**Chapter 4**

**Internal Organisational Elements – Decision Making Mechanisms**

In recent decades there has been an increase in research on diversity management in organisations, and the need for diversity and inclusion,[[1]](#footnote-1) due in part to the potential benefits that diversity and inclusion bring to both companies and the labour market,[[2]](#footnote-2) as opposed to older approaches based on social identity theory that assume people tend to cooperate better with similar people who belong to their social grouping, and in consequence that a diversification process would be less successful.[[3]](#footnote-3) This approach to human capital diversification is the basis for affirmative action programs, but it requires, as abovementioned, a clear and long-term operational plan, with control and enforcement options.

Examining the theories, or arguments for and against affirmative action or its various models, cannot be complete without taking into account internal organizational components that influence decision-making.

Examining the myriad of theories – arguments for and against affirmative action, as well as different models of affirmative action – cannot be complete without taking into account three additional elements: The first, are merit assessments and the predictive power of objectively testing attributes and skills. The second, are the biases and personal preferences of those responsible for selecting candidates at the recruitment stage, being mere mortals. The most common argument, is that even if we succeed in isolating and determining what the most effective and less abusive model of affirmative action is, it will never be completely pure, and it is not certain that it will guarantee full results, in view of the criticism of merit assessment, but mainly because of bias in decision making. A third element is the biased appointment, mainly for political reasons.

4.1 Merit Estimates

A first element is the ability of Merit assessments and an objective examination of skills and qualities to predict the degree of success in the job.

A skills and achievement-based recruitment policy may raise concerns about its ability to predict integration and perseverance in the service, as well as allegations of built-in discrimination in the assessment of certain populations.[[4]](#footnote-4) Beyond existing difficulties in processing and using skills-based assessments across the board, there is scope to critically discussing merit assessments themselves.

The evaluation of a job applicant is usually based on a humanly awarded numerical scoring. This decision-making process may make a difference in performance evaluation as a function of latent cognitive processes, and is therefore tainted by bias.[[5]](#footnote-5) It can be said, that the very provisions of affirmative action encourage awareness of bias and its eradication; however, as reviewed above, affirmative action is mostly intended for certain populations where discrimination takes other forms of preferences within the group. Most countries have internalised the gaps in merit assessment of women, and it is therefore common to find a scale of gaps in the assessment score that should be isolated in a way that gives preference to a female candidate, similar to the “*Tiebreak*” mechanism, and indeed, in my opinion, the most effective way to reduce bias, and create an objective merit assessment that has a direct impact on employment, is by reducing judgment and personal impression, face to face, in assessing talent.

However, merit assessment is also not bias-free, and to eradicate bias one must adhere to blind assessment, with no information on the candidate’s name, gender, or even place of residence, and also take into account that there is an influence of the author of the test who is often a member of the strong group, in a manner that excludes under-represented populations.[[6]](#footnote-6)

Examining merit assessments in the context of affirmative action should take into account that employee assessment at the recruitment stage is based, *inter alia*, on skills influenced by pre-market elements, and education in particular, and may affect the ability of the target population to compete for jobs. Who is the most qualified class? This is the relevant question when we are at the stage of evaluating attributes and skills. Affirmative action solutions seek, rightly or wrongly, to depart from the merit mechanism, as perceived by the majority group. In this way, the discussion places accepted merit principles, and the fairness of affirmative action, on different sides,[[7]](#footnote-7) and two solutions can be proposed which are also not entirely free of drawbacks: In one – it is possible to set lower threshold conditions and merit assessments for the target population,[[8]](#footnote-8) and in the other – change the skills assessment method so that it relies more on personality tests, and less on job skills that are directly affected by pre-market stages. Neither solution is without difficulty. The first solution proposes to move from an affirmative action preference to adequate representation for all, and not just the female population. In this way, a different merit assessment scale will be set for the target populations, or a similar procedure for adequate representation of women that eliminates a certain score gap between candidates from different groups. Although this solution constitutes a certain deviation from the merit principle as equal for everyone, as well as from the threshold conditions relevant to the position, it is possible to provide relevant training at the same time as the candidate is recruited. The second solution embodies a different difficulty, which is the isolation of education and training skills designated for the job.

Some even argue that merit assessments *per se*, even without the need for a discussion based on affirmative action, are unfair and undemocratic, because they do not serve as a reliable, functional, predictive factor, since values of excellence as a merit assessment yardstick are perceived as firmly fixing the strong group while excluding the weak.[[9]](#footnote-9) Studies have confirmed the weak link between merit test scores and actual successful performance, and have argued that there are better employment tests.[[10]](#footnote-10) A basic explanation for the merit test itself being unfair, is the fact that the test assumes that there is one way to complete a task. This fact enshrines criteria for recruiting candidates who are similar to the decision makers, with a uniform style. This standardised test creates an arbitrary barrier for many talented candidates, and a model of affirmative action in the face of rigid merit assessment pushes target populations to the margins. In this situation, it is prospectively assumed that these populations do not match the merit’s ‘normal’ score graph, and facilitate ways of compensating for non-compliance with this graph, for example, by ignoring a score gap for the female group, or holding designated tenders for other populations, within which the target population is measured in isolation, and not in comparison to the majority group. This mechanism is consistent with the collective view of the right to affirmative action. One of the solutions that can be offered, is to refine merit assessments so that they are suited to the entire population, thus reducing the gap created in employment patterns.[[11]](#footnote-11)

The central idea of ​​equality is a strict adherence to impartiality and uniform distribution, but this idea does not necessarily guarantee a fair distribution.[[12]](#footnote-12) This is the official argument against merit assessments and the setting of threshold conditions in a uniform manner for the entire population, since the entire population is not identical. Aristotelian equality versus substantive equality presents requirements regarding the rule of division itself, and requires adjustment: Equal treatment of equals, and different treatment of differences, where the distinctions are relevant to the manner of division.[[13]](#footnote-13) This Aristotelian idea may justify the existence of dedicated tenders or even the existence of different threshold conditions in these tenders. However, the way to justify them on a more horizontal level, with regard to possible harm to stereotypes or even to giving ‘concessions’ to those who belong to the target group, but who do not suffer from belonging to it, is to determine a predictive measure for assessing the candidate’s group ability and personal ability. It may not be enough for a person to belong to a particular minority group to determine that he is entitled to the benefit of affirmative action; It is possible that we must identify distinctions in the minority population that can predict under-representation. However, the idea is that a person’s belonging to a particular group also requires individual scrutiny, which imposes economic costs on the state. These general diagnoses may not only harm the individual, but also impose on him a collective and even arbitrary stereotypical group affiliation, that does not correlate to his individual characteristics. Due to the difficulties in Aristotelian equality, it is customary to promote the values ​​of affirmative action on the basis of substantive equality, that offers equality in abilities and justifies adjustments.[[14]](#footnote-14)

In the setting of affirmative action programs that employ quotas, and reserve a defined number of places for candidates from the target population, the components of the screening process are not addressed, rather, the scoring method is changed and the outcome influenced to reduce discrimination bias in screening. This procedure is done in tenders dedicated to a particular group, the places are reserved for candidates from that group only, and they compete with other members of the minority group, and not the majority group. In this context, various score indices are used for the target populations, for example lower cross-sectional points that allow for a lower pass score. One of the claims directed at the dedicated tender method, is the existence of different standards for candidates from different populations vying for the same type of job, once in a regular tender, and once in a dedicated tender, which assumes that the target population needs outside help to be accepted.[[15]](#footnote-15) In the case of women, intervention in the scoring method is permissible since they usually do not enjoy dedicated tenders or quotas, and it is still possible to use a “tiebreaker” when a male candidate and a female candidate have a similar score.

The argument in this book is for the need for culturally-adapted diagnosis, that stems from the need to take hire under-represented employees, with unique characteristics, for various roles, given the claim that they do not meet the current screening tests adequately. In this framework, it is important to adapt the diagnostic tools and create culturally adapted screening tools for a variety of populations. The assumption is that the conventional screening tools available today prevent diversity in the workplace, and although they allow the selection of a suitable candidate, they exclude certain populations, which in terms of actual job performance are not significantly different from others.[[16]](#footnote-16)

Screening and assessments tools are often perceived as barriers to employment for those who belong to other groups that are not the majority group. It is assumed, that some of the diagnostic tools are culturally biased, and therefore affect the chances of these candidates in the face of the stronger populations, and therefore lead to consequential discrimination. As part of the screening procedures, it is common to examine mental skills, personal traits, and professional knowledge, alongside other skills and characteristics such as judgment and biographical data, as well as use assessment centres as an alternative tool for diagnosing personal traits, which is a fertile ground for diagnostic biases. Although mental skills tests are perceived as valid and effective,[[17]](#footnote-17) their disadvantage is that they carry significant gaps between the minority and majority groups, and therefore the need for alternative tools is strengthened. The employment screening process is considered a significant barrier for populations that do not belong to the majority group, and one of the common screening tools is the mental skills test, but this is also the screening tool that perpetuates the largest discrepancy between the populations,[[18]](#footnote-18) given pre-market disparities. It has been found, that the current balance between screening tools that will indicate to the employer who the right candidate is, but will also minimise pre-market or cultural effects, is achieved through structured interviews and integrity testing.

It should be emphasised, that it is now more and more common to outsource the screening process to private institutes. This procedure consists of classical screening tools which are usually written tests, and alternative screening tools,[[19]](#footnote-19) which are intended to measure personal characteristics and judgment.[[20]](#footnote-20) There is no doubt that the mix is ​​right; however, I argue that it is advisable to minimise the weight of the score given to the classic screening tools, and that it is difficult to ignore unconscious biases even in the alternative process, which I will discuss later.

Some countries around the world have chosen to tackle discriminatory screening tools by creating guidelines for a uniform screening mechanism[[21]](#footnote-21) that emphasises alternative screening tools, and a preference for structured interviews and integrity tests that manage to reduce discrimination,[[22]](#footnote-22) over tools of specific academic achievement or skills, that still relay to a large extent on pre-market factors such as culture and education, which are also influenced by geographical indicators. The United States is one of the countries that addresses the problem through legislation that prohibits the use of discriminatory occupational classification tools against under-represented populations that are considered protected populations, and even sets clear guidelines for legal compliance.[[23]](#footnote-23) Part D of the guidelines document known as: Adverse Impact and the “Four-Fifths Rule,”[[24]](#footnote-24) states that if the percentage of candidates included in the target population accepted in the screening process is less than 80 percent of the majority population, the employer must check whether the screening tests he administers are valid and non-discriminatory.[[25]](#footnote-25) So how can one prepare to minimise the screening tools that exclude certain populations? Some researchers believe that it is possible to rely on academic achievement, grades, and the number of years of schooling.[[26]](#footnote-26) I believe, that in many contexts most of the under-represented populations also suffer from pre-market education issues, due to cultural disparities, or lower financial investment by the state in certain regions or populations, so it can be assumed that reliance on academic achievement will not narrow the gap.

And keep in mind, that alongside examining changes and adjustments in the screening tools, there is scope to also take into account the unconscious biases of the decision makers. Thus, we must harness those officials to a diverse recruitment process, especially when these officials are usually part of the majority group, and hold unconscious biases and positions that may influence the decision.

4.2 Implicit Bias

Second element is the examination of the bias and personal preferences of those responsible for selecting the candidates at the recruitment stage. It is estimated that biases in decision-making affect the ability to ensure results of affirmative action.

Framing affirmative action is largely based on historical background and moral arguments to shape policy, but the development of behavioural psychological studies may influence how we approach affirmative action policy.[[27]](#footnote-27) Given the cognitive processes underlying decision-making, it has been shown that there is a very strong latent bias that often conflicts with positions or policies of affirmative action.[[28]](#footnote-28) This behavioural research presents a gap between the behavioural assessments of the individual that the law relevant to affirmative action seeks to overcome, and the actual situation;[[29]](#footnote-29) Occupational research is aimed at changing affirmative action thinking, no longer seeking affirmative justice or a utilitarian principle, but a response to actual contemporary discrimination, while offering diversity and contributing to the quality of service.[[30]](#footnote-30) However, studies of behaviour and exposure of latent biases, also have drawbacks in designing affirmative action.[[31]](#footnote-31) There are dozens of latent biases that have varying predictive power, different attitudes and beliefs of the individual, which should be examined in a variable manner and depending on the magnitude of the bias.[[32]](#footnote-32) It is possible, that over and above the ability of behavioural models to explain and diagnose ways of overcoming discrimination and failure of affirmative action programs, these will also provide an answer to the question of which populations should fall under the auspices of affirmative action; however, in my opinion, for this, a count of the number of employees in relation to the ratio of their population in the overall labour market would be sufficient to point out any gaps that needs to be addressed.[[33]](#footnote-33)

Despite the importance of research, and the recognition of latent biases, both have difficulties in significantly influencing the design of affirmative action programs. Justifications for affirmative action, past or future-looking, cannot be based on a study of psychological biases, because they are mostly latent and difficult to measure, as well as the problem of the gap between how one actually behaves, and how they say they behave.[[34]](#footnote-34) Exposing possible biases can and should, in my opinion, be reflected in the procedural aspect – in the decision-making process under affirmative action programs, which creates new problems and suspicion of biases. That is, one should not prefer a particular affirmative action model, but rather refine the operation of the method of implementing the program. Either way, preventing or correcting discrimination is a compelling goal in itself, even without the need to persuade anyone whether it is caused by explicit discrimination or covert bias. Prof. Krieger wrote in her research:[[35]](#footnote-35)

*“that cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes.”*

The affirmative action legal model should affix a price tag to unwelcome behaviour. Formally however, the psychological-behavioural parameter must not be separated, and the institutionalisation of social enforcement must be ensured. Affirmative action laws usually have no compliance incentives, and have only an expressive-declaratory effect. Naturally, they have a social impact, but when in reality the results are disappointing, and there is no significant enforcement, they remain merely socially important. I believe, that it is difficult to bring about internal change in the preferences of an individual given the existence of biases and personal perceptions which from the outsetresulted in circumstances of excluding certain groups, and a need for corrective action. In addition, provisions regarding affirmative action give reasons of fairness and justice, and possibly also distribution on an equal basis, while pushing aside reasons of fairness based on skills (Equity); It anchors the approach of historical injustice that requires integration, rather than a discourse of integration due to contemporary unjustified social exclusion, given similar skills.[[36]](#footnote-36)

Many researchers have found that anti-discrimination laws in general, including those dealing with affirmative action, are ineffective, and it is difficult to create guidance when there are unconscious biases in the processes of social perception and judgment.[[37]](#footnote-37) This unconscious discrimination necessitates instituting measures of education and training, as well as the creation of a skills assessment option that neutralises the discrimination-creating indicators.[[38]](#footnote-38)

The biases against the target groups that cause their discrimination can be explained through generalised threat theory,[[39]](#footnote-39) which assumes that negative attitudes, including prejudice against other groups, arise from a sense of threat that they evoke. The theory does not assume that the majority group is acting rationally, otherwise it would have been difficult to accept the argument regarding a sense of real threat. This is a real or imagined threat that the target groups provoke, that affects the strength of the positions, usually a symbolic threat of cultural differences and appearances, that are transformed into negative stereotypes.

Stereotypes are not only harmful by their very essence, but they are also harmful in that they cultivate prejudice and discrimination. Prejudices, stereotyping, and discrimination often go hand in hand, but it is also possible for one of them to exist without the others. Thus, for instance, the affirmative action model in Canada, is based on the assumption of prejudices and structural barriers, and less on deliberate discrimination and numerical under-representation. An expression of this can be found in Section 33(2) of the Canadian law,[[40]](#footnote-40) which requires checking whether employees define themselves as belonging to one of the groups that suffer from prejudice, and compare the subjective data to state employment data in the same area, to determine numerical under-representation. But that is not enough; Each employer must personally map the under-represented parties in his or her own environment, recognising that there are different solutions for different parties, and there is no one-size-fits-all solution. On the basis of this test, he will be able to develop plans of action for both the short and long terms.

When attributing a stereotypical trait to an ethnic group, such attribution is not necessarily related to prejudice or discrimination, and similarly, general prejudice against a minority group does not have to include specific stereotypes or acts of discrimination. Stereotypes, like other generalizations, are often used as mental shortcuts, and people apply them especially when they are busy or distracted.[[41]](#footnote-41) Despite the high prevalence of discrimination, one of the biggest obstacles to its elimination is the difficulty people have in identifying it on an individual level. It is difficult for an individual to serve as his own control group,[[42]](#footnote-42) and discrimination can be more easily identified when it comes to accumulated evidence, rather than individual cases, because in such cases justifying the behaviour is easier.[[43]](#footnote-43) In addition, individuals can deny that they have been discriminated against, to avoid feeling that they have been treated unfairly, or that they have no control over their circumstances.[[44]](#footnote-44) The explanation is that the decision-makers responsible for recruiting candidates suffer from a cultural expectation that certain population groups will act in a specific way. This is usually negative stereotypical thinking; This is a basic attribution error from belonging to a particular group, and a personality and circumstantial assessment diminishing of other groups, most often the minority groups. To reinforce this, people tend to affirm certain hypotheses and attitudes they hold, as part of a stereotypical pool. For example, an interviewer who believes that individuals belonging to a particular group tend to be less cultured, and less fluent in the official language, will find reinforcements in the interviewee’s behaviour or personal data to support his or her view. Research literature[[45]](#footnote-45) suggests that stereotypes and prejudices make it difficult to gain employment, promotion, and rights, and may negatively affect the way these workers are recruited.[[46]](#footnote-46)

To conclude, cognitive biases of various kinds may affect the decision-making process, as well as the opinion formed concerning the candidate. They can lead to errors in the candidate’s evaluation, and affect professional judgment.[[47]](#footnote-47) Behavioural studies not only confirm the biases and attitudes of interviewers, but some also argue that the way the majority group perceives the minority population conveys a latent message that this is how the minority group is expected to behave. This effect, called the *Pygmalion Effect*, reinforces the existing situation in which the recruiter does not expect the minority group to succeed in the selection process, as well as in non-dedicated general tenders, to improve, or advance within the workplace. It is likely that if we succeed in creating a change of attitude among managers, or the relevant players in the recruitment process, we will contribute to a sense of trust in the minority group which will lead to an increase in their level of performance. Thus, for instance, a change in the perception on behalf of candidates that they are competing for a job by right rather than grace, can make the change.[[48]](#footnote-48)

4.3 Biased Appointments

Affirmative action is effective only where tender and meritocracy values followed, combined with the rules of affirmative action or appropriate representation program. These solutions do not assist to bias appointment, in the absence of a tender or when the overriding consideration is political.

Biased appointments have many faces, but the equal aspect of them all is that it is not the most suitable person who gets the job. Audits flag situations in which functionaries’ skills do not meet the requirements of the position, in terms of education, experience or other required characteristics. One of the results in the face of biased appointments is the undermining of a sense of security and stability among all employees, as well as damage to the workplace’s image, and within the context of the civil service, this damages moral purity as well as proper public administration. Underlying the term “biased appointment” are several different types of biased appointments grouped together, ranging from appointments by party affiliation, appointments based on a personal interest, and more. Biased appointments are an inclusive term for the plague of improper appointments, bad appointments, flavoured by corruption, and not necessarily appointment by a politician, and in the absence of a clear definition of what a biased appointment is, there can be no authoritative knowledge of the extent, severity, and harm of the phenomenon.

John Stuart Mill saw the proposal to select candidates for the civil service by a competitive test as one of those improvements in public life whose adoption would create an era in history, and its contribution would be depositing public affairs in the most talented hands. According to him, if there is anyone who holds the opposite view that the world was not created only for the talented, and that mediocrity must have a part in it, he is of course right, but not so in the management of state affairs.[[49]](#footnote-49) In the political context, Wilson called for a separation between politics and public service.[[50]](#footnote-50) The distinction does not only limit the administration to its field, but allows it to fulfil its goals without political intervention, including by dividing public posts according to party affiliation (Spoils System) and frequent intervention by politicians in the discretion of administrators. An examination of Wilson’s approach later by Dugan, found that when it comes to the civil service in Western European nations, the separation of the two functions, the political and the administrative, does not fully exist, merging at the top of the hierarchy in almost every country.[[51]](#footnote-51) Others have also argued, that the distinction between the two functions cannot be sharply maintained,[[52]](#footnote-52) and that from a moral point of view, the distinction is dangerous.[[53]](#footnote-53)

Further to biased appointments in the civil service for political reasons, the debate over the division of labour between the political and administrative echelons continued, and still preoccupies states, with each state finding its own path between the principle of national interest and the principle of partisanship. In all Western democracies there is an attempt to simultaneously grasp these two ideas, professionalism and independence on the one hand, and the superiority of the political echelon as an expression of partisanship on the other. The myth of the political neutrality of the professional staff continues to exist because it is necessary to reconcile the contradiction, if one can clearly distinguish between politics and public administration, one can also adhere to, and separate, professionalism and independence along with the supremacy of politics when it comes to policy making. In the American model, for example, biased appointments are possible, mainly due to the purely political reason. It is believed, that employees must share the same political will, and that political appointments, even if completely professional, which are provided as a benefit, are prohibited, with the exception of positions concerned with policy formation.[[54]](#footnote-54) In this way, the American model maintains, in my opinion, a good balance between a relatively small percentage of biased appointments, in respect of some senior and pre-defined positions, while on the other hand, the civil service appointment process is conducted according to a meritocratic model of eligibility.[[55]](#footnote-55)

A biased appointment can be any appointment that is based on considerations extraneous to the meritocratic appointment process based on attributes and skill. A biased appointment does not necessarily lead to the conclusion that the appointment is corrupt or bad for the public service. Sometimes a biased appointment will actually help promote a public administrator’s programs.[[56]](#footnote-56) Proponents of this do not necessarily present a political ideological argument, but criticize the meritocratic model, arguing that there are no perfect, objective criteria for determining merit, and that selection procedures adversely affect social mobility. One of the claims condemning the appointment criteria, is that recruitment on the basis of qualifications excludes certain populations from the civil service. Thus, not only biased appointments contribute to social exclusion, but also ordinary appointments pursuant to skill and attributes carries within them many problems, mostly in setting threshold conditions, which contribute to social exclusion. Success in exams, education, employment records, are all dictated by economic and social circumstances, are influenced by pre-market mechanisms, and the degree to which these skills are able to predict a person’s success in any given civil service position is questionable. Therefore, the mechanism for determining the threshold conditions entrenches the existing state of distributive justice.

The pro-public service approach sees the civil service as a pure institution for the benefit of the public as a whole, in which there is no room for biased appointments other than for reasons that promote the public’s interests. On the other side of the scale, there is an approach which recognises integration of the political element,[[57]](#footnote-57) and therefore encourages a system of laws that permit biased appointments. A third approach is the integration approach, which combines the approaches in a way that sometimes allows for biased appointments within the limits of the provisions of the law.

The appointment of a candidate who is not suitable in terms of his qualifications for the position, is perceived as wrongful, regardless of whether the appointment was made to bring any personal or political benefit. When it comes to appointing a person with the right qualifications for a job, an objective examination is required as to whether he would have been selected had it not been for the personal or political benefit he brings with him. It is therefore, in my opinion, best to construct a two-stage test, with skills taking preference over contacts. The theoretical justification for the political appointment exists, and the element of danger is not enough to abolish the intermediate approach and move to a clear pro-public and service-minded approach. The need for an appointment that is also based on political considerations is vital in my view, for certain posts, sparingly, and with an emphasis on the word “also”. That is, the merit values ​​of attributes and skills should not be abandoned in these positions, and these appointments should not be allowed to proceed extensively. Therefore, “political appointment” or “biased appointment” does not necessarily have to be perceived as a rude word, but rather important to the manner of appointing and characterising the candidate. If the law defines the extra-meritocratic elements that can be taken into account in certain positions, for example, a political element, while the appointment is still subject to external objective review, we will reduce the phenomenon of the proscribed political appointment that carries negative characteristics, and strengthen the rule of law.

Biased appointments undermine public trust, as well as the perception of the civil service as professional, and may contradict the Weberian perception of the bureaucracy that is largely positivist, with no room for discretion. It may result in the public employee having a conflict of interest which is prohibited for two reasons: To exercise only relevant considerations that do not conflict with the public interest, and to avoid harming public trust and the principles of the civil service. As elected officials they must ensure that the best candidate is chosen for the position in a way that will fulfil the public role in the best possible way, and thus serve us, the public, well. There is no room in this ideology for biased appointments in the way that the public representative will appoint agents on his behalf to promote interests that are not interests that the public as a whole share. This problem is known in the business world as the “representative problem”.[[58]](#footnote-58) The perception of the biased appointment in general, and in particular the political kind, as an evil, is based on the fact that biased appointments increase the sense of alienation from politics, and may undermine the basic principles of the legal system, the perception of the values ​​of the nature of public service and the social contract, which are the basis for our experience as a civilised nation, embodying danger to both democracy and the bureaucratic administrative state.

It seems that the state losses out, as do the civil service and public trust in it, from a sweeping ban on biased appointments. In this way we move away from the concept of public service according to Weber, a concept according to which the civil service, for the most part bureaucratic, should leave limited space for discretion, and carry out, by almost commanding obedience, the instructions of the political masters.[[59]](#footnote-59)

**Chapter 5**

**Examination of Alternatives – Alternative Models of Affirmative Action and Civil Service**

At the end of the discussion on affirmative action, it is important to deepen the choice made in a number of countries, while emphasizing the characteristics of the model, problems, and successes in its implementation. To enable this, the chapter will examine how affirmative action reflected in various treaties, legal provisions and in EU provisions. The chapter will also expand on a comparative aspect between UK, the source of the meritocratic model, the United States, Canada, and Israel.

In the search for the most appropriate model of affirmative action, it is difficult not to see the pros and cons of each model individually. Sometimes it will be possible to coalesce around a single alternative, and sometimes the public administration needs to choose a certain path. *The first model is of group blindness*, which suggests that each stage of selection and recruitment will allow for a choice that does not reveal the group affiliation of the person vying for the position.[[60]](#footnote-60) However, beyond the selection process, which usually includes a stage of direct and personal impression of the candidate, it is well known that a perusal of one’s resume can give an impression of the candidate’s gender, and sometimes the candidate’s name may indicate his group affiliation. To ensure encouragement of selection from an under-represented group, there is a model of incentives for submitting applications – usually through dedicated tenders in which the target group ‘enjoys’ the elimination of competition from the majority group.

Three additional models seek to ensure affirmative action via merit values. The first advocates a *rigid preference* – intervening in merit values ​​and setting low threshold conditions, or accepting candidates with lower qualifications than the prescribed threshold conditions. This option is less popular, and usually does not meet the constitutional test of violating the values ​​of equality, neither does it even truly serve the target group, by increasing opposition towards it from the majority, as well as perpetuation of stigma. Another, third, model, is that of a *tie-breaker* – choosing a candidate who belongs to the target population over another candidate given identical or similar qualifications.[[61]](#footnote-61) This method is often adopted for the purpose of adequate representation for women. The tiebreaker does not change the rules of the game in terms of merit, only intervenes in the final stage, when we are faced with two candidates who are equals in terms of skills and attributes; here, the model allows the candidate belonging to the group suffering from under-representation to be preferred. The fourth model in the context of merit is a *range of skills* – this method relaxes the merit values, ​​while maintaining equality as much as possible, by providing a list of parallel skills, and in this way facilitates recruiting additional candidates for a position. This method combines flexibility in the merit values, ​​with the tiebreaker method, and given similar skills, will prefer the candidate who belongs to the target group.[[62]](#footnote-62)

Another model, the most controversial, is the *quota* model – that is, prefixed allocation of employment positions to the target group. This can be done through quotas of dedicated tenders, as is customary by way of encouragement to apply; however, this method has been mentioned mainly for its negative aspect, as allowing pre-reservation of jobs for almost every claimant from the target group to be selected, even if his or her skills are much lower than the skills of members of the majority group.[[63]](#footnote-63) In the Weber[[64]](#footnote-64) case, the Supreme Court of the United States addressed the question of the legality of setting affirmative action quotas,[[65]](#footnote-65) and ruled by a majority, that in those circumstances, the quota plan was proportionate, despite the notion that setting quotas was prohibited.[[66]](#footnote-66) This approach by the Court in the Weber case, differs from that of Judge Powell as previously held in the Bakke case, that affirmative action by quota is disproportionate, which position he reiterated in later rulings.[[67]](#footnote-67) It may be possible to point to the difference between the Court’s treatment or intervention in the private sector on the one hand, and the public sector on the other, when the prevailing view is that in the public sector quotas should not be allowed, since they constitute a rigid determination. But since the law directing affirmative action presents it on display, but does not instruct how it will actually be applied, administrative flexibility is possible in changing the path leading to affirmative action, and even setting quotas and changes. Thus, the Court in the United States found that since the quotas were not prescribed by the wording of the law, but were ordered by the Secretary of State, who was also at liberty to amend or repeal them, they were not “rigid” quotas, and therefore were constitutional and proportionate.[[68]](#footnote-68) The balance reached by the United States Supreme Court is in the possibility of setting quotas, which are not rigid and do not create different threshold conditions for candidates to meet quotas that have been set, but are temporary.[[69]](#footnote-69) This approach was also adopted in Europe in the case of women, and it allows for adequate representation.[[70]](#footnote-70) Compared to the Weber approach that has taken root in both American and European law, Canada takes a less inflexible approach, and does permit rigid quotas for women in the setting of affirmative action programs.[[71]](#footnote-71)

Developments in recent decades on the issue of affirmative action around the world, and the momentum that this idea has received in comparative employment law, are the result of the aspiration to promote civil rights that gained so much force in the United States in the 1950s. Only in the context of the social and institutionalised discrimination of African Americans and of women, has the idea matured that positive action must be taken to eliminate this scourge. The aim was to promote the status of disadvantaged groups and to exercise the individual’s right to equality (The Equal Protection Clause), which was established by the Fourteenth Amendment to the United States Constitution.[[72]](#footnote-72) The idea of ​​affirmative action was born in an executive order issued in the United States by President Johnson, Executive Order 11246, by virtue of which he encouraged the implementation of voluntary affirmative action programs through incentives, and which served as an arrowhead and example for development of voluntary and constitutional affirmative action programs in the Western democratic world. Accordingly, later in this chapter, I will review the mode of expression of the merit method and affirmative action alongside it, in different countries and in various legal systems.

5.1 Affirmative Action in International Treaties and in Legislation in Various Countries

Affirmative action was first formulated in the mid-1960s in the United States, as a means of realising the right to equality enshrined in the Equal Protection Clause of the 14th Amendment. Extensive activity of civil rights movements led to the enactment of a number of laws to eradicate discrimination, particularly in the field of employment law, the principal one being Title VII of the Civil Rights Act. Eventually, however, it transpired that the legislation did not lead to the desired results, and that resources had to be allocated differently in order to bring about equal opportunities.[[73]](#footnote-73) This need led President Johnson to sign an executive order mandating companies that win government contracts to adopt a policy of affirmative action with respect to their employees.[[74]](#footnote-74) Despite the development of affirmative action policy and the idea underlying it in the United States, at the international level the idea encountered difficulties; however, it is possible to point to two treaties in which there is explicit reference to the subject.

The 1965 United Nations Convention on the Elimination of All Forms of Racial Discrimination states in Paragraph 4 of Article 1, that special measures[[75]](#footnote-75) may be taken to ensure the proper promotion of groups or individuals in need of protection. Section 4(1) of a 1979 UN Treaty addressing discrimination against women, also provides that temporary and special measures may be employed to promote equality between men and women.[[76]](#footnote-76)

Since the mid-1970s, affirmative action programs have gained purchase also in other parts of the Western world, a prominent example being Canada, where the principle was enshrined in the Bill of Rights.[[77]](#footnote-77) During the 1980s, a reverse trend started, with the Supreme Court and the US administration promoting a trend of limiting applicability of affirmative action programs,[[78]](#footnote-78) the rest of the Western world, such as Western Europe and Scandinavia, actively promoted the policy.

Later in the chapter, the policy will be discussed in detail in the setting of the European Union, the United Kingdom, the United States, Canada, and Israel. But the issue is also relevant in other places, such as Australia and Norway, which are not part of the EU. In Australia, the law sets a mandatory policy of quantitative targets for the integration of women into the labour market, in order to achieve equal opportunities.[[79]](#footnote-79) This method of integration targets and quotas is also customary in Norway, where mandatory quotas were established by law to ensure adequate representation of women in public bodies.[[80]](#footnote-80) And the Government has found it appropriate to emphasise that affirmative action programs are an integral and inseparable part of the realisation of the principle of equality.[[81]](#footnote-81)

5.2 European Union

It is impossible to establish real equality of opportunity without an appropriate system of sanctions (Sabine von Colson and Elisibeth Kamman v. Land Nordrheim Westfalen).[[82]](#footnote-82)

EU law was established on the basis of two principles,[[83]](#footnote-83) the principle of direct applicability, according to which Community law applies directly to, and is binding on, Member States,[[84]](#footnote-84) and the principle of supremacy, according to which Community law prevails over state law in the event of a conflict between them.[[85]](#footnote-85) The unification of interests and a redefinition of economic and political borders were the guiding principles of the six countries that founded the European project after the horrors of World War II. This move necessitated the removal of trade barriers, relaxing the freedom of movement of people, labour, and goods, prevention of discriminatory tariffs and levies, and transferring powers to European institutions.[[86]](#footnote-86)

The term affirmative action does not appear in the EU’s legislation or case law, but there is awareness of the need for social justice to be expressed as actual equality, and not just formal equality. Concrete addressing of employment law and the basic principles in primary legislation, began with the Treaty of Rome, signed in 1957, which was the initial basis for broader economic integration between the European nations.[[87]](#footnote-87) The Treaty of Rome is the central historical legal marker that drove the development of the European Union to its current status.[[88]](#footnote-88) At the beginning, the Treaty of Rome included only one article dealing with worker equality, which provided for equal pay as between workers of different sexes,[[89]](#footnote-89) and the treaty did not mention equality of opportunity at all. Subsequently, in 1975, a directive was issued to implement the principle of equal pay,[[90]](#footnote-90) and in 1976, a directive was issued regarding equal opportunities at work, which introduced the rule of equality in recruitment, in promotion, and in all terms and conditions of work.[[91]](#footnote-91) Subsection 4 provided that the Directive would not prejudice measures to encourage equal opportunities as between men and women, in particular in order to remove existing inequalities which prejudice women’s opportunities at work. And as I will demonstrate below, the European Court interpreted this section narrowly, as an exceptional act, and not as a basis for affirmative action programs.

The 1997 Amsterdam Treaty, called for full equality and made it possible to adopt measures to prevent discrimination or for compensation of a particular group,[[92]](#footnote-92) and later in directives aimed at gender equality.[[93]](#footnote-93) Moreover, the UK Equality Act evolved from the idea of ​​equality enshrined in the European Union first under the Amsterdam Treaty of 1997, which called for full equality, and allows for the adoption of measures to prevent discrimination or compensation for a particular group.[[94]](#footnote-94) The law adopted the rule of equality from the provisions of the 1976 Directive, which allowed the appointment of a female candidate when her test score was similar to that of the male candidate.[[95]](#footnote-95) But in October 2002, another directive was issued to amend the 1976 Directive[[96]](#footnote-96), and to adopt additional approaches that were flagged by the European Court of Justice. Apart from the two Directives from 1975 and 1976, mention should be made of the 1979 Directive on equal rights in the field of social security,[[97]](#footnote-97) and a recommendation from 1984 which promotes the issue of affirmative action preference for women.[[98]](#footnote-98) In the 1990s, directives were issued to facilitate the integration of women,[[99]](#footnote-99) the most prominent of which is the one from 1997 which shifts the burden of proof in claims of discrimination on the grounds of sex to the employer. This determination greatly helped women, who were and still are the main victims of this discrimination.[[100]](#footnote-100) In all the excellent normative sources it has been determined in one way or another that special and temporary measures to accelerate equality, despite their violation of the values ​​of meritocracy, will not be considered discrimination. An example of this is reflected in the UK Equality Act 2010.[[101]](#footnote-101)

The Amsterdam Treaty marked a turning point in human rights in the Community. Article 13 of the Amsterdam Treaty adopts two directives from 2000 aimed at promoting positive actions to promote groups suffering from discrimination,[[102]](#footnote-102) while Article 7 of Directive 2000/78/EC deals with positive actions to promote these groups. Furthermore, Article 137 instructs that the Community support the activities of Member States in the field of equality at work and equal opportunities. This means that the positive promotion of affirmative action is entrusted to Member States, and the role of the Community is to support and supplement. Section 141(4) outlines the legal norm that there is scope to adopting measures that confer benefits on a particular group to ensure actual full equality. The last is the directive issued in 2002, which was intended to update one from 1976,[[103]](#footnote-103) and to adopt the main principles that emerge from case law, declaring gender equality as a Community goal and mission, and as such, impose a positive obligation to encourage it. But beyond the provisions that allow for affirmative action but do not mandate it, the EU has adopted the tiebreaker rule, which allows for the appointment of a female candidate when her score is similar to that of the male candidate, in accordance with the 1976 Directive,[[104]](#footnote-104) and thus preferred equality in outcome rather than in process.

At the state level, each Member State in the Union has acted separately, seeking to promote solutions in different ways, and for diverse populations, according to the need arising from its individual circumstances. In **Northern Ireland** there is a constitutional removal (*sic*) of affirmative action towards the Catholic population, set out in Irish law.[[105]](#footnote-105) The law requires supervision and a duty to report on the group composition of employees, but also on job applicants, and in places where there is an indication of under-representation, employers are asked to act proactively and institute a policy of affirmative action. The law gives authority to a committee designated for this issue, that has the authority to enforce this policy, and even to set a timetable and targets for its implementation.[[106]](#footnote-106)

In **Germany**, an affirmative action program for women in the public service and the private labour market was established,[[107]](#footnote-107) which, *inter alia*, mandated at least 50% representation for women.[[108]](#footnote-108) It was the Court that had to address the question of the degree of legitimacy of the German legislation on this point, following the EU ruling in the Kalancke[[109]](#footnote-109) case, and it found that this legislation was inconsistent with the principle of equality laid down in Directive 76/207 of the European Community Council of 1976.[[110]](#footnote-110) The Court accepted the prosecutor’s claim, and stated that a policy of equal opportunity is permissible, but automatically giving priority to women ignores a man’s right to equality, and deviates from the provisions of the directive encouraging the employment of women. The Court decision ruled out the automatic affirmative action preference of women. This is one of the first cases in which a question was submitted to the Court for a decision that came from one of the EU Member States. In the German context, the matter was settled in 2001, a federal order regulating the manner of execution, and specifically the issue of quotas,[[111]](#footnote-111) the affirmative action program is based on a statistical factual basis of the ratio of men to women, among job candidates, employees, workers promoted within the organisation, or anyone eligible for professional training.

Adequate representation for women that requires positive action to promote women in the labour market can be found in other countries such as **Finland**, where a law enacted in 1987 mandated the duty, and in 1995 an amendment was introduced to ensure representation of at least 40% of women on committees and public councils.[[112]](#footnote-112)

But in this sense of equality, a question arises of what equality are we talking about? For whom? What are the means of achieving or accelerating equality? Do they have scope, or is it a violation of the value ​​of meritocracy? These issues, and many more, were addressed by the European Court of Justice. In this review, I will seek to address a number of cases, out of hundreds of precedents. The Court’s contribution to the establishment of norms throughout the Community, and its uniform interpretation, leads to harmonisation of State laws. Apart from the Kalancke case[[113]](#footnote-113), the Court in the Marschall case[[114]](#footnote-114) dealt with preferring a job candidate, when two candidates had different merit scores. The Court ruled that the employer has discretion to decide against a candidate’s affirmative action preference if he can point to the man having an advantage in terms of meeting the threshold conditions and meritocratically, as long as the criteria under review is not inherently discriminatory. A third case, from Germany, the Badeck case[[115]](#footnote-115), was a critique of a law aimed at improving the proportion of women working in the civil service, arguing that the law violated the rights of every worker, and in this context men, to equal opportunity and recognition of skills. Concretely it was argued that the law set rigid quotas for the integration of women and their alleviation from a state of under-representation, which gave women an unfair advantage in employment. The Court ruled that the law preserves the Community’s equality provisions if it allows for a uniform merit assessment, thus fulfilling the principle of equal opportunity for every candidate. As for the quotas, the Court did not find flaw in them either, it found them to be proportionate, were not set arbitrarily, and they allowed the civil service flexibility, so that where there were not enough suitable female candidates, it was possible to open the position to men. The Court reiterated that the Equal Opportunity Directive of 1976 only prohibits inflexible quotas. The Court in its ruling relied on the Directive, although in the meantime the Amsterdam Treaty, and with it Subsection 141(4) became effective, which called for the inclusion of women also by active measures that would ensure substantive equality.[[116]](#footnote-116)

5.3 United Kingdom

According to the meritocratic model, the appointment system should be free of irrelevant considerations, and personnel turnover should be based on professional data only. This model is more careful than models in other countries to separate politics from governance, with the aim of protecting and isolating the civil service. All positions belong to the professional service, and are staffed by professional officials, who are sorted and screened in accordance with professional qualifications. But the British model did not always advocate this approach. The professionalism of the service, and the reliance on the attributes and skills that characterise the British meritocratic model, were the result of a process.

Until 1850 the British model was characterised by staffing pursuant to personal affiliation, thus the wealthy lords gained control over members of parliament and other officials.[[117]](#footnote-117) The change came in the wake of the “Northcote Trevelyan Report of 1854”[[118]](#footnote-118) which prohibited unprofessional appointments on political-partisan grounds, and established appointment and promotion based on skills and achievements.[[119]](#footnote-119) The reform was late in coming, and it was not until 1870 that an Order in Council stipulated that appointments of a political nature were the exception to the rule of manning posts in the civil service.[[120]](#footnote-120) By World War II, the scope of appointments subject to the test of competency and achievement has been consistently and regularly expanded. This created a system of causes or tests for the purpose of professional judgment, rather than appointment based on extraneous considerations perceived as irrelevant, including political considerations.

To monitor the method’s implementation, the United Kingdom set up two independent bodies responsible for the meritocratic method, and also operate a system of appeal from tender proceedings.[[121]](#footnote-121) These bodies are also responsible for supervising appointments to positions that received legislative approval to deviate from the meritocratic model:[[122]](#footnote-122) A temporary appointment position, a new appointment for a former civil servant (in the same position), and the appointment of a disabled employee. These exceptions have no political causes, and the harm to the model and its values ​​is small and balanced. Thus, for instance, a temporary employee, even if he does not have the objective skills and abilities for the job, is only temporarily on the job; With respect to a civil servant who had been in public service and who now wishes to return to it, there is no doubt about his suitability, and a worker with a disability is part of a social mindset that cares for excluded populations. Therefore, these exceptions are proportionate, and do not harm the overall meritocratic set-up of the service.

To conclude, according to the meritocratic model, the appointment system should be free from irrelevant considerations, and the turnover of personnel in it is based on professional data only. All positions are staffed by employees who have passed a job suitability exam, and threshold conditions are set by a professional and independent body responsible for them. The British model found a balance point between exceptions to tenders and the possibility of appointment on a political basis within the framework of positions of trust; All while strictly maintaining compliance with threshold conditions. Thus, the British model ensures that even where there is a political or personal consideration in the appointment process, it will in any case be a worthy candidate for the position, who, at most, did not bid in a tender that gave equal opportunity to other candidates, and was selected for the position due to considerations which are not always relevant.[[123]](#footnote-123) The British model actually ensures that the professionalism of the service is not compromised, even if extraneous appointment considerations are improperly used.

The British model upholds merit rigidly, in parallel with affirmative action programs under the Equality Act 2010.[[124]](#footnote-124) In this way, the entire recruitment, assessment, promotion, and testing methods are done uniformly without any distinction aimed at advancing target populations.[[125]](#footnote-125) This separation between affirmative action programs striving for positive action on representation from the decision-making stage, allows for a positive discourse around these programs that does not raise objections of inequality or the recruitment of candidates who do not have the appropriate skills.[[126]](#footnote-126) However, other voices have also been heard from the courts against the notion that merit assessment could remain neutral, arguing that it may actually have a biased effect in practice, especially due to gender biases and stereotypes, emphasising that the quota system is permitted under European law.[[127]](#footnote-127) In another case, the Court reverted to the line of thinking that the individual’s belonging to a protected group is not important in assessing his ability and skills for the job.[[128]](#footnote-128) The dilemma was finally resolved by legislation in the setting of the Equality Act 2010, under which any assessment of an employee or candidate will continue to be objective and ignore group affiliation such as race or gender, except in cases of a tiebreaker.[[129]](#footnote-129) The legal framework for affirmative action in the UK exists alongside European laws and conventions, and the Equality Act 2010 encourages equal participation in the labour market[[130]](#footnote-130) that allows employers to take proportionate action to enable or encourage people with protected characteristics to participate in the labour market[[131]](#footnote-131), thus, for instance, different entry exams can be offered,[[132]](#footnote-132) population-targeted recruitment, and more.

More specifically and prescriptively, the UK enacted a law allowing affirmative action for people from Northern Ireland, including by means of setting target quotas,[[133]](#footnote-133) which has only been possible for specific groups, such as citizens of Northern Ireland, and the quota system does not provide for equal opportunities under the Equality Act 2010. This law is a significant development for the idea of ​​equality in the EU from the Amsterdam Treaty of 1997 calling for full equality that allows the adoption of measures to prevent or compensate for shortcomings experienced by a particular group,[[134]](#footnote-134) and directives dealing with gender equality in goods and services from 2000, 2004, and 2006.[[135]](#footnote-135) But this law does not set goals, quotas, or operational obligations, and most of the actions are done not out of duty but as voluntary positive actions.[[136]](#footnote-136) In the UK, more than 80 percent of the labour force is employed in the private sector, which may explain why the duty of affirmative action in the civil service is not a primary need, as it will not lead to satisfactory results in the general population, and there is severe criticism of intervention the private market by imposition of duties.[[137]](#footnote-137) Simply advancing a recommendation in British law is not surprising when it does not provide results, and indeed, studies show that there is no change in the under-representation in the UK.[[138]](#footnote-138)

The British and European courts also had to address the issue under the Equality Act 2010,[[139]](#footnote-139) and it interpreted the pursuit of affirmative action in the setting of employer choice as requiring compliance with three requirements of proportionality: Adapting the program to the attainment of the desired goal; The necessity of the program, and the proportionality of the measures taken.[[140]](#footnote-140) However, as compared with the Courts in the United States, those in the United Kingdom have remained relatively less involved in the development of affirmative action policy, and it is customary to attribute to the Courts an interpretive role limited to dealing with protection against negative and non-positive discrimination.[[141]](#footnote-141)

The term “civil service” has deep roots in the British administration, ever since the public report submitted in 1854 which put an end to the system of political appointments. According to the method that has developed since, civil servants are selected according to their skills (merit), and serve for years (career-based service leading to tenure). From these principles, arose an infrastructure of an objective and apolitical civil service, that is, a permanent service that transfers its loyalty and expertise from one elected administration to another. Today, the English Civil Service Commission[[142]](#footnote-142) sets and publishes rules for conducting open and competitive tenders in various government ministries, and oversees their execution. These rules are intended to ensure that a person will not be appointed to a position in the civil service unless he has the necessary skills to perform the job. The duty to conduct a tender and exams applies to the entire civil service, as far as can be discerned, from the office of the director general of the ministry to the lowest employee; However, there are a limited number of general exemptions, such as: Temporary appointments, reappointment of a former civil servant returning to duty, and additionally: Transfers to the civil service from other public entities, and even appointments of employees with disabilities.

As a rule, appointments in the British Civil Service are subject to strict threshold conditions, as well as holding a tender, and in the case of the senior echelon, a procedure has been prescribed which is given to a special committee to select candidates for senior positions,[[143]](#footnote-143) but the British managed to carry out a three-stage procedure, upon the conclusion of which, the committee passes on its recommendations to the Head of the Home Civil Service, who also submits his recommendations to the Prime Minister, who has the final say. The fact that there are two examining and recommending parties before the government’s review, ensures a better balance in the face of extraneous interests.[[144]](#footnote-144) The UK meticulously adheres to the procedure, with all stages of the appointment having to be fully documented, and information about them accessible by all.[[145]](#footnote-145)

The British Code of Appointments, which requires the regulation of the civil service appointment procedure, sets out several principles compliance with which is absolutely mandatory,[[146]](#footnote-146) the main ones relevant to our case being: Choosing as between candidates will be based on suitability of ability, experience, and skills; After selection, before the appointment takes effect, the selected candidate must undergo a thorough examination by an independent team appointed by the commissioner, which means that an additional supervisory mechanism exists; All stages of the appointment should be documented, and information about them should be accessible by all; The Lower House Committees of the British Parliament hold hearings to approve senior appointments,[[147]](#footnote-147) which means – that there is a possibility of complaining about the tender process without the need for legal action; Senior positions are filled exclusively from within the service itself, as opposed to locating external candidates; And promotion is done according to seniority and skill. To summarise, the British model allows for a more layered, independent oversight mechanism, and more options for promotion to senior positions from within the service.

5.4 United States

The affirmative action doctrine originated in public movements that arose in the mid-1940s in the United States, which aimed to eradicate the evils of discrimination and prejudice – most often on the basis of race and ethnic origin – from American society. These movements sought to realise the individual’s right to equality, within the setting of the 14th Amendment to the US Constitution. The principle that everyone is equal before the law is a cornerstone of the rule of law, and its essence is equal treatment of people *qua* people, without attributing significance to various human characteristics, such as social status, family lineage, gender, age, religion, language, skin colour, etc. However, it is intuitively clear, that the phrase “everyone is equal before the law” should not be taken literally, because all are not equal. Two different meanings of equality must be distinguished: One, the formal meaning – the application of the law by the Courts without prejudice and without distinction between litigants. The meaning of enforcing the law equally *vis-à-vis* everyone does not apply to the distinctions drawn by the law. The second, a substantive meaning – a review of the law itself, and not the manner of its operation; This is a substantive, material examination. The law draws certain distinctions; The law takes into account natural inequality and inequality that is the creation of society. The focus of the affirmative action doctrine in the United States on the realisation of the principle of equal opportunity, later turned out to be insufficient. It transpired that alongside the principle, action had to be taken to reallocate resources in order to achieve egalitarian outcomes. Thus, the idea of ​​affirmative action is derived from the principle of equality, and its purpose is to achieve equality as a consequential social norm. The idea is to provide equal opportunities to achieve equal results, and this is only possible when the competing populations do so from a starting point that is more or less equal. Affirmative action has become one of the most effective tools in the active war against the phenomenon of discrimination, and it has been said in one way or another that special and temporary measures to accelerate actual equality will not be considered discriminatory.

The American model is considered extreme as compared with the British meritocratic model, as it is characterised by appointments based on trust and partisan preference, and could be referred to as the “Spoils System” model. The model is characterised by new appointments on a political basis every four years, and the test for employment in government loyalty to the constitution, family background, education, respect, and reputation (“Fitness of Character”).[[148]](#footnote-148) But even the Americans reached the point of saying “enough is enough” to political appointments, and refined them by partially institutionalising meritocratic admission,[[149]](#footnote-149) in a way that encouraged objective metrics without imposing a duty, as part of harnessing the effort to reduce the phenomenon of political appointments. However, unlike the meritocratic model, case law in the United States[[150]](#footnote-150) preserves the right of the US administration to advance its policies through appointments based on party affiliation. Although judicial review has succeeded in reducing the scope of political appointments, it has certainly not eradicated the phenomenon. That is, despite the understanding that it is appropriate to adopt the tenets of the meritocratic model which is free from political considerations in order to prevent over-politicisation, the opinion of the legislature and the American Courts has been that there is still scope to permitting party-based appointments, and that examination on the basis of attributes and skill is only a recommendation.[[151]](#footnote-151)

The American model combines meritocracy values with appointment pursuant to political considerations, and is therefore in sequence with the classical British model. At the federal level, the United States Constitution establishes the first principle of the American spoils distribution model, and public figures are to be appointed with the “Advice and Consent” of the Senate;[[152]](#footnote-152) Therefore, the American model is characterised by new appointments on a political basis every four years, and the test for employment in government has been set as loyalty to the constitution, family background, education, honour, and reputation (“Fitness of Character”).[[153]](#footnote-153) As a result of an increase in the number of political appointments, the administration has been asked to institutionalise examinations per characteristics and qualifications, according to the model developed in the UK. The first change that moderated the American spoils distribution model slightly followed the “Pendleton Act of 1883,”[[154]](#footnote-154) which encouraged the establishment of rules on staffing while maintaining the principle of specificity and objective metrics that characterise the British model, without imposing a duty to test per attributes and skills, and called for the abolition of political appointments. It was later decided, in the setting of the “Civil Service Reform Act 1978”[[155]](#footnote-155) that two bodies be established, whose role would be to enforce provisions of law regarding the exposure of corruption, and oversee the prohibition of political activity – the MSPB (Merit System Protection Board) which serves as a system of appeals on tender proceedings, and is based on the Civil Service Reform Act 1978,[[156]](#footnote-156) and the OPM (Office of Personnel Management), responsible for ensuring that the values ​​of the meritocratic model are reflected in the procedures and practices employed by human resources departments.[[157]](#footnote-157) The law does not define who the minority groups are, and requires the OPM to define them.[[158]](#footnote-158)

The American Courts have also joined the effort to reduce the phenomenon of political appointments, but unlike the meritocratic model, judgements[[159]](#footnote-159) preserve the right of the American administration to advance its policy, *inter alia*, through appointments based on party affiliation. Although judgements quantitatively limited the number of political appointments, they certainly did not eliminate the practice. That is, despite the understanding that it is appropriate to adopt the tenets of the meritocratic model, which is free from political considerations, to prevent over-politicisation, the opinion of the legislature and of the American Courts is that there is still scope to permitting party-based appointments, and that examination by virtue and skill is a recommendation only.[[160]](#footnote-160)

In the U.S. federal government, the senior administrative staffer is the president’s political partner, and therefore it is customary to proceed by presidential appointment; Thus, the president fills most of the posts with his own men, and these leave at the end of his term.[[161]](#footnote-161) This is a non-competitive appointment system, but also not necessarily made on a purely partisan basis. It is generally accepted that the Senate oversees these appointments, as it is the body that approves non-competitive appointments, but additionally, there are a significant number of positions (approximately 4,000), that the president can fill without competition and without the need for Senate approval.[[162]](#footnote-162) Thus, alongside the clear exceptions outlined by the federal system for appointment on an political-ideological basis, legislation anchors[[163]](#footnote-163) the principles of the meritocracy system which are in fact equal opportunities for all, and a ban on appointment on a personal basis. The section in the constitution generally enumerates two methods of appointment: Appointments by the president put before the Senate for approval, and appointments without the approval of the Senate made by the president himself, the Court and the Department Head, a method which is relevant only to inferior officers.[[164]](#footnote-164) The civil service in the United States justifies a system of non-competitive appointments, in that the system is perceived as more accountable to its constituents, ensures a high level of motivation, and a flow of ideas and initiatives during each term.

The purpose of the Spoils System in the United States is not to avoid efficient and reliable public service, but to ensure a limited number of effective and competent appointments that will accompany every new administration, and establish civil service positions that are designed to support the parties. However, two requirements should be noted: The first, the “reduction requirement” and the second the “efficiency and talent requirement”. The Pendleton Civil Service Reform Act 1883 numerically limited political appointments, although it did not abolish them, and the American system requires a degree of virtue and skill from appointees. As a rule, most appointments to federal positions are made by Congress; The exceptions are functions defined in the constitution: The president and vice president,[[165]](#footnote-165) seats on the Supreme Court, the Senate and Congress.[[166]](#footnote-166) These provisions allow Congress to determine the name of the office, the scope of the office, the job description, and its attendant salary. However, these provisions do not necessarily determine what the selection method for those jobs will be. With regard to the method of appointments, the Constitution sets out a separate section:[[167]](#footnote-167)

*“[The President] shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments”.*

The United States Constitution does not directly address the issue of discrimination at work, but the provisions of the 5th and 14th Amendments to the Constitution preclude discrimination by the US. However, they apply only to the federal government.[[168]](#footnote-168) The fear of a lack of protection of civil rights at work in the private labour market led to the enactment of the Civil Rights Act, which, for the first time, addressed discrimination in the private labour market[[169]](#footnote-169) and formed the basis for the development of the theory of equality in employment by the Courts. Prohibition of discrimination at work was further mentioned in the New Deal legislation,[[170]](#footnote-170) but only presidential executive orders from Kennedy’s days in 1961 mandated the government’s commitment to providing equal opportunities and take positive action to increase efforts to secure the employment of candidates, first regardless of race, religion, colour, or national origin,[[171]](#footnote-171) and then later on the basis of sex,[[172]](#footnote-172) even extending the commitment also to organisations that entered into contracts with the federal government.[[173]](#footnote-173) The executive orders did not give operative meaning to the undertaking beyond determining the need to take initiative to assist these populations and establish a prohibition of discrimination.[[174]](#footnote-174) And none of the presidents who followed took any steps to abolish affirmative action.[[175]](#footnote-175)

Beyond the general framework outlined by Kennedy’s Executive Order 10,925, later (*sic*), during World War I and World War II, they tried to set up dedicated committees on the subject,[[176]](#footnote-176) attempts that achieved nothing, and did not survive beyond a small number of years of work.[[177]](#footnote-177) Concurrent with the publication of the executive order by Kennedy, a Presidential Committee on Equal Employment Opportunity (PCEEO) was established.[[178]](#footnote-178) The Committee soon sought to approve uniform patterns of conduct (PFP),[[179]](#footnote-179) using uniform internal procedures binding on any federal firm to incorporate in its articles of association an effort to achieve employment equality, and formulate an action plan to secure this effort, similar to the Canadian model we shall discuss below. The Committee’s periodic review was not of meeting targets, because recruitment and placement targets were never set, but of checking whether employers increased the number of workers from minority populations amongst their employees, and whether existing minority employees were promoted at work, and if not, why not. The need to provide explanations has proven to be stronger than setting empty numerical targets.[[180]](#footnote-180) The Committee’s reports pointed to good recruitment numbers, as opposed to lesser success in minority worker promotions.[[181]](#footnote-181)

The civil service in the United States shifted in the second half of the 19th Century from a method of political appointments, to a method of testing qualifications, which was reflected in the Pendleton Act 1883. Today, the duty to hold a tender and exam, encompasses over 90% of federal civil service appointments, yet the tradition remains that about a quarter of senior staff positions (about 2,000 jobs in a civil service that numbers more than eight million) are reserved for personal appointment by the elected and incoming president, of which about 1,000 are appointed from outside the regular civil service. Moreover, in the United States, merit criteria are objective and, as a general rule, relying on any factor other than individual talent, such personal contacts, is prohibited.[[182]](#footnote-182) However, at least as far as affirmative action at the universities is concerned, one can see at Ivy League institutions preferences which are not academic or objective to encourage a socially diverse student body, or specific talent.[[183]](#footnote-183) The American approach is integrated: There is affirmative action that sometimes allows for deviations from merit values, but these are focused and limited programs, that are still dominated by the white male hegemony.[[184]](#footnote-184) The meritocratic principles which the United States has chosen to incorporate in its domestic model are different from those accepted in the classic meritocratic model.[[185]](#footnote-185) One of the most prominent indications are the threshold conditions, which are usually set by the director of the ministry and not by a professional body, alongside the existence of independent supervisory bodies (the OPM and the MSPB). The importance that the US administration[[186]](#footnote-186) affords merit, is reflected in the establishment of a special office for merit affairs.[[187]](#footnote-187) While the U.S. government appears to have applied merit extensively, studies show that more than 2/3 of workers are employed in ways that deviate from the general model that prescribes merit values.[[188]](#footnote-188)

The purpose of implementing the principle of equal opportunity as an expression of the right to equality (the Equal Protection Clause) prescribed by the 14th Amendment to the US Constitution, was ostensibly achieved with the enactment of the Civil Right Act in 1964, when Section 703 declared a practice of recruiting or promoting workers in a discriminatory manner to be illegal. Thus, for instance, on the basis of said section, the Supreme Court rejected eligibility tests for employees which ostensibly provided equal opportunities for all candidates, but were in fact irrelevant to the nature of the position, and their real purpose was to deny or diminish the chances of certain candidates, in that case African American candidates.[[189]](#footnote-189) It later transpired, that even when equal opportunity was granted, no results were achieved.[[190]](#footnote-190) Against this background, a trend arose demanding redistribution of resources and social engineering, aimed at achieving results.[[191]](#footnote-191) But this conception of equality of results generated opposition, raising the banner of harm to the majority group, as well as the argument of economic viability as a consideration.[[192]](#footnote-192)

In the 1970s, the Nixon administration created the “Philadelphia Program,” the first major quota program, that shifted the emphasis from positive recruitment to positive affirmative action for women and minorities within the civil service, the business sector, and universities, claiming compensation for past discrimination. Subsequently, the reasoning among proponents of this policy changed, and today it is based on the diversity argument. Beginning in the mid-1980s, a trend formed in the administration to reduce employing affirmative action policy, with the Congress demonstrating ambivalence: Apparent reluctance coupled with actual support in practice. The fear exhibited by elected officials to formally approve the policy was based on the claim that it contradicted the Civil Rights Act, which prohibits any form of discrimination, even one in favour of minorities. This position caused the Supreme Court to play a key role in the issue, and it set strict rules for implementing affirmative action programs that threatened to put an end to the policy, and the socio-political controversy surrounding the issue of affirmative action was clearly and emphatically expressed in Supreme Court judgements. The attitude of the Courts towards the explicit use of a program that offers preferential treatment to candidates from the minority population, or the use of quotas, has undergone many changes, and today such programs could be illegal. Even the use of the tiebreaker, that is, giving preference only in cases where there is equality between a candidate from a minority population and a candidate from the majority group, can cause legal problems for employers.

The conflict of values of merit ​​with affirmative action has never been examined in depth, in part because the affirmative action model is perceived as temporary policy.[[193]](#footnote-193) Similarly, in the Weber case[[194]](#footnote-194) in the United States, the Court defined the affirmative action program, the model’s pioneer, as a temporary measure that allows one group to take precedence over another, until the population assimilates and proves itself and thus no longer needs employment discrimination solutions. In its ruling, the Supreme Court addressed the question of the legality of setting affirmative action quotas,[[195]](#footnote-195) and ruled, by a majority, that in those circumstances, the quota plan was proportionate, the notion that setting quotas was prohibited notwithstanding.[[196]](#footnote-196) This approach by the Court in the Weber case differed from that by Judge Powell previously established in the Bakke case, that affirmative action by quota is disproportionate, which he also repeated in later rulings.[[197]](#footnote-197) The Court had to address the question whether the state is entitled to set a quota for a particular target group, competing only among themselves? The Supreme Court ruled, at the request of the petitioner who was not a member of the target group, that a closed quota program is unconstitutional, and that only preferential scoring could be awarded to the target group.[[198]](#footnote-198) Thus, the Court in the United States found that since the quotas were not prescribed by the language of the law, but were ordered by the Secretary of State, who was also entitled to amend or repeal them, they were not “rigid” quotas, and are therefore were constitutional and proportionate.[[199]](#footnote-199) The balance reached by the United States Supreme Court is in the possibility of setting quotas, which are not rigid, that do not create different threshold conditions for candidates to meet the quotas that are set, and are temporary.[[200]](#footnote-200) The approach according to which affirmative action should be seen as part of the principle of equality itself, can be found in the words of Judge Blackmun in the Bakke case: “*In order to treat some persons equally, we must treat them differently*.”[[201]](#footnote-201) In the judgment, by the slimmest majority of five to four, the Court accepted the petitioner’s contention, and held that the affirmative action program was unconstitutional in the circumstances. It was held, that there was no justification for punishing white candidates for wrongdoing previously inflicted on African Americans, or members of other groups. However, the Court recognised the legitimacy of affirmative action, an important substantive determination, as long as it did not involve setting racial quotas, and further recognised the academic freedom of the institution, that included the freedom and contribution of diversity in the cultural background of academic candidates. Operatively, it was stated, that testing candidates would be done according to qualifications, but it was possible to give a beneficial score to the minority group.[[202]](#footnote-202)

In an interesting review written following the ruling in the Wygant[[203]](#footnote-203) case, in which the Court disqualified a collective agreement that for reasons of affirmative action gave non-white teachers, in the event of a strike, some preference over white teachers, Sullivan noted that in similar cases where the Court approved affirmative action, the common denominator was concerned with compensation for past discrimination, and for this reason adhering to the principle of equality was restricted.[[204]](#footnote-204)

The criteria for partial recognition of affirmative action were recognised in the Weber[[205]](#footnote-205) case, Justice Brennan held that affirmative action can be accepted only if it is a temporary means of correcting distortions, and only on a racial basis, and in the Johnson[[206]](#footnote-206) case, he opined that the program was legitimate also to correct distortions of lack of representation for women in certain positions.

Affirmative action programs in the United States offer a wide range of methods for adequate representation of ethnic minorities and women. A review of the variety of methods presents the conclusion that in the absence of clear legal provisions, affirmative action programs have been found to be ineffective, and sometimes even been declared illegal.[[207]](#footnote-207) Moreover, clear affirmative action guidelines have often led to condemnation from the majority group. Aside from Executive Order 10925, federal contract enforcement programs have been set up to increase the employment of minorities at organisations that contract with the federal government,[[208]](#footnote-208) which have set integration goals while maintaining merit values ​​and avoiding quotas that are perceived as unconstitutional.[[209]](#footnote-209) These plans to monitor and enforce federal contracts have proven ineffective in the test of time.[[210]](#footnote-210) For the first time, under the Equal Opportunities Act 1972,[[211]](#footnote-211) the Courts were allowed to impose hiring and promotion quotas on employers found guilty of discrimination,[[212]](#footnote-212) but such action remained rare, and mainly as retaliation as a result of legal action.[[213]](#footnote-213) Despite this, in 1972 the Congress determined that there was still severe discrimination, and in view of this, changes were made to the Equal Employment Opportunities Act,[[214]](#footnote-214) and the Civil Service Reform Act 1978 was enacted.

The main focus of affirmative action programs based primarily on race and gender can be seen in the field of education[[215]](#footnote-215) and universities scholarships,[[216]](#footnote-216) where most of the criticism was written and dealt with primarily by the U.S. Courts, from establishing the illegality of affirmative action programs in the form of rigid quotas for minorities in educational institutions,[[217]](#footnote-217) through legal support of affirmative action in federally funded projects[[218]](#footnote-218) or short-term programs.[[219]](#footnote-219) It seems that the Courts in the United States do not support affirmative action. As a rule, they declare them unconstitutional and disproportionate, unless they are directed in an extremely focused manner or are temporary, at which point the proportionality of the violation of the rights of the majority is accepted. The Courts have further complicated the policy of affirmative action by adopting different policies towards different populations.[[220]](#footnote-220) Thus, women and minorities were required to produce a higher level of evidence of potential harm, to justify affirmative action, as opposed to the majority population, men and whites, who had to show less potential harm to justify not allowing the existence of affirmative action programs.[[221]](#footnote-221)

However, all of these federal provisions have relatively little power at state level, which has the freedom to decide whether to adopt affirmative action programs.[[222]](#footnote-222) Faced with the change that has taken place at the federal level, one can find various states that have enacted local laws prohibiting affirmative action. The most prominent example is the State of California, whose constitution proscribes as follows:[[223]](#footnote-223)

*“SEC. 31.(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”*

If affirmative action programs in the United States need to be defined, it can be said that this is a non-uniform policy, which insofar as it exists, is aimed primarily as a duty incumbent on organisations and bodies contracting with the federal government, and not at the administration itself, as well as in the case of education and higher education. In any event, the Supreme Court has ruled[[224]](#footnote-224), that these programs should be temporary and not set rigid quotas, and in any case, they should not be continued after reaching the representation targets. The United States also treats the population groups for which it recognises a right to affirmative action, differently; Thus, it is perceived, that the historical injustice done to women, in relation to men, is different from that done to African Americans in relation to whites.[[225]](#footnote-225) The OPM[[226]](#footnote-226) has developed employment programs for minorities at federal authorities, defining the minority populations.[[227]](#footnote-227) All the programs in the United States define under-representation as a situation in which the proportion of members of the minority group employed in the civil service is less than the proportion of that group in the general labour force.[[228]](#footnote-228) There is also a different approach to the results of representation: Is it enough for us to have passive representation that leads to results, or is the meaning of representation active, requiring the success of advancing agendas and hearing the voice of the under-represented minority?[[229]](#footnote-229)

For example, the Courts believe that the quota system is only permissible for candidates belonging to the ‘racial group,’ and even then, its use must be very limited and this preference program should end immediately once their representation in the population is achieved.[[230]](#footnote-230) In general, the Courts are an important, designing party in the US affirmative action debate, but on the other hand, most judgments demonstrate an anti-paternalistic trend, and a conservative judicial tendency against affirmative action,[[231]](#footnote-231) especially in the Supreme Court’s principled debate in attempting to reconcile affirmative action in light of the 14th Amendment of the US Constitution.[[232]](#footnote-232) Therefore, the Courts in America are perceived as not being able to bring about significant change.[[233]](#footnote-233)

It seems that in general terms, the position of American law on the issue of affirmative action can be summarised as a constitutional preference,[[234]](#footnote-234) since the social norm has never been universally rejected; It is drawn from the need to compensate for past discrimination as a legitimate consideration;[[235]](#footnote-235) And it is legitimate for it to realise and promote diversity with respect to affirmative action programs in admission to institutions of higher learning;[[236]](#footnote-236) Arbitrary quotas are prohibited, and statistical reliance on data is necessary;[[237]](#footnote-237) And finally – every affirmative action program is a temporary tool, and a target must be set for when it ends. Compared to the Weber approach that has taken root in American law and in some European countries, Canada takes a less inflexible approach, and does allow rigid quotas as part of its affirmative action programs.[[238]](#footnote-238)

5.5 Canada

Canada also sought to develop the issue of affirmative action alongside merit values,[[239]](#footnote-239) and first introduced preference programs primarily for women, people with disabilities, and Canadian minorities, binding on private employers seeking to contract with the government. In contrast to the United States, Canada has undergone many developments, which in 1986 led to federal legislation mandating affirmative action.[[240]](#footnote-240) However, and like in the United States, Canada was in no hurry to apply affirmative action programs to the public service or its corporations.[[241]](#footnote-241) In general, although the quota and target method is very popular in some countries, in Canada it is objected to on the grounds that the lack of representation is not due to intentional discrimination, but mostly due to structural barriers, biases, and prejudices. Only legislation from 1995[[242]](#footnote-242) refers both to courses of action for the purpose of achieving adequate representation of the target populations, and applies the duty also to the federal service, in addition to the private sector. The law explicitly prohibits the setting of arbitrary representation targets, also requires occupational adjustments for all preferred populations, and establishes a duty to inspect and redeploy every three years, or to set arbitrary quotas.[[243]](#footnote-243)

Canada is a federal country made up of ten provinces, and sparsely populated territories with special status. The divide between French and English speakers is central to its political existence.[[244]](#footnote-244) Canadian heterogeneity, however, is the result of a long history of relations between diverse ethno-cultural groups, between the indigenous peoples of Canada, the Indians and the Inuit, the French settlers, and the Metis mixed group; Between the French and the British settlers; And later, between all these and new immigrant groups.[[245]](#footnote-245) Canada’s racial-ethnic composition, and the issue of Visible Minorities, is a major part of the Canadian agenda.[[246]](#footnote-246) Within this complex relationship, Canada succeeds in managing, by agency of non-identical features of inter-communal relations, liberally, and by virtue of it has adopted a classic adequate representation policy which focuses on the labour market, which in principle is temporary in character, and bears characteristics which are as individual as possible.

The central point in the context of adequate representation in Canada, is its federal structure and the creation of adequate group representation. The federal structure divides political power between the federal and provincial levels, and each province has governmental powers enshrined in the Canadian Constitution. An interesting example is the French-speaking minority in Canada, which makes up just over a fifth of its citizens, but is credited as a full partner alongside recognition as a national-cultural group. For example, one of the informal practices is their representation in the Canadian government.[[247]](#footnote-247) This minority, which is also recognised in Canada’s bilingualism, is also interesting in its absence from the groups protected by federal legislation on equal opportunities and affirmative action.

Federal legislation developed late, against the backdrop of various provincial pieces of legislation prohibiting discrimination on the basis of group affiliation, and inspired by affirmative action programs in the United States from the 1960s. The central contention, was that anti-discrimination norms are insufficient, especially when based on a need to produce proof. And indeed, as early as 1978, the federal government formulated an affirmative action program for employment,[[248]](#footnote-248) establishing protected groups: Women, people with disabilities, native Canadians, and black Canadians from Nova Scotia. The plan imposed relatively limited demands for affirmative action on private corporations seeking to contract with the government, similar to the presidential executive orders issued by Johnson and Nixon in the United States, and in fact were content with demanding a reasonable effort to improve the employment status of these groups. Notwithstanding this limited starting point, later on, significant development could be discerned in Canada, and in 1981 a pilot program of affirmative action in the Federal Civil Service was introduced, and in 1982 the Canadian Constitution was amended, and the Charter of Freedoms and Rights, which explicitly addressed affirmative action, was adopted:[[249]](#footnote-249)

*15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

*(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Beyond this anchor, Parliament acted vigorously and issued three reports calling for the promotion of equal employment opportunities legislation, the first, the Obstacles report from 1981, calling for the advancement of people with disabilities; two years later, the Equality Now report, which dealt with Visible Minorities, and finally, in 1984, a report was published by a royal commission of inquiry headed by Judge Abella, that presented an approach promoting employment equity, and calling for affirmative action as a vigorous mandatory policy.[[250]](#footnote-250) These three led Canada to adopt binding federal legislation in the field of ​​affirmative action,[[251]](#footnote-251) which imposed a reporting obligation in relation to the representation of four population groups on a large group of employers: Women, Visible Minorities,[[252]](#footnote-252) aboriginal peoples, and people with disabilities. Federal law requires employers who provide federal services to take “*Positive Action*” to correct under-representation, and prepare plans that set goals and deadlines for achieving them. The law calls for transparency and reporting, and is driven from the assumption that as long as the employer takes an active part in locating and diagnosing the causes of under-representation, there will be no need to impose a duty of representation by quota. The duty specified in such a law imposes on all private employers employing over 100 employees the design of an action plan to change recruitment and promotion methods, where under-representation is found, but it does not apply to the Federal Civil Service nor to most private corporations.[[253]](#footnote-253)

The Supreme Court of Canada also did not remain indifferent to the constitutional changes, and in the case of the Canadian National Railways, the Court gave full approval to the concept of affirmative action, and obliged the railway company to correct the situation of under-representation of women in various positions, forcing the company to integrate to the point of achieving a feminine participation rate that corresponds to the national average rate.[[254]](#footnote-254) The importance of the petition was in the innovative nature of the claim of discrimination of individuals, of women, in the railway company, relying on statistics about the company’s labour force. The Supreme Court’s dissatisfaction led to changes, and ultimately to the enactment of a new law, the Employment Equity Act 1995, which clearly and operatively outlined the steps to correct the under-representation of the four target groups, extending the program’s application to the Federal Civil Service.

The assumption that accompanies affirmative action policy in Canada, is that the under-representation of the groups that receive special protection at law (designated group members), stems less from intentional discrimination, and more from prejudices and structural barriers to employment. This means, that it is not necessarily intentional discrimination but is a result based on covert prejudice. The affirmative action model that needed to deal with this situation focused on the method of hiring and setting criteria for promotion, and pushed out the rigid quota model whereby places are allocated to the excluded groups. The approach whereby the quota model was perceived as less relevant led to the enactment of a ban on the use of quotas, whenever the quota is arbitrarily set.[[255]](#footnote-255) This section imposes an obligation of self-audit on the employer, *Employment Systems Review*; He is required to examine the representation of employees in relation to the demographic composition of the population, and to the extent that under-representation is discovered, he must act independently to identify the factors causing the under-represent, examine new criteria and threshold conditions to hiring staff, and finally, formulate methods of correction, goals, and a work plan that must be re-examined every three years. The information gathered by the employer, and the recommendations he formulated, are transparent to employees and also reported to the authorities. Relatively, this legislation has led to good involvement of employers and employees as well as to action improving under-representation, and one gets the impression that there has indeed been actual improvement.[[256]](#footnote-256) Its important success is in creating collaboration that will lead to a change in the image of the target groups. And various studies conducted in Canada have indeed shown an increase in the value of representation.[[257]](#footnote-257) At the same time, studies show a disadvantage in the method, which on the one hand allows the Canadian Commission to impose fines on employers who do not submit reports, but on the other hand, it does not have effective enforcement mechanisms to enforce representation targets, or even effectively monitor all employers who submit reports.[[258]](#footnote-258)

5.5 Israel

Reference to English law has been and still is a key element in the legal evolution in Israel, especially following the British Mandate, whose laws were used as the basis for Israeli law,[[259]](#footnote-259) and by virtue of Article 46 of the Order in Council. The hastily established temporary civil service was directly influenced by partisanship, and the genesis of Israel’s biased appointment habit is evident in the “party index” applied in the institutions of the new country.[[260]](#footnote-260) Ever since the Appointments Act of 1959[[261]](#footnote-261) stated that civil service appointments are to be made by tender,[[262]](#footnote-262) emulating the English meritocratic model that promotes a professional and apolitical civil service,[[263]](#footnote-263) and since the Supreme Court[[264]](#footnote-264) later ruled that the civil service, as a trustee of the public, must be free of foreign interests, including partisan influence,[[265]](#footnote-265) the appointments system was supposed to be objective, and any new appointment should have been based on professional factors only. In that respect, the Israeli governmental system tried to emulate the British system as much as possible,[[266]](#footnote-266) including its appointment procedures, which are supposed to be professional, in the sense of evaluating professional skills only.[[267]](#footnote-267) This issue was considered of utmost importance, as the Supreme Court reiterated.[[268]](#footnote-268)

The implementation of the Appointments Act was undoubtedly the beginning of a new era in the civil service. Its main objective was to reduce biased appointments and ensure employees are hired and promoted based on objective skills and qualities (“merit system”), much like the English meritocratic system, which is not contingent on a change of government. Thus, the legislation intended to foster a neutral, professional, and apolitical civil service.[[269]](#footnote-269) The state authorities’ decision to choose the British model over the American one is evident in the Supreme Court ruling in the matter of Halamish.[[270]](#footnote-270) The court stressed that the underlying principle of the meritocratic model is the desire to select employees based on their qualities and skills alone, while eliminating any other consideration that is not relevant to the position itself. This was a rejection of the “spoils system” model: “Public Tender – to reassure the public that the best is hired, not those with the most connections.”[[271]](#footnote-271) One of these irrelevant considerations is the political one: “Hiring state employees... shall not be subject to partisan bias or political affiliation, but rather personal training”. [[272]](#footnote-272)

That being said, since Israel chose to adopt the meritocratic model over the others, biased appointments should have been eliminated. Israel did not fully enact the meritocratic model to begin with; furthermore, over the years this model eroded, allowing the incidence of biased appointments. Upon the establishment of the state, most of the principles of the British meritocratic model were implemented. However, it is wrong to assume that Israel has fully adopted the British model. The Appointments Act was supposed to embody the meritocratic model, but it did not prevent the politicization of the civil service that existed back in the early days of the country, before the Act was passed. It actually eroded the model even more by extending the list of positions, making appointments by tender the exception to the rule of biased appointments. Besides legislation, the government continued to erode the principles of the meritocratic model more and more. the Act both mandated public tenders and set the path for exemptions from them. On the one hand, the Appointments Act was enacted to reduce improprieties and adopt the professional and apolitical British model (Section 19 of the Appointments Act), On the other hand, Sections 21[[273]](#footnote-273) and 23[[274]](#footnote-274) of the Appointments Act state that the tender requirement shall not apply to senior positions, allowing the government to set a list of positions that are exempt from this mandatory tender. In particular, Section 23 of the Appointments Act allows appointments by search committees, originating from the provisions of the Civil Service Regulations and government decisions.[[275]](#footnote-275) It seems, at least in theory, that Section 23 was meant to provide a more effective way of searching for qualified candidates than tenders, rather than to be a gateway for biased appointments. Following the Supreme Court ruling,[[276]](#footnote-276) which had the aim of improving the tender exemption mechanism, the government decided[[277]](#footnote-277) to establish the search committee mechanism and apply it to a limited number of specific positions that are exempt from tender.[[278]](#footnote-278)

The main conclusion so far, then, is that the Appointments Act includes provisions that poorly implement the meritocratic model. That some provisions of the Act lead to deviations from the classic meritocratic model (be it intended by the legislature or not) that Israel chose to adopt at its inception does not condemn the meritocratic model. The core concept of the civil service in Israel, as anchored in the Appointments Act of 1959 and in legal rulings, states that the public service relies on neutral, professional, and apolitical staff appointed in a public, competitive, and equal selection process. The Israeli civil service is based on personnel that do not change with the replacement of the minister in charge; this is the essence of the professional service in the meritocratic model, in which workers are selected based on objective skills instead of political affiliation, and are therefore considered worthy for any time or under any government. However, as an exception to this meritocratic rule and under the Civil Service Act and the provisions of the Civil Service Regulations,[[279]](#footnote-279) the prime minister or any minister or government ministry director can appoint someone to a position of trust in their office as they please, without holding a tender.

The concept of meritocracy in the civil service in Israel has also influenced the concept of affirmative action, and raises broader questions about the nature of the service, and the duty to hold tenders in it. Additional questions concern the interpretation of the provisions of the law regarding affirmative action – do they impose a duty of adequate representation on all positions in the civil service? Is this duty relevant to all positions, even those that have no tender? And is the duty of adequate representation an active duty? The Appointments Act stipulates, in Section 15(c), that the provisions of the law regarding adequate representation (for all target groups) shall apply to all measures of admission to, and promotion in, the civil service, whether by tender or otherwise; the provisions of Section 6C(a) prescribe adequate representation for women in every public entity, without limitation to tender proceedings only.[[280]](#footnote-280) The Israeli legislature selected a number of target populations and explicitly noted them in the provisions of the law: Women (as part of the duty to represent both sexes), people with disabilities, Arabs (including Druze and Circassians), ethnic Ethiopians, the ultra-Orthodox community, and new immigrants. The duty of adequate representation for non-women target groups is fulfilled through tenders, usually designated for them, and with respect to women – representation must be achieved on an ongoing basis in tenders, but there is no duty of adequate representation where there is no tender.[[281]](#footnote-281)

Case law states that even where there is an exemption from tender, there is no exemption from the applicability of the usual criteria that apply to appointments in the civil service with respect to reasonableness, fairness,[[282]](#footnote-282) etc., and therefore applying an active duty of affirmative action to all positions, even those exempt from tender, is not supposed to limit the sphere of action for decision-makers (such as ministers). This duty does not dictate to them whom to appoint, but establishes an active duty to search, leaving a zone of freedom to appoint. This concern was raised in the Women’s Lobby High Court of Justice case,[[283]](#footnote-283) but the Supreme Court, sitting at the High Court of Justice, ruled that the duty of adequate representation includes taking reasonable measures to locate female candidates, including by active search. Following the High Court of Justice case, new directives were issued by the Attorney General,[[284]](#footnote-284) under which, provisions regarding adequate representation and affirmative action apply to all positions within the civil service, and are also actively binding. But we should not feel relieved by these provisions. First, this active duty set by precedent has not yet received expression in the provisions of the law, or anchored any *modus operandi* in practice, was mentioned only in the context of women, and not for the other target groups, and where women did not vie for office from the outset Judge Cheshin did not believe there was any reason to complain about the appropriateness of the tender proceedings in accordance with the law. The *Ethach* Society High Court of Justice case[[285]](#footnote-285) held that the exception that releases the appointing body from compliance with the duty of striving to hire women, will apply only in exceptional cases where fulfilling the duty is impossible, for example, when there is no candidate who meets the necessary eligibility conditions for appointment to a particular position.

An in-depth examination of the Civil Service Commission’s reports, along with the provisions of the law and the Courts’ interpretation, presents a picture according to which the duty of adequate representation does not address the question of the promotion of target groups in general, and does not even uniformly guarantee adequate representation. On the contrary, it seems that even if the civil service adheres to the duty of adequate representation, it focuses only on the lower ranks of the service. The duty of adequate representation has evolved over the years, and various target groups have been added to it. This list is not yet closed, there are no definitions or criteria that characterise the target groups, and from reading the case law we see that there is a significant gap between the clarity of the law, and the duty of adequate representation as it is currently implemented. Examining the latest and sparsely published data, the following conclusions emerge: We have not reached the goals of adequate representation in the civil service in any target group; In the case of women, one can argue whether the review of adequate representation is in the civil service as a whole, or with respect to jobs or ranks; There is a large gap of adequate representation across the senior ranks in the civil service, and even laterally in certain positions; It can be said, that the absolute majority of appointments of Arabs are via dedicated tenders; In the lower ranks of the civil service, we see an extreme majority for women.[[286]](#footnote-286) In the conceptual review of the relationship between the goals and objectives of adequate representation policy, and the tools provided by the law for their fulfilment, the book finds a gap in both the mix of groups participating in the tenders, and problems in promotion, especially for women, derived from a lack of actively locating members of the target groups in tender-exempt positions.[[287]](#footnote-287)

One of the tools for achieving substantive equality, is the rule of affirmative action, which is designed to promote equality to cure a historical injustice on account of which the starting point of different population groups is not equal.[[288]](#footnote-288) Considering the historical injustice as a relevant and necessary consideration to promote the equality of certain populations against the background of the gaps and hardships that discrimination has left in them, is a seemingly necessary consideration in all recruitment and selection procedures in the civil service. Consideration of this factor fulfils the rule of affirmative action, and measures of distributive justice. The Courts in Israel have begun to address the issue of affirmative action in the case of women, after the legislature addressed the issue of adequate representation of women in government companies.[[289]](#footnote-289) The law itself did not bring about any actual change, until the judgement in the first petition filed by the Women’s Lobby,[[290]](#footnote-290) where it was held, that the section in the Government Companies Act does not deal with “new legislative anchoring of ingrained rights, such as the basic right to equality, but with a new norm the purpose of which is to positively enforce and give expression to the adequate representation of both sexes in the composition of boards of directors.” In 1998, the Court was afforded another opportunity to continue to address the issue, and in the case of the second petition by the Women’s Lobby[[291]](#footnote-291), it applied the doctrine of affirmative action in its broad sense also to entities not subject to it by law. At the time, there was talk of everyone except the government companies, and the Court even prescribed the duty to actively search for a female candidate. The Supreme Court was asked to address the issue for a third time,[[292]](#footnote-292) and criticised the government ministries for not acting on the matter, and leaving the lacuna for interpretative action by the Court.

Amendment No. 11 to the Appointments Act from the year 2000, enshrined affirmative action and the ways to achieve it. But it is worth noting, that even before the Amendment, actions were taken aimed at integrating members of the Arab, Druze, and Circassian populations into the civil service. The report by the Kovarsky Commission (1989), which examined the entire structure of the civil service, presented a series of recommendations for the integration and promotion of the Arab, Druze and Circassian populations in the civil service.[[293]](#footnote-293) Following this, on June 16, 1993, the government decided to allocate 100 designated jobs for workers from the Arab sector, and another 30 jobs for workers from the Druze sector. Since said decision and to date, the Civil Service Commission continues to implement government decisions on the subject by holding separate tenders for jobs designated for the various groups entitled to affirmative action. It should be emphasised, that until 2000, affirmative action was exercised without the issue being enshrined in legislation, based on the legal position that the principle of substantive equality – as opposed to formal equality – allows, and even mandates, affirmative action to promote adequate representation (then, of the Arab population) in the civil service. This is in contrast to the position presented in the Kovarsky report, according to which, the Appointments Act and the duty of equality in tenders, do not allow jobs to be designated for a specific population.

Amendment 11 enshrines the duty of representation for certain groups in the civil service, including Arabs (including Druze and Circassians), women, people with disabilities, and later members of the Ethiopian community. Section 15 uses the term “adequate expression” rather than “adequate representation” to mark the goal to be pursued, but how is it achieved? There is no clear operative mechanism. The legislature authorised the government to act in several ways to promote adequate expression among employees: “To take reasonable measures in the circumstances, which may enable and encourage adequate representation”[[294]](#footnote-294); “To designate jobs that will be filled, as far as possible, only by candidates who are fit for the job, from among a group entitled to adequate representation that is not adequately represented, as determined by the government”[[295]](#footnote-295); To give “priority to candidates from among a group entitled to adequate representation that is not adequately represented, when they have qualifications similar to those of other candidates.”[[296]](#footnote-296) Thus far, the government may determine for itself what adequate representation is, and which its goals are, it may designate certain jobs for an eligible group, and prefer a candidate with similar qualifications in a regular tender, as was done in the case of women[[297]](#footnote-297) and even as stated by the law – accept qualified candidates only “as far as possible”. Following the Amendment, the Attorney General issued guidelines on the issue of adequate representation for certain sectors,[[298]](#footnote-298) emphasising both the prohibition of discrimination, and the duty to take positive action to achieve substantive equality. In this context, it should be noted, that the duty of adequate representation is a purposeful duty that “depends, *inter alia*, on the nature of the entity, including the practical importance of the entity in terms of the groups entitled to adequate representation.”[[299]](#footnote-299)

Contrary to the perception that the law has the power to direct social behaviour, Rosenberg argues,[[300]](#footnote-300) that laws that are perceived as problematic, or are opposed by a strong group (not necessarily the majority group), do not facilitate real change, and make enforcement more difficult;[[301]](#footnote-301) This non-compliance with the provisions of the law, such as affirmative action, may be seen as an exception to the rule that the law succeeds in shaping conduct. Of course, there is no complete disregard for the provisions of the law, and the prescription of affirmative action; It is carried out in the shadows, on a small scale, in a protracted war, and by changes in the form of affirmative action, but these do not lead to real results, and therefore there is no real harm in this behaviour that can undermine the effectiveness of the legal system to direct behaviour.[[302]](#footnote-302)

An initial examination of the field of ​​affirmative action can lead to the conclusion that the legal situation in Israel is excellent, and that the legislature deals with the issue comprehensively. But the sceptical reader should read data from the field, that demonstrate both pay gaps, and employment gaps for certain populations. Affirmative action programs are of great importance in marking the absorption and social integration of certain populations, and especially minorities suffering from under-representation in employment. Social exclusion does not operate in a vacuum, and its existence and especially the question of its success in the face of the affirmative action model must be examined. The affirmative action model did not change anything, on the contrary – it exacerbated the phenomenon, and contributed to deeper exclusion; Not only did the law not change enough, but in the context of excluding certain populations from the labour market, it had an adverse affect.

As one examines affirmative action laws in depth, as well as their actual implementation, one can discern that the civil service promotes various decisions that impose requirements that make it difficult for parts of the population to participate in the public sector labour market, as part of a negative impact on various populations failing to advance their labour market interests. What group should be assisted in integrating into the public labour market? It is customary to address employment integration by measuring the labour market participation rate. This test is narrow, and gives distorted results. In order to examine the need for integration, the participation rate must be measured in proportion to the scope and quality of employment. Is the integration horizontal across all civil service jobs and ranks? Does the integration match the professional skills? The higher these metrics, the more successful the integration can be defined.

It should be borne in mind that it is not certain that gaps in the employment of those populations indicate discrimination in employment, or a phenomenon which an affirmative action program can remedy. It can be assumed, at least for some members of the target population, that they have lower qualifications than the rest of the population for a particular matter, and are therefore naturally less competitive in relation to a particular job. This diagnosis raises a theoretical question: Should affirmative action solve a problem of tastes and preferences at the hiring stage, or correct pre-market barriers of education, culture, language, and more? If we accept the second option, it seems to me that it is possible to “handle” under-representation through the setting of the threshold conditions for a position. Moreover, in my view, one of the problems with the existing model, is that the solution of dedicated tenders without reference to threshold conditions, does not provide a real opportunity to enter the service; And indeed, in practical terms, very few compete for these jobs which subsequently become a regular tender, and are not staffed by the target population.

The transition in Israel from a passive policy of non-discrimination laws, to an active policy to ensure equal opportunities and equality in results, was done by adopting affirmative action which is perceived as a systematic way to combat systematic discrimination, and one of its methods is to ensure adequate representation. But what is “adequate representation”?[[303]](#footnote-303) There are several way in which it is customary to review the rate of representation in the civil service: The ratio between the group and all employees, and its comparison to the group’s proportion in the general population; Representation of the group at various levels in the civil service, especially junior and management positions; Another option is to examine the group’s representation in comparison with its participation rate in the labour market. Israel chose the first option, while complying with lateral and horizontal splicing within the various jobs and ranks.[[304]](#footnote-304) This chapter seeks to examine the group’s representation in the most advanced way, and to compare it with its employment rate in the labour market in particular, and spliced to senior positions in general. This examination is similar to the manner in which under-representation is examined in the United States, in which the OPM[[305]](#footnote-305) is required to implement a policy of non-discrimination at work, under anti-discrimination laws similar to those in our country. To this end, the OPM must develop a minority population employment plan within the federal government, defining the minority population along with the Commission.[[306]](#footnote-306) All programs in the United States define under-representation as a situation in which the proportion of members of the minority group employed in the civil service is less than the proportion of that group in the general labour force.[[307]](#footnote-307) There is also a different approach to the results of representation: Is it enough for us to have passive representation that leads to results, or is the meaning of representation an active meaning that requires the success of advancing agendas, and hearing the voice of the under-represented minority?[[308]](#footnote-308) Even though this is an important and interesting distinction, Israel is still in the first stage of failing to achieve representation in outcomes.

The provisions of Section 15A of the Appointments Act do not explain what adequate representation is. In reviewing the Bill, one reads language which is different from the language of the section as finally approved, with a literal explanation in the explanatory remarks. This is what the Bill stated, and which was then omitted from the wording of the section: “Taking into account their proportion among the population qualified for the work in issue (in this Act – adequate representation).” And the explanatory remarks said the following:

*“The Arab population, including the Druze population and the Circassian population in the state, although it constitutes almost one-fifth of the state’s population, is represented in the civil service only at a rate of about 5% of all civil servants, and amongst senior civil servants, the rate is even lower.”*

Usually, people who tend to adopt merit principles and who believe that results should be awarded to the most deserving, oppose a policy of affirmative action that violates or infringes the merit principle in any way. But how should affirmative action be viewed in light of existing discrimination rather than corrective justice emphasising historical injustice? It seems that the same supporters of merit will express support for eradicating discrimination on the grounds that discrimination distorts assessment of talent, and recruitment using methods that bypass tenders harms the purity of the civil service, and gnaws at the success of affirmative action. Any tender that deviates from the ordinary, facilitates an unprofessional appointment, and further excludes the under-represented populations, when from the outset they are denied the right to compete for the position. Worse, it seems that section 15A(c) of the Appointments Act, which prescribes a duty of adequate representation in all means of appointment, including by way of tender or otherwise, will not succeed in correcting the distortion.[[309]](#footnote-309) The Amendment made by the legislature once again links the duty of adequate representation to merit assessments. Thus, Section 15A(b)(2) and Subsection (3) require implementation of adequate representation only from amongst the group of candidates who are eligible for the position. But the legislature failed, because it did not address the phenomenon – that merit assessments do not always take place, and in their absence, according to the letter of the law, there is no legal duty of adequate representation. Therefore, the problem lies not only, if at all, in the development of the legal doctrine of affirmative action, but in the appointment procedures in the civil service, which are, for the most part, biased appointments that deviate from the original principle – the meritocratic principle. Without adhering to proper appointment procedures, we will not reach the state necessary to activate the affirmative action norm, which exists only in an appointment procedure based on an examination of the candidate’s qualifications. The discussions about the scope of adequate representation, its quality, and the way it is implemented are all important, but they cannot take place in a vacuum, and may sometimes divert the discussion from one of the main barriers to the success of an affirmative action program – the appointment process. It is important to understand, that the insistence on merit values is necessary and is not subject, at least at this stage, to a discussion of its advantages or disadvantages. Why is that? Because the State of Israel has chosen the meritocracy model, and thus, it is important to examine how, if at all, the model allows for the existence of affirmative action in its current form. Ostensibly, the legislature has created a legal structure that seeks to maintain a policy of affirmative action, and a meritocratic method of appointment to the civil service. This structure never worked. From the moment the Appointment Act was enacted, the erosion of the meritocratic model adopted had started. Moreover, quantitative studies published by the Civil Service Commission show that the attempt to maintain a model of affirmative action under the provisions of the Appointment Act does not allow for adequate representation, *inter alia* due to deviation from the meritocratic model, and erosion of the duty to hold a tender.

Following the Prime Minister’s letter of appointment dated August 10, 2011, Prof. Manuel Trachtenberg submitted a report of a Committee for Socio-Economic Change (hereinafter: the “**Committee**”), on August 26, 2011,[[310]](#footnote-310) which, inter *alia*, dealt with failures in the public sector and encouraging ultra-Orthodox employment. The Committee pointed out that the civil service in Israel lags behind new trends in public administration,[[311]](#footnote-311) and that efforts must be made to adapt the manpower management system in the public service to strengthen compliance with service objectives, maintain its values, moral purity, integrity, and transparency. The Committee recommended many structural changes and the adoption of market-based norms, which presented the civil service with significant challenges. The Committee reinforced the importance of the Commission’s place as a body that sets policy, and enables the transfer of some aspects of the implementation to the ministries, ensuring that success metrics are put in place, as well as a Commission supervision and control mechanism. In this way, the Committee enabled the delegation of authority from the Commission to the ministries, to be done in a responsible manner that maintains a supervisory mechanism as well as clear targets. The report also recommended reform of the recruitment process, to facilitate recruitment of quality personnel as well as reward excellence. The report further focused on encouragement of ultra-Orthodox employment[[312]](#footnote-312) in the labour market in general.

It is difficult for the ultra-Orthodox population to break through the barriers of entry into the civil service due in part to the threshold conditions that favour secular or national religious candidates, academic graduates, and those with training in English and mathematics, notwithstanding that there may be advantages that yeshiva graduates could bring to the table. To resolve this, adequate representation has the power to deal with both pre-market discrimination, and pre-market failures. Over the years, a number of bills have been submitted seeking to recognise the ultra-Orthodox community as a target population for statutory adequate representation, along with a certain increase in the employment rate of ultra-Orthodox men and women, mainly due to a desire to overcome a state of poverty, and about half of those of working age have integrated into the labour market.[[313]](#footnote-313) Only in 2015 did the government pass a decision[[314]](#footnote-314) to adopt the recommendations of the inter-ministerial team for the integration of the ultra-Orthodox population in the civil service, and offer exposure routes for jobs for the ultra-Orthodox population in appropriate channels. Even today, enabling integration of adequate representation must be done by way of dedicated tenders. These open for low-level positions, even changing the merit assessment and threshold conditions for these jobs, as compared to parallel tenders for the same job addressed at the general population.

In light of the Committee’s report, the government adopted a decision[[315]](#footnote-315) on improving human capital management mechanisms in the civil service, while establishing an outline for human capital management reform at the Civil Service Commission, aimed at formulating a detailed plan to implement civil service management and development reform, and deliver its recommendations in light of these principles: Strengthening the Commission as a professional body responsible, *inter alia*, for policy-making, with an emphasis on adequate representation and equal opportunities at work; Setting threshold requirements and necessary skills; Striving for outputs and results-based evaluation to reward employees; Delegating powers from the Commission to the ministries while at the same time strengthening the control mechanism; Re-examination of which jobs are considered senior staff positions; Examining the possibility of creating time-limited employment routes; Performing screening tests through external parties; Reviewing a general reform of the recruitment processes. Therefore, the government decided to establish a committee headed by the Civil Service Commissioner to formulate a detailed plan for implementing civil service reform, with an emphasis on human capital management,[[316]](#footnote-316) and for this purpose the ‘Civil Service Human Capital Management Reform Staff Team’ was established, which on June 25, 2013, presented the report of the committee to reform improvement of human capital management mechanisms in the civil service including the creation of goal-based management.[[317]](#footnote-317) It should be emphasised, that the need for comprehensive change in the civil service in Israel, and adapting to global trends is not new. The issue was raised comprehensively by the Kovarsky Commission as far back as 1986, which recommended a re-shaping of human capital in the civil service while examining all government functions and the independence of the Commission, together with delegation of powers and authorities to the ministries, recommendations which were never adopted.[[318]](#footnote-318)

According to the provisions of the *Takshir*,[[319]](#footnote-319) priority is given to employees from within any given ministry, and the possibility of appointing an employee from within the ministry to any position offered by way of internal tender will be explored first. Only if no suitable candidate is found, will an inter-ministerial tender be published open to all civil servants, which will result in transferring a civil servant from one ministry to a post being offered in another. Only as a last resort, when no suitable candidate is found, the *Takshir* permits a public tender open to all competitors. The provisions of Section 19 of the Appointments Act states, that a person will not be appointed as an employee until after a public tender has been held, and Section 20 of the Appointments Act allows for the establishment of rules regarding the participation of civil servants in tenders. The law does not refer to any other tender, only to the public tender and, as stated, prevails over the provisions of the *Takshir*. Thus, the public tender is not the only way for employees to be recruited to the civil service, and alongside it is a mechanism of internal tenders, including the inter-ministerial kind, designated only for civil servants. Additionally, there are certain positions which can be manned both from within and from outside the service, in a tender-exempt process, under Sections 12, 21 of the Appointments Act, as detailed above. The Staff Team found that the tender procedure is unreasonably long, and there is no proactive appeal to the potential target audience, including in the context of dedicated tenders or locating women for positions to adhere to adequate representation. For the purpose of improvement, the Staff Team concluded, *inter alia*, that active recruitment for unique positions or target populations should be held in order to increase the potential for participation in the tender. The Staff Team further concluded, that internal tenders for entry-level positions should be cancelled, retaining the possibility for the ministries to decide on an internal tender of any kind, before going to a public tender.[[320]](#footnote-320) This is in contrast to the situation thus far, according to which, the Appointments Act stipulates that admission to the civil service will be by public tender,[[321]](#footnote-321) but the *Takshir* stipulates that in order to fill a vacancy, there is a duty to publish an internal tender open only to ministry employees, and if the position is not filled by internal tender, an inter-ministerial tender may be held for all civil servants, even before the public tender.[[322]](#footnote-322) The policy proposed by the Staff Team to cancel the internal tenders, and go to public tender, focuses on the lower ranks, on the grounds that with respect to them the internal tenders are ineffective. For the higher ranks, both intermediate and senior staff, the Staff Team proposes to preserve the internal and inter-ministerial tenders as the first option, to preserve the professional knowledge and functional continuity of the civil service, but recommends allowing these tenders to be waived, and to go to straight to a public tender.[[323]](#footnote-323) The Staff Team also recommended adaptation of the diagnostic and screening procedures, or rather their cancellation, for competitors within the service in internal or inter-ministerial tender.[[324]](#footnote-324) Thus, the Staff Team recommends waiving objective merit values to reviewing a candidate’s suitability for a position, and rather rely on personal assessment from the employee’s file. This distinction is based on the fact that the employee has undergone a tender and examination of attributes and skills upon entering the service, but does not take into account the need to re-examine his suitability for the new position for which he is a candidate. Since holding an inter-ministerial tender for entry-level positions is still an option open to the ministry, it is likely that the ministry will exercise it when it is interested in a candidate or candidates from other ministries, and therefore, I think it is important to emphasise the knowledge and experience in the relevant ministry, the central reason for the existence of internal tenders in the first place. There is no doubt that this is a restriction on the ability of outside candidates to compete for jobs within the service, but this restriction can be justified, both in terms of promotion, and in terms of growth within the system, as well as by retaining important knowledge. Transitioning to inter-ministerial tenders will not solve the problem of outside applicants, and will not increase their chances. At most, this will impair the ability of employees within a particular ministry to progress and grow within the system.

Comparative research shows an opposite trend in the world. At the intermediate levels and above it, and not at entry level, the cancellation of internal tenders and the institution of public tenders that permit the candidacy of any person, including from the civil service, is encouraged.[[325]](#footnote-325) Two general approaches can be identified: A career-based approach that enables the development of a career within the civil service over years, while maintaining promotion opportunities within it,[[326]](#footnote-326) and a role-based approach based on providing opportunities for candidates outside the organisation with an emphasis on finding the best candidate.[[327]](#footnote-327) The Staff Team seeks to justify the abolition of internal tenders as part of organisational changes and a transition to a role-based system, as opposed to a career-based system. But in my opinion, a role-based system does not necessarily mean recruiting outsiders to improve results, but it also can retain employees from within the service who are able to achieve the desired results. In the United States, for example, where the norm is the role-based approach, the tendency is to hold public and competitive tenders, except for with respect to the tender-less appointment exceptions[[328]](#footnote-328) and mobilisation of employees within the service, between ministries, and within the ministry, based on performance and without the need for a tender.[[329]](#footnote-329)

Cancelling the internal tender will strengthen the glass ceiling under which the target populations suffer, and it is likely that the existence of an inter-ministerial tender will not change this; On the contrary, the slim chance that the target population had of any promotion within the service, is due to the personal and professional acquaintance with the ministry, that was able to bridge the tendency and attitudes that prevented them from being promoted and mobile. The illusion of affirmative action also includes the fact that it is a partial preference for part of the process. Affirmative action in Israel concentrates on the first stage of opening the doors to the target population into the civil service; but the continuation of the process lacks any preferential treatment. The continuation of the screening and promotion process within the service is characterised by equal treatment. In this way, the threshold for entering the service is lowered, as candidates compete within their own group, and not *vis-à-vis* those who do not belong to their population group, but later on, in any internal tender in the civil service, to improve their employment status, horizontally or vertically, there is no preferential treatment and they compete with the general population.[[330]](#footnote-330) Failure to set the scope of tenders of any type, at the low, intermediate, and higher ranks, with an emphasis on the percentage of designated tenders of all types, will result in a failure to meet affirmative action and adequate representation targets. Only an orderly plan of the volume of tenders by percentages, will be able to simultaneously integrate new employees from the private market into the civil service, and encourage internal mobility and job availability, all while maintaining the goal of diversity and inclusion in employment to meet affirmative action targets.

The state of employment diversity, or even prior to it, meeting integration goals, was found by the Staff Team to bad. The Staff Team recommended that to meet the long-established representation targets, even before re-examination or mapping of barriers, it is necessary to hold a dedicated tender for every third tender in the civil service.[[331]](#footnote-331) It should be noted, that this is not a recommendation, but a quantification of the need for a dedicated tender to close the gaps.

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119. The Report introduced into the British model, for the first time, the following service principles: Separation of service for senior academics who graduated university with higher education from administrative clerks; Entry at a young age pursuant to competitive exams as a condition for entering the service; promotion pursuant to skill and achievement, with no personal or political affiliations, and unification of the various offices. [↑](#footnote-ref-119)
120. Richards. pp. 49 – 51. [↑](#footnote-ref-120)
121. For the monitoring, see: Civil Service Commissioners Recruitment Code, Sect. 1.1.; The two bodies are: OCSC – Office of the Civil Service Commissioners; and OCPA - Commissioner for Public Appointments. [↑](#footnote-ref-121)
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125. See, for instance, the recruitment of personnel in Northern Ireland under the Code of Practice Fair Employment in Northern Ireland, para 5.1.1, (2003). For further reading, see: B. Hepple, ‘Discrimination and Equality of Opportunity – Northern Irish Lesson’, Oxford Journal of Legal Studies 10 [1990] 408, p. 413. [↑](#footnote-ref-125)
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133. Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162 (N121) 1998 (‘FETO)

art. 4 and See the Fair Employment (Northern Ireland) Act 1989 (c. 32); the Northern Ireland Act 1998 (c. 47). [↑](#footnote-ref-133)
134. EC Treaty, Art. 141(4). Similar elements, especially in the context of racial equality, can be seen in the Racial Equality Directive of 2000. *Cf.*: Elizabeth F. Defeis, “The Treaty of Amsterdam: The Next Step Towards Gender Equality”, 23 *B.C. Intl & Comp Law Rev* 1 (1999), pp.30–33. [↑](#footnote-ref-134)
135. Council Directive, 2000/78/EC, art. 7(1) and Council Directive, 2004/113/EC, art. 6 and Council Directive 2006/54/EC. art. 2(8). [↑](#footnote-ref-135)
136. Thus, according to S. 158 of the 2010 Act, an employer is entitled to employ certain, proportional measures, to diversify representation, but again, he is not obliged to do so. The intention is mainly for the private market. [↑](#footnote-ref-136)
137. Equality Act 2010 (n 215) s 149. [↑](#footnote-ref-137)
138. Bob Hepple, Mary Coussey, Tufyal Choudhury, Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Hart Publishing, Oxford, 2000) 12-13; National Equality Panel, An Anatomy of Economic Inequality in the UK - Report of the National Equality Panel (Government Equalities Office 2010). [↑](#footnote-ref-138)
139. And even prior to that in the Directive: Equal Treatment (Amendment) Directive 2002/73/EC OJ L268/15 and in the Treaty of Amsterdam: EC Treaty, Art. 141(4), in both instances in the context of affirmative action for women. [↑](#footnote-ref-139)
140. Lommers v Minister van Landbouw Natuurbeheer in Visserij (Case C-476/99) [2002] ECR I – 2891. [↑](#footnote-ref-140)
141. S. Pager, ‘Strictness and Subsidiarity: An Institutional Perspective on Affirmative action at the European Court of Justice’, 26 BC Int’l 7 Comp L. Rev. 35 (2003). [↑](#footnote-ref-141)
142. Civil Service Commission. [↑](#footnote-ref-142)
143. Senior Appointments Selection Committee. [↑](#footnote-ref-143)
144. See: <https://www.gov.uk/government/organisations/civil-service>;

And <http://www.civilservicecommission.org.uk/civil-service-reform.html>;

And <http://www.civilservicecommission.org.uk/employment-in-the-civil-service.html> [↑](#footnote-ref-144)
145. See details on website (the website contains details also with respect to junior appointments):

<http://publicappointmentscommissioner.independent.gov.uk/publications/annual-reports/> [↑](#footnote-ref-145)
146. See on website: [www.ocpa.gov.uk/index2.htm](http://www.ocpa.gov.uk/index2.htm); [↑](#footnote-ref-146)
147. See: [www.parliament.uk/commons/lib/research/notes/snpc-03161.pdf](http://www.parliament.uk/commons/lib/research/notes/snpc-03161.pdf); [↑](#footnote-ref-147)
148. See: Schneider, Ben Ross. 1991. *Politics within the State.* Pittsburgh: University of Pittsburgh Press. pp. 518. [↑](#footnote-ref-148)
149. See: Civil Service Reform Act, U.S.C (1883). [↑](#footnote-ref-149)
150. See: *Elrod v. Burns* 427 US 347 (1976); *Cf*. *Branti v. Finkel*, 445 U.S. 507 (1980). [↑](#footnote-ref-150)
151. See: Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 359-62 (1990) (arguing that affirmative action “helps to make American society a more just society”) [↑](#footnote-ref-151)
152. See: U.S. Const. art. 2, § 2, 2.2. [↑](#footnote-ref-152)
153. Schneider, Ben Ross. 1991. *Politics within the State.* Pittsburgh: University of Pittsburgh Press. pp. 518. [↑](#footnote-ref-153)
154. See: Civil Service Reform Act, U.S.C (1883). This move followed the proposal of Senator Charles Summer in 1864 for “Appointment by Competitive Examinations”. See further on this point: Robert Maranto “*Politics and Bureaucracy in the Modern Presidency*” 1993 p. 12. And: Richard Rose “*Public Employment in Western Nations*” Cambridge: Cambridge University Press, 1985, 126 62, with Klaus Dieter Schmidt. [↑](#footnote-ref-154)
155. See: Civil Service Reform Act. U.S.C (1978). [↑](#footnote-ref-155)
156. See: <http://www.opm.gov/BiographyofAnIdeal/PU_CSreform.htm>; [↑](#footnote-ref-156)
157. George A. Krause “Political Appointments, Civil Service System”, *American Journal of Political Science*, V.50, Issue 3, pp.770-787, July 2006. [↑](#footnote-ref-157)
158. Five groups have been defined in this setting: African American, Hispanic, Asian/Pacific Islander, Native American, non-Hispanic / Multiracial. Women and people with disabilities are not defined as minority groups, and there are independent encouragement programs for them; thus, for example, in the case of people with disabilities a presidential Executive Order has been signed: United States Government Accountability Office, “Participant-Identified Leading Practices That Could Increase the Employment of Individuals with Disabilities in the Federal Workforce”, p. 6, and in 2006 a program aimed at promoting their representation in the Federal Government was declared: Leadership for the Employment of Americans with Disabilities (LEAD). [↑](#footnote-ref-158)
159. See: *Elrod v. Burns* 427 US 347 (1976); *Cf*. *Branti v. Finkel*, 445 U.S. 507 (1980). [↑](#footnote-ref-159)
160. George A. Krause, David E. Levis, James W. Douglas *“Political Appointments, Civil Service System, and Bureaucratic Competence; Organizional Balancing and Executive Branch Revenue Forecasts in the American Stats”***.** American Journal of
Political Science, 50: 770-787 (2006). [↑](#footnote-ref-160)
161. Article II Section 2, Clause 3. [↑](#footnote-ref-161)
162. These are referred to as: “Recess Appointments”, and this appointment process is regulated by the Constitution: Article 2 Section 2. [↑](#footnote-ref-162)
163. 5 U.S.C. § 2301 b(1) and b(2) and § 2302. [↑](#footnote-ref-163)
164. Gary Lawson, “The rise and rise of the administrative state” 107 *Harv. L. Rev*. 1231, 1241-1245 (1994). [↑](#footnote-ref-164)
165. U.S. Const. art. I, § 2, Cl. 2-6; Amend. XII, XX, XXII-XXIII & XXV. [↑](#footnote-ref-165)
166. *Id*. Art. I, § 3, cl 1-3; *id.* Art. I §, c. 1 art. I § 5, cl. 1; *id*. Art. I, § 6, cl. 2; *id*. Amend. XVII. [↑](#footnote-ref-166)
167. U.S. Const. art. II, § 2, cl. 2. [↑](#footnote-ref-167)
168. Risa Lieberwitz, “United States Employment Discrimination Law in the United States: On the Road to Equality?” in: New Developments in Employment Discrimination law JILPT Report No. 6 (2008) 1. [↑](#footnote-ref-168)
169. 42 U.S.C 2000e-2(a)(1). [↑](#footnote-ref-169)
170. The National Labor Relations Act of 1935 (49 Stat. 449) [29 U.S.C.](https://en.wikipedia.org/wiki/Title_29_of_the_United_States_Code) [§ 151-169](http://www.law.cornell.edu/uscode/text/29/151%E2%80%93169). [↑](#footnote-ref-170)
171. President Kennedy’s Executive Order 10,925. [↑](#footnote-ref-171)
172. President Johnson’s Executive Order 11,375, 32 Fed. Reg. 14,303 (1967). [↑](#footnote-ref-172)
173. President Johnson’s Executive Order 11,246, 30 Fed. Reg. 12,319 (1965). [↑](#footnote-ref-173)
174. John F. Kennedy, “Statement by the President Upon Signing Order Establishing the President’s Committee on Equal Opportunity Employment,” March 7, 1961, in John T. Woolley and Gerhard Peters, The American Presidency Project [online], Santa Barbara, CA. <http://www.presidency.ucsb.edu/ws/?pid=8520>. [↑](#footnote-ref-174)
175. Darien A. McWhirter The End of Affirmative Action: Where Do We Go From Here? (New York, 1996) 44 [↑](#footnote-ref-175)
176. See, e.g.: FDR issued EO 8802 and the Fair Employment Practice Committee (FEPC). [↑](#footnote-ref-176)
177. Anne Peters *Women, Quotas and Constitutions* (1999) 32 [↑](#footnote-ref-177)
178. President’s Committee on Equal Employment Opportunity. [↑](#footnote-ref-178)
179. Plans for Progress. For more detail, see: PCEED, *Information* Newsletter, June 1961; Graham, *The Civil Rights Era,* 47-49*.* [↑](#footnote-ref-179)
180. Moreno, *From Direct Action to Affirmative Action*, 191-92. [↑](#footnote-ref-180)
181. Report to the President by PCEEO, Nov. 26, 1963, see: Moreno, *From Direct Action to Affirmative Action*, 193. [↑](#footnote-ref-181)
182. Gratz v. Bollinger, 539 U.S. 244 (2003). And Mitchell v Cohen 33 U.S. 411 (1948). [↑](#footnote-ref-182)
183. R. Post, ‘Introduction: After Bakke’, in R. Post and M. Rogin (eds.), Race and Representation

Affirmative Action, (Zone Books, New York, 1998), pp. 13-27. [↑](#footnote-ref-183)
184. Skrentny, J.D., The Ironies of Affirmative Action: Politics, Culture, and Justice in America, (The University of Chicago Press, Chicago and London, 1996). [↑](#footnote-ref-184)
185. From an interview I conducted with Prof. Jack Birman and Prof. Jack Lousso at Boston University, on October 2, 2011, in the setting of my stay as a Visiting Scholar at Boston University. [↑](#footnote-ref-185)
186. The Office of Personnel Management (OPM). [↑](#footnote-ref-186)
187. The Office of Merit Systems Oversight and Effectiveness (MSO&E). ראו הרחבה לעניין זה ב: Merit Systems Protection Board, “Civil Service Evaluation: The Evolving Role of the U.S. Office of Personnel Management” (July 1998), p. v. [↑](#footnote-ref-187)
188. Donald Kettl, Patricia Ingraham, Ronald Sanders, Constance Horner, Civil Service Reform: Building a Government that Works (Washington: The Brookings Institution, 1996), p. 17. [↑](#footnote-ref-188)
189. Griggs v. Duke Power Co. (1971). [↑](#footnote-ref-189)
190. Gerald N. Rosenberg The Hollow Hope (Chicago, 1991) 39-156. [↑](#footnote-ref-190)
191. C. R. Sunstein, “Three Civil Rights Fallacies” 79 Cal. L. Rev. (1991) 751, 757. [↑](#footnote-ref-191)
192. Morris B. Abram, “Affirmative Action: Fair Shakers and Social Engineers” 99 Harv. L. Rev. (1985-86) 1312. [↑](#footnote-ref-192)
193. Thomas Sowell *“Affirmative Action: A Worldwide Disaster”*, Commentary December 1989, pp. 21-41, p. 24. [↑](#footnote-ref-193)
194. *Steelworker v. Weber* 444 U.S. 193 (1979). [↑](#footnote-ref-194)
195. In that case it was private employers. [↑](#footnote-ref-195)
196. Chief Justice Burger, and Justice Rehnquist. [↑](#footnote-ref-196)
197. University of California. Bakke*,* 438 U.S. 265 (1978) 407. [↑](#footnote-ref-197)
198. Even before affirmative action was anchored in federal legislation in the US, local affirmative action initiatives began in academic institutions. See: Phillips Derek L. (1979) *Equality, Justice and Rectification*, Academic Press London, p. 297. [↑](#footnote-ref-198)
199. In re *Fullilove v. klutznick, Secretary of Commerce* 448 U.S. 448 (1980). [↑](#footnote-ref-199)
200. *Grutter v. Bollinger*, [539 U.S. 306](https://en.wikipedia.org/wiki/Case_citation) (2003) and *Gratz v. Bollinger*, [539 U.S. 244](https://en.wikipedia.org/wiki/Case_citation) (2003). And for extensive analysis of case law development in the US in this context see: Bankston, Carl “Grutter v. Bollinger: Weak Foundations?” *Ohio State Law Journal* 67 (1): 1–13 (2006). In July 1995, the White House rescinded all affirmative action programs that set quotas or a preference for candidates lacking the necessary skills. See on this point: Anne Peters *Woman, Quotas and Constitutions* (1992) pp. 39-40. This approach was also adopted in Europe with respect to women: *Kalanke v. Freie Hansestadt Bremen (450/39)*: [1996] ECR I-3051, *Marschall v. Land Nordhein-Westfalen* (*C-409/95)*: [1997] All E.R (EC) 865. [↑](#footnote-ref-200)
201. University of California. Bakke*,* 438 U.S. 265 (1978) 407. [↑](#footnote-ref-201)
202. Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1073 (“Considering the black experience in a historical and contextual framework that focuses not only on the past, but [also on] the future of American society, the use of quotas is the most efficacious method for achieving racial equality in contemporary American society.” [↑](#footnote-ref-202)
203. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

Many of the affirmative action cases under Title VII involve public employees such as police, firefighters, and teachers. The most politicized version of the anti-affirmative action narrative is typified by the campaign strategy used by Senator Jesse Helms, the white incumbent, against Harvey Gant, the black challenger: “The Helms campaign commercial displayed a white working class man tearing up a rejection letter while the voice-over said, ‘You needed that job, and you were the best qualified. … But it had to go to a minority because of a racial quota.”‘ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1767 n.261 (1993). [↑](#footnote-ref-203)
204. K. M. Sullivan, “Dins of Discrimination: Last Term’s Affirmative Action Cases” 100 Harv. L. Rev. (1986-87) 78. [↑](#footnote-ref-204)
205. Steelworkers v. Weber (1979). [↑](#footnote-ref-205)
206. Johnson v. Transportation Agency, Santa Clara County (1987). [↑](#footnote-ref-206)
207. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L.REV. 1251, 1276-77 (1995) (challenging central assumption of affirmative action critics that test scores are closely correlated with productivity and that small test score differentials indicate meaningful performance differentials). [↑](#footnote-ref-207)
208. Executive Order 11246 (30 Fed Reg 12319) issued in 1965. In 1967 Executive Order 11375 (32 Fed Reg 14303) extended the provisions to women, Department of Labor Order of June 27, 1969; Bloch, Farrell *Antidiscrimination Law and Minority Employment.* Chicago U. Press (1994) p.70. [↑](#footnote-ref-208)
209. Office of Federal Contract Compliance Programmes, US Department of Labor, EEO and Affirmative

Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion and National Origin, <http://www.dol.gov/ofccp/regs/compliance/fs11246.htm>. [↑](#footnote-ref-209)
210. From reports by The Office of Federal Contract Compliance Programmers (OFCCP) <http://www.dol.gov/ofccp/>. [↑](#footnote-ref-210)
211. Equal Employment Opportunities Act of 1972. [↑](#footnote-ref-211)
212. Equal Opportunities Employment Act 1972, s. 4. [↑](#footnote-ref-212)
213. G. Stephanopoulos and P. Edley, Affirmative Action Review: Report to the President, (Government Printing Office, Washington, DC, 1995). [↑](#footnote-ref-213)
214. Equal Opportunities Employment Act 1972, s.2000e-16. [↑](#footnote-ref-214)
215. University of California v Bakke 438 US 265 (1987). [↑](#footnote-ref-215)
216. Podberesky v Kirwan 38 F. 3d 147 (4th Cir. 1994). [↑](#footnote-ref-216)
217. University of California. Bakke*,* 438 U.S. 265 (1978) 407. [↑](#footnote-ref-217)
218. Fullilove v. Klutznick, 448 U.S. 448 (1980). [↑](#footnote-ref-218)
219. United Steelworkers v Weber 443 US 267 (1986). [↑](#footnote-ref-219)
220. L.A. Jacobs, Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice, Cambridge University Press, Cambridge, (2004), p. 103. [↑](#footnote-ref-220)
221. Watson v. Fort Worth Bank and Trust 487 US 977 (1988). [↑](#footnote-ref-221)
222. Day, J. (2001). Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace. California Law Review, 89(1), 59-127. [↑](#footnote-ref-222)
223. The Constitution of California, art. 1, 31(a), <http://www.leginfo.ca.gov/.const/.article_1>. [↑](#footnote-ref-223)
224. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). [↑](#footnote-ref-224)
225. K. Monaghan, Equality Law, (Oxford University Press, Oxford, 2007), p. 15. [↑](#footnote-ref-225)
226. “Office of Personnel Management” – website: <https://www.opm.gov>; [↑](#footnote-ref-226)
227. “Minority Recruitment Program”. [↑](#footnote-ref-227)
228. 5 CFR §720.205(c)-(d). See, *e.g.*, the report of the US Office of Personnel Management concerning employment patterns and representation in federal service as compared with the general civilian market:

<https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/feorp-2012.pdf> - the data are represented at page 11 of the report. [↑](#footnote-ref-228)
229. For more detail, see: Krislov, S. (1974) Representative bureaucracy; Prentice Hall: Englewood Cliffs, New Jersey; Mosher, F. C. (1982) Democracy and the public service, 2nd ed., New York: OUP; Kim, P. S. (1994) “A theoretical overview of representative bureaucracy: synthesis,” International Review of Administrative Sciences, 60(3): 385-397. [↑](#footnote-ref-229)
230. Justice O’Connor in Adarand Constructors v Peña 515 US 200 (1995). [↑](#footnote-ref-230)
231. G. Spann, ‘Pure Politics’ 88 Michigan Law Review 1971 (1990). [↑](#footnote-ref-231)
232. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); and the Bakke affair, *supra*. [↑](#footnote-ref-232)
233. G.N. Rosenburg, The Hollow Hope: Can Court Bring About Social Change? (University of Chicago Press, Chicago, 1991). [↑](#footnote-ref-233)
234. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Deal*, 84 Cal. L. Rev. 953 (1996). [↑](#footnote-ref-234)
235. K. M. Sullivan, “Dins of Discrimination: Last Term’s Affirmative Action Cases” 100 Harv. L. Rev. (1986-87) 78. [↑](#footnote-ref-235)
236. The issue was settled in the case of Bakke, and was confirmed again twice in 2003 in Gratz and in Grutter. [↑](#footnote-ref-236)
237. Holzer, Harry and Neumark, David (2000) *“Assisting Affirmative Action”* Journal of Economic Literature, 38, 483-568. [↑](#footnote-ref-237)
238. *Canadian National Railway Co. v. Canada* [1987] 1 SCR 1114. [↑](#footnote-ref-238)
239. The main instrument that constitutes the basis for merit-based recruitment in the Canadian civil service is the Public Service Employment Act (1967), similarly to Sections 2301 and 2302 of the United States Code. [↑](#footnote-ref-239)
240. Employment Equity Act 1986. [↑](#footnote-ref-240)
241. Hiranandani, V. S. (2018). Diversity Management in the Canadian Workplace: Towards an Anti-racism Approach. In T. Das Gupta, & E. A. (Eds.), *Race and Racialisation*(2. ed.). Canadian Scholars Press. [↑](#footnote-ref-241)
242. Employment Equity Act (S.C. 1995, c. 44); accessible at: <http://laws-lois.justice.gc.ca/eng/acts/e-5.401/page-1.html> [↑](#footnote-ref-242)
243. Employment Equity Act (S.C. 1995, c.33(1)(e)). [↑](#footnote-ref-243)
244. Both languages, English, and French, were recognised as official languages. The Canada Charter of Rights and Freedoms, Canada Act, 1982 S.16, and an Act from 1985 also set the goal of creating equal opportunities in employment at the civil service as between native English and French speakers, Official Languages Act, (1985, c. 31 (4th Supp.)). [↑](#footnote-ref-244)
245. L.S. Laczko *Pluralism and Inequality in Quebec* (Toronto, University of Toronto Press, 1995) 15; Reitz, J. G., & Verma, A. (2004). Immigration, race, and labor: Unionization and wages in the Canadian labor market. Industrial Relations: A Journal of Economy and Society, 43(4), 835-854.‏ [↑](#footnote-ref-245)
246. R. Breton “Multiculturalism and Canadian Nation-Building” *Constitutionalism, Citizenship and Society in Canada* (A. Cairns & C. Williams eds., Toronto, University of Toronto Press, 1985) 27, 56–59; M. Weinfeld “Canada” *Protection of Ethnic Minorities: Comparative Perspectives* (R. Wirsing ed., New York, Pergamon Press, 1981) 41, 65–68;John Samuel and Kogalur Basavarajappa, *The Visible Minority Population in Canada: A Review of Numbers, Growth and Labour Force Issues*, Canadian Studies in Population, Vol. 33.2, 2006, pp. 241-269 [↑](#footnote-ref-246)
247. S.J.R Noel “Making the Transition from Hegemonic Regime to Power-Sharing: Northern Ireland *and Canada in Historical Perspective” Northern Ireland and the Divided World* (J. McGarry ed., Oxford, Oxford University Press, 2001) 209; R.L. Watts “Federalism and Diversity in Canada” *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States (Y. Ghai ed., Cambridge, Cambridge University Press, 2000) 29* [↑](#footnote-ref-247)
248. A.B. Bakan & A. Kobayashi *Employment Equity Policy in Canada: An Interprovincial Comparison* (Ottawa, Status of Women, 2000), available at [www.swc-cfc.gc.ca](http://www.swc-cfc.gc.ca); [↑](#footnote-ref-248)
249. The Canada Charter of Rights and Freedoms, Canada Act, 1982 s. 15(2). [↑](#footnote-ref-249)
250. Abella, Rosalie. 1984. Equality in Employment: A Royal Commission Report, Ottawa. Minister of Supply and Services. [↑](#footnote-ref-250)
251. Employment Equity Act 1986. [↑](#footnote-ref-251)
252. Employment Equity Act (1995, c.3) [↑](#footnote-ref-252)
253. Lois Thwaites, ‘The British Equality Framework is Incapable of Achieving Equality in the Workplace’, 2 N.E. L. Rev. 137 2014. [↑](#footnote-ref-253)
254. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R.; and see important judgements rendered thereafter which strengthened the duty imposed on employers:

*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 [Meiorin case]; *British Columbia (Superintendent of Motor Vehicles) v.* A *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [Grismer case]*.* [↑](#footnote-ref-254)
255. Employment Equity Act (S.C. 1995, c.33(2)). [↑](#footnote-ref-255)
256. [www.parl.gc.ca/InfoComDoc/37/1/HUMA/Studies/Reports/HUMARP9/07-intro-e.htm](http://www.parl.gc.ca/InfoComDoc/37/1/HUMA/Studies/Reports/HUMARP9/07-intro-e.htm)

And see the last report by the Canadian Human Rights Council, from 2019:

<https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports/2019-annual.html> [↑](#footnote-ref-256)
257. Stephanie Bernstein, Marie-Jos6e Dupuis, Guylaine Vall6e, ‘Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market-A Study of Legislative Solutions Adopted in Canada 15 (2009) The Journal of Legislative Studies 481. [↑](#footnote-ref-257)
258. Nicole Busby, ‘Affirmative Action in Women’s Employment: Lessons from Canada’ (2006) 33 Journal of Law and Society, 42. [↑](#footnote-ref-258)
259. Law and Administration Ordinance, 5708-1948. [↑](#footnote-ref-259)
260. See also: Public Enquiry Committee (1989) *A Report: General Inspection of the Civil Service and Other Bodies Supported by State Budget. (The Koberski Committee), Vol. 1.* Government printing office, Jerusalem [in Hebrew]. [↑](#footnote-ref-260)
261. Civil Service Law (Appointments) 5719-1959 (hereinafter: *Appointments Act*(. [↑](#footnote-ref-261)
262. Section 19 of the Appointments Act and the remarks of honor Strasberg-Cohen in the *Einstein* case, *supra* note 5. [↑](#footnote-ref-262)
263. Zamir I, *supra* note 2; and *Einstein* case, *supra* note 5, pp. 120-122. [↑](#footnote-ref-263)
264. HCJ 4566/90 *David Dekel v. Minister of Finance,* IsrSC 45(1) 028. [↑](#footnote-ref-264)
265. HCJ 313/97 *Avraham Exclrod v. Deputy Mayor of Jerusalem,* IsrSC 22(1) 80. [↑](#footnote-ref-265)
266. At the date of the establishment of Israel in 1948. [↑](#footnote-ref-266)
267. Dery D. (1993) *Political Appointments in Israel: Between Statehood and Partisanship.* The Israel Democracy Institute, Hakibbutz Hameuchad, Israel [in Hebrew]. [↑](#footnote-ref-267)
268. *Einstein* case, supra note 5, in p.120. [↑](#footnote-ref-268)
269. Section 24 to the Civil Service Appointment Act Bill, 365-1958. [↑](#footnote-ref-269)
270. N.L.C 44/ 4-20 *Halamish v. Tel Aviv Workers Council*, IsrLC 15, 320. [↑](#footnote-ref-270)
271. *Ibid*. p. 327. [↑](#footnote-ref-271)
272. N.L.C 53/ 3-171 *Yihiya v. State of Israel*, IsrLC 25, 479, 485.In the matter of state companies,see State Comptroller’s Office, *Report no. 39*, 1989 (in Hebrew) and State Comptroller’s Office, *Report on* *Appointment of directors of government companies*, Jerusalem: State Comptroller’s Office, 1989 (in Hebrew). [↑](#footnote-ref-272)
273. “21. The Government may, on the basis of a proposal from the Service Committee and subject to a published notice in the ‘Reshumot’, determine jobs and types of jobs to which the tender obligation referred to in section 19 shall not apply, and section 11 shall not apply to the Service Committee proposal; The Service Committee may, whether normally or in a particular case, permit, under conditions to be determined, or unconditionally, an appointment to a position without being declared as aforesaid, if the candidate passes to the civil service under this Act….” [↑](#footnote-ref-273)
274. “23. A person from one of the positions specified in the Second Schedule to this Law shall not be appointed except with the approval of the Government and under the conditions to be determined; The government may add to and subtract from the list of jobs in the second appendix.” [↑](#footnote-ref-274)
275. Paragraph 11.968 of the Civil Service Regulations. See also Israeli Government Resolution No. 345 dated 09.14.1999. [↑](#footnote-ref-275)
276. HCJ 154/98 *Histadrut Haovdim Haclalit v. State of Israel,* IsrSC 52(5) 111 [hereinafter: *Einstein Case*]. [↑](#footnote-ref-276)
277. Israeli Government Resolution No. 345, September 1999. [↑](#footnote-ref-277)
278. Paragraph 11.968 in the civil service regulations. Review regarding the search committees; see State Comptroller’s Office, Annual Report 61b, 2010. [↑](#footnote-ref-278)
279. Article 21 of the Appointment Act. [↑](#footnote-ref-279)
280. Explanatory Notes to the Civil Service (Appointments) (Amendment 11) (Appropriate Representation) Bill 2000-5764, Legislative Bills 496. And the remarks of Minister Y. Beilin, who presented the reasons for the bill on behalf of the government, *Knesset* Annals, *Lamed-Zayin-Lamed-Het* (5760), 10367. [↑](#footnote-ref-280)
281. For an extension of the doctrine to appropriate representation, see the case of the Second Women’s Lobby: HCJ 2671/98 **The Women’s Lobby in Israel v. Minister of Labor and Welfare** (issued on August 11, 1998). [↑](#footnote-ref-281)
282. HCJ 7068/10 **Hemi Doron v. Minister of Religious Affairs** (issued on May 29, 2011). [↑](#footnote-ref-282)
283. HCJ 2754/02 **Women’s Lobby in Israel v. Government of Israel and Others**, *Taf-Kuf-Ayin-Lamed* 2002 (3) 301. [↑](#footnote-ref-283)
284. Attorney General Guidelines, Appropriate Representation for Certain Sectors, Guideline 1.1503, March 2003. [↑](#footnote-ref-284)
285. HCJ 5660/10 **‘*Etach*’ Society Female Jurists for Justice, Women’s Lobby and Others v. Prime Minister of Israel**, *Pey-Daled Samech-Daled* (1) 504. [↑](#footnote-ref-285)
286. State of Israel Civil Service Commission, Account for 2011; State of Israel Civil Service Commission – Department for the Advancement of Women and their Integration, Activity Report for 2011, Adv. Talila Shahal-Rosenfeld, December 2012. [↑](#footnote-ref-286)
287. And active locating in general – although a government decision from 2007 stipulated that active search actions should be conducted to locate suitable candidates. [↑](#footnote-ref-287)
288. Eyal Benvenisti and Guy Sagi, Public Participation in Administrative Procedure, **Yitzhak Zamir’s Book: On Law, Government and Society** 119, 126–127 (2005). [↑](#footnote-ref-288)
289. And enacted Section 18 of the Government Companies Act (1993 Amendment). [↑](#footnote-ref-289)
290. HCJ 454/94 **The Women’s Lobby in Israel v. The Government of Israel and Others**, *Pey-Daled Mem-Het* (5) 501. [↑](#footnote-ref-290)
291. HCJ 2671/98 **The Women’s Lobby in Israel v. Minister of Labour and Welfare**, *Pey-Daled* *Nun-Bet* (3) 630. [↑](#footnote-ref-291)
292. HCJ 2754/02 **Women’s Lobby in Israel v. Government of Israel and Others**, Supreme Court Laws *Samech-Gimel* 146. [↑](#footnote-ref-292)
293. H. Kovarsky Report of the Public-Professional Committee for a Comprehensive Examination of the Civil Service and Supported Bodies from the State Budget (Vol. A, 5746), hereinafter: the “**Kovarsky Commission**”. [↑](#footnote-ref-293)
294. In Section 15(b)(1) of the Appointments Act. [↑](#footnote-ref-294)
295. In Section 15(b)(2) of the Appointments Act. [↑](#footnote-ref-295)
296. In Section 15(b)(3) of the Appointments Act. [↑](#footnote-ref-296)
297. In the case of women, there is an interpretive dilemma: What are “similar skills”? [↑](#footnote-ref-297)
298. Attorney General’s Guideline 1.1503, March 2003. [↑](#footnote-ref-298)
299. In HCJ 6924/98, **The Association for Civil Rights In Israel v. The Government of Israel**, *Pey-Daled* *Nun-Heh* (5) 15, 41. [↑](#footnote-ref-299)
300. Rosenberg, see Footnote ***supra***. [↑](#footnote-ref-300)
301. John Kaplan, Marijuana -The new prohibition (1970). [↑](#footnote-ref-301)
302. Rosenberg, see Footnote 42 ***supra***, pp.269-292. [↑](#footnote-ref-302)
303. See the first expression of this as “Representative Bureaucracy” in 1949 – a reflection of the composition of society, in: Subramniam V. “Representative Bureaucracy – A Reassessment” *The American Political Science Review*, Vol 61, No. 4, pp. 1010-1019 (1967). [↑](#footnote-ref-303)
304. And see also the duty in Canadian law, at Sections 5 – 15 of the Employment Equity Act (1995, c.44). The background for the enactment of the law, was the publication by a royal commission of a report in 1984 on the subject of promoting workplace equality, that emphasised the need for employment fairness. [↑](#footnote-ref-304)
305. “Office of Personnel Management” – website: <https://www.opm.gov>; [↑](#footnote-ref-305)
306. “Minority Recruitment Program” [↑](#footnote-ref-306)
307. 5 CFR §720.205(c)-(d). For more information, see: *Knesset*, Research and Information Center “Encouraging the Employment of Workers from Groups Characterised by Under-Representation”, Comparative Review, Submitted to the Parliamentary Inquiry Committee on the Absorption of Arab Workers in the Civil Service, 1st *Iyar* 5771, May 5, 2011. See last report of the US Office of Personnel Management from 2012 concerning employment patterns and representation in federal service as compared with the general civilian market: <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/feorp-2012.pdf> - the data are represented at page 11 of the report. [↑](#footnote-ref-307)
308. For more detail see: Krislov, S. (1974) Representative bureaucracy; Prentice Hall: Englewood Cliffs, New Jersey; Mosher, F. C. (1982) Democracy and the public service, 2nd ed., New York: OUP; Kim, P. S. (1994) “A theoretical overview of representative bureaucracy: synthesis,” International Review of Administrative Sciences, 60(3): 385-397. [↑](#footnote-ref-308)
309. See the Legislature’s position on the damage caused to under-represented populations due to biased tenders in the civil service: Explanatory Notes to Amendment Bill No. 11 to the Appointments Act, Bills 5760, 2901, p. 496. [↑](#footnote-ref-309)
310. The Commission’s report is accessible at:

<http://hidavrut.gov.il/sites/default/files/%20%D7%A1%D7%95%D7%A4%D7%99.pdf>; [↑](#footnote-ref-310)
311. *Ibid*., pp. 50 – 52 of the report. [↑](#footnote-ref-311)
312. *Ibid*., p. 130 of the report. [↑](#footnote-ref-312)
313. <http://hidavrut.gov.il/content/4273>; [↑](#footnote-ref-313)
314. Decision 869, dated December 20, 2015, promoting recommendations to integrate people from the ultra-Orthodox community into the civil service. [↑](#footnote-ref-314)
315. Government Decision 3993, dated December 18, 2011. [↑](#footnote-ref-315)
316. *Ibid*. [↑](#footnote-ref-316)
317. Hereinafter: the “Staff Team” or the “Staff Team Report”, accessible at:

<http://www.csc.gov.il/databases/articlesandpublications/documents/reformreport2013.pdf> [↑](#footnote-ref-317)
318. The Kovarsky Report, see Footnote, ***supra***. [↑](#footnote-ref-318)
319. Para. 10.232. [↑](#footnote-ref-319)
320. See Paragraph 11.401 of the Internal Revenue regarding the internal tender to which the employees of the ministry and the inter-ministerial tender may apply, according to Paragraph 10.232, employees of all government ministries may submit applications, and it is up to the ministry to choose whether to hold it. In them, an internal tender was held, followed by a public one, and no suitable candidate was found, to hold a public tender only in the second round of the tender for the position, even if less than a year has passed. This is an effective time-saving mechanism. [↑](#footnote-ref-320)
321. Section 19 of the Appointments Act. [↑](#footnote-ref-321)
322. Paragraphs 10.232, 11.431, 11.401 and 11.411 of the *Takshir.* [↑](#footnote-ref-322)
323. In the Commission’s publication of the Staff Team’s work in the setting of the “Tree of Knowledge” Program, accessible at: <http://www.csc.gov.il/Units/Reform/Documents/Knowledgetree/KnowledgetreeProgram.pdf>, p. 20.

See also, the summary recommendations by the Civil Service Commission, Policy Paper Concerning Internal and Inter-Ministerial Tenders, Jerusalem, May 2015, p. 72, accessible at:

<http://csc.gov.il/Units/Reform/Documents/Knowledgetree/Tenders2.pdf> [↑](#footnote-ref-323)
324. The Civil Service Commission, Policy Paper Concerning Internal and Inter-Ministerial Tenders, Jerusalem, May 2015, pp. 43 & 53, accessible at:

<http://csc.gov.il/Units/Reform/Documents/Knowledgetree/Tenders2.pdf> [↑](#footnote-ref-324)
325. See at: <http://www.oecd.org/gov/pem/acquiringcapacity.htm> [↑](#footnote-ref-325)
326. Career-based system. This approach characterises the civil service in Canada and England where most jobs are advertised internally. The Civil Service Commission, Policy Paper Concerning Internal and Inter-Ministerial Tenders, Jerusalem, May 2015, pp. 28 & 29, accessible at:

<http://csc.gov.il/Units/Reform/Documents/Knowledgetree/Tenders2.pdf>. See also: The Partnership for Public Service, “Mid-Career Hiring in the Federal Government: A Strategy for Change” (2002), <http://ourpublicservice.org/OPS/publications/viewcontentdetails.php?id=54>. [↑](#footnote-ref-326)
327. Role-based system. This approach characterises the civil service in the United States where most jobs are open to the public. The Civil Service Commission, Policy Paper Concerning Internal and Inter-Ministerial Tenders, Jerusalem, May 2015, p. 28, accessible at:

<http://csc.gov.il/Units/Reform/Documents/Knowledgetree/Tenders2.pdf>. See also: C. Pollitt, G. Bouckaert, Public Management Reform, A Comparative Analysis, Oxford University Press 2004, p. 76. [↑](#footnote-ref-327)
328. U.S. Office of Personnel Management, “Hiring Authorities: Competitive Hiring”:

[www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/#url=Types-of-Appointments](http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/#url=Types-of-Appointments). [↑](#footnote-ref-328)
329. U.S. Office of Personnel Management, “Human Resources Flexibilities and Authorities in the Federal Government”, p. 10:

[www.opm.gov/policy-data-oversight/pay-leave/referencematerials/handbooks/humanresourcesflexibilitiesauthorities.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/referencematerials/handbooks/humanresourcesflexibilitiesauthorities.pdf). [↑](#footnote-ref-329)
330. Further reading on the idea of preferential treatment limited to part of the process, and an example of this from the recruitment of candidates in institutions of higher education in India, see: Thomas Sowell *“Affirmative Action: A Worldwide Disaster”*, Commentary December 1989, pp. 21-41, p. 39. [↑](#footnote-ref-330)
331. The Civil Service Commission, the Civil Service Commissioner’s guidelines for human capital planning, working year 2016, p. 16, accessible at:

<http://www.csc.gov.il/DataBases/ArticlesAndPublications/documents/guidelineplanninghc-2016.pdf> [↑](#footnote-ref-331)