to ensure that deaf or hearing impaired people can take part; the second covers changes in the built environment, like ramps for wheel chair users. The third is the provision of auxiliary services, for example, providing information in

large print or Braille.<sup>89</sup> Section 21 of the Equality Act 2010 makes clear that a failure to comply with the duty amounts to discrimination against the disabled person.

EU law also imposes, in article 5 of Directive 2000/78/EC, a duty of reasonable accommodation on employers in relation to disabled people unless this would impose a ‘disproportionate burden’. And, article 5(3) of the Convention on the Rights of Persons with Disabilities 2006 (CRPD), which came into effect in 2008, also contains the same duty. Article 2 CRPD gives a definition:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The UK and the EU have both signed and ratified this Convention.<sup>90</sup> As with the duty in the Equality Act 2010, failure to make reasonable accommodation under both EU law and the CRPD constitutes discrimination.

There are two provisions for reasonable adjustments: one in Schedule 2 of the Equality Act 2010, covering services and public functions and one in schedule 8, covering work. There is a

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<sup>89</sup> See the explanatory notes to section 20 and Hepple, B. (supra note 31, p. 94-95).

<sup>90</sup> The CRPD is the first human rights treaty that has been signed and ratified by the EU itself, as well as by all its Member States. The CRPD has been ratified by 181 States, including South Africa.

difference between these two areas; the duty on employers to make reasonable adjustments is a reactive duty: it only arises when there is a disabled employee or job applicant and the employer does not have to anticipate the needs of a potential disabled employee or job applicant. The employer thus does not need to do anything until there is a disabled job applicant or employee. The duty covering services and public functions is, generally, proactive: it requires service providers and persons exercising public functions to take proactive steps to make their services accessible, by, for example, providing ramps, hearing loops or allowing access for guide dogs. The purpose is to provide access to a service which is as close as is reasonably possible to achieve the standard normally offered to the public at large.<sup>91</sup>

In relation to reasonable adjustments at work, there is no duty if the employer does not know or could not be expected to know of the disability. The beneficiaries of this duty are job applicants and employees. The extent of the adjustments needed is subject to a reasonableness test. A number of factors are taken into account in considering whether an employer has made reasonable adjustments: the operational needs of the employer; the interests of other employees; the extent to which the adjustment would prevent the discriminatory effect; the nature of the employer's activities; the size of the undertaking; and the financial implications of the adjustments. However, the adjustments must be job related and an employer is not required to provide personal care.<sup>92</sup>

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<sup>91</sup> Hepple, B (supra note 31, p. 95-97).

<sup>92</sup> Emir, A. *Selwyn's law of employment*. 19<sup>th</sup> ed. Oxford: Oxford University Press, 2016. P. 141.

An employer or service provider must thus make reasonable adjustments for disabled persons. In both UK and EU law, the duty only exists in relation to disabled persons, in contrast to, for example, Canada, where it extends to cover all prohibited grounds of discrimination. This is the same in South Africa, where section 15(2)(c) of the Employment Equity Act 1998 determines that affirmative action measures implemented by a designated employer must include ‘making reasonable accommodation for people from the designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer’. Therefore, the duty covers all designated groups, not only disabled people. But, as Archibong and Adejumo write, people with disabilities are not benefitting from affirmative action measures, they are still underrepresented in the South African working population and ‘people living with disabilities are heavily marginalised’.<sup>93</sup>

Despite these provisions, there is still a large ‘disability employment gap’ in the UK as well. In 2019, people with disabilities had an employment rate which was 28.6 percentage points lower than people without disabilities.<sup>94</sup> In 2017, the Conservative Party’s election manifesto pledged to get ‘1 million more people with disabilities into employment over the next ten years’. To meet this target, 285,000 more disabled people should be in employment by the end of these 10 years, an increase which would represent growth of 7% on current levels.<sup>95</sup> Between 2013 and 2019, the disability employment gap has been reduced by 5.6 percentage

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<sup>93</sup> Archibong, U; Adejumo, O. (supra note 63, p. 21).

<sup>94</sup> Powell, A. House of Commons Library Briefing Paper Number 7540. *People with disabilities in employment*. January 2020. P. 3: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7540>

<sup>95</sup> Ibid. P. 5.

points,<sup>96</sup> but it is not clear how much the duty to make reasonable adjustments has contributed to get disabled people into jobs.

Conclusions: possible alternative models to reach substantive equality

Of the jurisdictions examined in this chapter - Great Britain, Northern Ireland and South Africa - a rather mixed picture emerges as to the efficacy of the affirmative action measures which are provided for in national laws. With the exception of section 46 of the Police (Northern Ireland) Act 2000, all provisions are still in force. It is suggested that despite the difference in approach to affirmative action between the UK and South Africa, the aims of affirmative action, to make a more equitable and representative work force and society, has not been achieved yet in either country. The reasons for this mixed picture were analysed and it became clear that similar reasons were brought forward in the UK, in the EU and in South Africa. The importance attached generally to the merit principle played a role in many of these reasons. The most successful affirmative action measures appear to be those in Northern Ireland: the employment rate of Catholics is now almost as high as that of Protestants; and, the number of Catholic police officers has reached the level aimed for. However, section 46 has been less successful in relation to police support staff. It is suggested that section 4 of the Fair Employment (Northern Ireland) Order 1998 could be seen as an example of good practice, but a caveat needs to be added. The affirmative action measures in Northern Ireland were very much based on the specific situation there and targeted only two distinct religious communities. This indicates that such measures are often very situation specific and it might, therefore, not be quite so easy to transplant the Northern

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<sup>96</sup> Ibid.

Ireland provisions to other countries. However, with this in mind, a closer inspection of these provisions would be warranted.

Another measure that would warrant closer examination is a duty to mainstream equality as it exists in the EU and in the British Equality Act 2010. Mainstreaming equality means that an authority or organisation must take equality into account in everything they do, including decision making, service delivery and employment. It means that they need to consider the impact of their actions on equality and on the groups protected by anti-discrimination laws. It is suggested that such a duty would provide an alternative but complementary way of achieving substantive equality. For example, section 149 of the Equality Act 2010 determines that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination and other prohibited conduct; to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and, to foster good relations between these groups. This could involve treating some persons more favourably than others.

Hinds and O’Kelly write that equality mainstreaming refers to ‘equality programmes that aim towards the development of a more equal society in general, through the mainstreaming of equality in service outcomes of public sector and publicly funded bodies’ and that affirmative action and equality mainstreaming ‘are neither opposed to each other, nor entirely discrete’ but that they ‘lie in a continuous relationship to each other, differing in emphasis and degree rather than being categorically distinctive’.<sup>97</sup> Equality mainstreaming is, therefore, a useful addition to affirmative action measures in the quest for substantive equality. It can be argued

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<sup>97</sup> Hinds, B; O’Kelly, C. (supra note 46, p. 105).

that a duty to mainstream equality is part of the equality guarantee in article 9 the South African Constitution, which states that equality includes the full and equal enjoyment of all rights and freedoms.

Affirmative action measures and equality mainstreaming duties laid down in law can both contribute towards realising equality in practice for all people. However, as the section on efficacy of the former shows, they need to be used more widely. In designing and developing such measures, the obstacles and contestation discussed above must be kept in mind. Moreover, these measures are also only a part of the quest for greater equality and must be combined with and supported by economic and social policies as well as measures in the field of education and awareness-raising campaigns. We may never reach ‘full equality in practice’ but that does not mean we should give up trying.