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Reimagining power relations: Hierarchies of disadvantage and affirmative action

2017 Acta Juridica 124

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The South African Constitution has embraced affirmative action as an aspect of substantive equality from its inception. Nevertheless, it remains a challenging concept. Because affirmative action measures tend to redistribute existing jobs or benefits, rather than widen the pool of benefits, they inevitably create competition between individuals. When legal challenges of affirmative action measures come from privileged applicants, the rationale for preferring members of disadvantaged groups is easy to derive from the aims of substantive equality. However, recent cases have brought to the fore the potential of competition between disadvantaged individuals. Section 9(2), in permitting measures 'designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' does not give a metric for distinguishing between degrees of disadvantage, or different kinds of disadvantage. Affirmative action expressly recognises the link between status, such as gender or race, and class, in the sense of socio-economic disadvantage. One of its aims is therefore clearly redistributive. However, this paper argues that status should not be regarded as simply a proxy for socio-economic disadvantage. In other words, race, gender and disability cannot simply be collapsed into class. It is argued in this paper that there are also other core mutually reinforcing aims of substantive equality to complement the redistributive element: to redress stigma, stereotyping, prejudice and violence; to facilitate voice and participation; and to accommodate difference and transform underlying structures. Affirmative action measures need to be calibrated to address all of these dimensions of substantive equality simultaneously. Stigma and ongoing racial prejudice need to be addressed, but at the same time, attention must be paid to the ongoing class divisions within status groups. Most importantly, it is necessary to examine the extent to which affirmative action can genuinely bring about structural change, rather than simply changing the racial or gender composition of existing structures. By applying a more nuanced analytic framework to affirmative action cases, it is possible to come to more principled, transparent and appropriate ways of addressing different degrees and types of disadvantage.

'So, plainly, [our Constitution] has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was

and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.' [1]

– Moseneke ACJ, *Barnard*

The South African Constitution has embraced affirmative action as an aspect of substantive equality from its inception. There is therefore no need to enter into the arid debates in the US and UK as to how it might be reconciled with the equal treatment principle. Nevertheless, it remains a challenging concept. As Moseneke ACJ so pertinently pointed out in *Barnard*: 'Our quest to achieve equality must occur within the discipline of our Constitution.... We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged.' [2]

In this paper, I want to explore this last and particularly pressing issue, that of different and perhaps conflicting disadvantage. What do the principles set out by Moseneke DCJ in his judgments suggest as to how different and perhaps conflicting disadvantages can be reconciled, if at all, within the conception of affirmative action? In particular, I want to explore the role of class, and its interaction with identity categories or status. It is telling that in *Barnard*, Moseneke ACJ emphasised that: 'At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class.' [3]

In this dictum, Moseneke ACJ does not elaborate on the meaning of class, or on its relationship with race and gender. The concept of class has of course generated a vast literature, which is well beyond the scope of this paper. Instead, the paper focuses on what could be regarded as the pivotal insight of Moseneke's dictum, namely that socio-economic disadvantage has a close but contested relationship with gender and race. On one understanding of substantive equality, the key issue is not so much race or gender, but the socio-economic disadvantage to which race and gender discrimination gives rise. This means in turn that the aim of equality laws should not be to eliminate race or gender as a factor in decision-making, but to redress the socio-economic disadvantage associated with race or gender. On this view, then, race and gender can legitimately be used to redress such disadvantage, and affirmative action, far from breaching substantive equality, should be regarded as an essential means to achieve such equality.

However, gender and race do not map neatly on to socio-economic differences. Both black people and women, whether white or black, can

be privileged or disadvantaged. The juxtaposition of race and gender on the one hand, with class on the other, allows us to examine more closely the aims and effects of affirmative action and shape appropriate jurisprudential responses. In this paper, the juxtaposition is captured by drawing broadly on the Weberian concepts of class and status. Class is very broadly related to an individual's position in the market, and particularly her access to economic resources; whereas status is contingent on her 'prestige' or ranking in the social order. [4] While the Weberian use of 'status' is wider than the social positioning which attaches to race, gender or their intersection, it is this aspect of status which is the focus here. [5] Status attaches to individuals and thereby creates groups of similarly situated individuals. The use of status in this sense to denote both individuals and groups is helpful in that it leaves open the question of whether groups should themselves be regarded as worthy of protection, or, on the other hand, whether this would involve essentialising of identities.

For the purposes of this paper, I regard affirmative action as an express use of a protected characteristic (such as race, gender or disability) to distribute benefits, with the aim of advancing substantive equality. Because affirmative action measures tend to redistribute existing jobs or benefits, rather than widen the pool of benefits, they inevitably create competition between individuals. When legal challenges of affirmative action measures come from privileged applicants, the rationale for preferring members of disadvantaged groups is easy to derive from the aims of substantive equality. However, recent cases have brought to the fore the potential of competition between disadvantaged individuals. Section 9(2), in permitting measures 'designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' does not give a metric for distinguishing between degrees of disadvantage, or different kinds of disadvantage. Employment equity plans, such as those at issue in *Barnard* and *Correctional Services*, [7] use population statistics as the metric of distribution, the aim being that workforces should reflect national demographics. This puts representivity at the centre of the mission of affirmative action.

The focus on representivity raises several key challenges. The first is whether affirmative action establishes not just minimum levels of representation for previously disadvantaged groups, but also maxima. The *Barnard* principle, as understood in the *Correctional Services* case, established that maximum levels of representation apply not just to advantaged

groups but also to designated groups. This means that groups, such as Indians, which are very small minorities of the population, might reach their ceiling with only one or even less than one representative. Intersectional disadvantage might similarly be rendered invisible. The second is that affirmative action might become a competition between disadvantaged individuals. This is because class divisions within a protected or

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designated status group might be reinforced or exacerbated by affirmative action, which gives some parts of the group access to a limited pot of elite benefits. As will be further explored below, in India, the response has been to hold that members of the equivalent of a designated group who earn above a set maximum are no longer eligible for reservations, the equivalent of affirmative action.

These challenges require a closer look at the aims of affirmative action. Affirmative action expressly recognises the link between status, such as gender or race, and class, in the sense of socio-economic disadvantage. One of its aims is therefore clearly redistributive. However, this paper argues that status should not be regarded as simply a proxy for socio-economic disadvantage. In other words, race, gender and disability cannot simply be collapsed into class. It will be argued below that there are also other core mutually reinforcing aims of substantive equality to complement the redistributive element: to redress stigma, stereotyping, prejudice and violence; to facilitate voice and participation; and to accommodate difference and transform underlying structures. [8] Affirmative action measures need to be calibrated to address all of these dimensions of substantive equality simultaneously. Stigma and ongoing racial prejudice need to be addressed, but at the same time, attention must be paid to the ongoing class divisions within status groups. Most importantly, it is necessary to examine the extent to which affirmative action can genuinely bring about structural change, rather than simply changing the racial or gender composition of existing structures.

These arguments are elaborated below. I begin by establishing an analytic framework based on substantive equality to assist in navigating the tensions between status and class. In the second section, I consider how courts in different jurisdictions have mediated the relationship between status and class in the process of delineating the class of beneficiaries of affirmative action. The focus on representivity in the South African jurisprudence is contrasted with that of the Indian courts on socio-economic disadvantage. In the third section, the four-dimensional

approach to substantive equality set out in Part I is applied to the context of affirmative action, demonstrating the importance of avoiding negating either status or class, while at the same time highlighting the role of participation and structural change.

I Affirmative action and substantive equality: a four-dimensional analysis

One of the main advantages of substantive equality over formal equality is its asymmetry. This means that it is not race or gender per se which is regarded as problematic, but the detriment and disadvantage associated with subordinated groups. [9] This asymmetry means that equality is not necessarily breached by measures which specifically use race or gender as a means of distributing benefits and burdens. Indeed, provided that they aim to benefit the subordinated group, race or gender specific measures may be necessary to achieve substantive equality. Thus, whereas formal equality would regard affirmative action as a breach of equality, substantive equality sees such programmes as a means to achieve equality. [10]

This understanding of affirmative action has been endorsed by the South African Constitution, which makes express provision for affirmative action as a means of achieving substantive equality. [11] According to s 9(2), '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' The meaning of this provision was elaborated in *Van Heerden*, [12] a claim of race discrimination brought by a white Afrikaner member aggrieved at a measure which enhanced the pension contributions of post-apartheid members of Parliament but not pre-apartheid members. The High Court took an emphatically formal view of equality, holding that the affected white members had been less favourably treated on grounds of their race. The relatively advantaged position of the affected white members was regarded as irrelevant. The High Court therefore struck down the programme as unfair discrimination. The Constitutional Court reversed the decision. According to Moseneke J:

What is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. [13]

At one level, affirmative action constitutes a valuable synthesis between status and disadvantage, specifically attaching socio-economic benefits to those disadvantaged by status. However, it is not necessarily the case that a programme singling out one group for special protection will in fact advance substantive equality. First, it may freeze individuals into the very status identity which substantive equality aims to eliminate. In their concurring judgment in *Barnard*, Cameron J, Froneman J and Majiedt AJ warned: 'We must note with care how these remedial measures often utilise the same racial classifications that were wielded so invidiously in the past. Their motivation is the opposite of what inspired apartheid: for their ultimate goal is to allow everyone to overcome the old divisions and subordinations. But fighting fire with fire gives rise to an inherent tension.' [14] It may also perpetuate stereotypes. This is particularly true for special measures in favour of women in their child-caring role. [15] Secondly, as the status group begins to benefit from the affirmative action provisions, a gap may open up between status and socio-economic disadvantage; and the category of beneficiaries identified by the measure might become over- or under-inclusive. In particular, as the association between race and disadvantage loosens, it may become necessary to include a further criterion, such as that known as the 'creamy layer' in India, which excludes status members who are no longer socio-economically disadvantaged. [16] Thirdly, it may create competition, not between the advantaged and disadvantaged groups, but between individuals in the same or different disadvantaged groups, requiring a ranking of disadvantage. Behind these issues is the fourth challenge, namely the extent to which affirmative action can be genuinely transformative, in that it brings about structural change, rather than simply changing the colour or gender composition of classes within the existing structure. These challenges in turn raise questions as to the role of courts, and in particular, the standard

of scrutiny which courts should apply in order to determine whether affirmative action measures breach a constitutional equality guarantee.

To address these difficult challenges, it is necessary to have a richer understanding of the role of affirmative action in achieving substantive equality. The recognition of the connection between status and socio-economic disadvantage is central to substantive equality. However, this does not mean that status is simply a proxy for socio-economic disadvantage. Substantive equality requires attention to be paid too to the ongoing stigma, stereotyping, prejudice and even violence which can attach to certain characteristics. Such stigma and stereotyping can exist separately from socio-economic disadvantage, as well as causing or being caused by such disadvantage. There are also two more dimensions to substantive equality. Inequality is also centrally due to political and social marginalisation and exclusion, leading to absence of voice among disadvantaged groups. Substantive equality therefore needs to aim to enhance participation and amplify the voices of those who are marginalised. Furthermore, equality is not sameness. It should not bring with it a requirement of conformity or assimilation to the dominant norm. Substantive equality recognises and celebrates difference. [17] It therefore requires structural change, and a transformation of the dominant norm.

I argue therefore that substantive equality has four different dimensions. [18] First, it is an asymmetric principle, aiming to redress socio-economic disadvantage rather than regarding all classifications as invidious. Thus, its focus is on those who are disadvantaged by racial or other classifications. Secondly, substantive equality aims to promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation, and violence because of status. This encompasses recognition harms. [19] Thirdly, substantive equality should facilitate full participation in society. Fourthly, substantive equality should not exact conformity as a price of equality. Instead, it should entail accommodation of difference and structural change. It is argued here that this four-dimensional understanding of equality aids in navigating the complex tensions between different groups jostling for the benefits of affirmative action.

The four-dimensional approach provides an analytic framework to illuminate better the multifaceted nature of inequality and to assist in determining whether actions, practices or institutions impede or further the right to equality. It is deliberately framed in terms of dimensions, to

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permit us to focus on their interaction and synergies, rather than asserting a pre-established lexical priority. In this way, we are able to understand the manner in which different dimensions might be used to buttress one another and to address the interaction between different facets of inequality. These interactions are not always harmonious. But instead of excluding one or the other facet wholly from the right to equality, it is argued here that a substantive approach requires them to be considered together. This makes it possible to recognise and deal with conflicts between the different facets. Where there is the potential for these facets to pull in opposite directions, the aim is to look for synthesis or compromise, rather than suggesting that substantive equality pursue one of the aims at the cost of obliterating the others. For example, affirmative action measures can cause stigma and other recognition harms, either where beneficiaries are regarded as unmeritorious, or where some groups, such as small intersectional minorities, are rendered invisible. Alternatively, in aiming to address stigma and past prejudice, such measures might fail to change underlying structures, simply changing the racial or gender composition of existing structures without transforming them. Thus, paying attention to all four dimensions is essential to ensure that the design and implementation of affirmative action measures is in tune with substantive equality. The framework does not of course resolve all of the issues relating to competing disadvantages. Instead its aim is ultimately an evaluative one, to provide a set of criteria to determine whether an affirmative action measure is likely to fulfil the right to equality and to point to ways in which it could be reformed better to do so. [20]

II Delineating the beneficiaries: status and class

In determining how race and class interact within an affirmative action paradigm, it is necessary to begin by considering how to delineate the category of beneficiaries in the first place. A key strength of substantive equality is its move away from the individualism of formal equality or direct discrimination, [21] which requires proof that an individual has suffered discrimination at the hands of an identified perpetrator before an individual remedy can be granted. Affirmative action does not require proof of individual detriment. Therefore, the category of beneficiaries need not consist only of proved victims. Nevertheless, there needs to be some correlation between the beneficiaries and the previous disadvantage. How then should the beneficiaries be determined? Section 9(2) of the South African Constitution refers to measures 'designed to protect or

advance persons, or categories of persons, disadvantaged by unfair discrimination'. Moseneke DCJ makes it clear that affirmative action under s 9(2) is a restitutionary remedy. It is emphatically not punitive or retaliatory. At the same time, the reference to restitution does not mean that individuals need to prove that they were individually wronged. Instead, according to Moseneke DCJ, the target should be a particular class of people who have been susceptible to unfair discrimination and the measure must be designed to protect or advance those classes of persons. [22]

This raises the question of whether all the beneficiaries must be disadvantaged. Can the beneficiary category include some individuals who have never been disadvantaged by unfair discrimination? The court in *Van Heerden* held that it could. In this case, although an overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws, not all new parliamentarians of 1994 belonged to the class of persons prejudiced by past disadvantage and unfair exclusion. Moseneke J recognised that it would often be 'difficult, impractical or undesirable to devise a legislative scheme with "pure" differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or "hard cases" or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies....' [23] He thus held that the measure should be judged by 'whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion'. [24] The validity of the remedial measures was unaffected by the existence of a tiny minority of members of Parliament who were not unfairly discriminated against, but who benefited from the measure. This can be contrasted with the decision of Mokgoro J, who held that a more exact fit was necessary. She regarded the measure as too loosely related to a protected group to fall within s 9(2), which relieves the state of the burden of proving unfairness. Instead, it needed to fulfil the higher standards of fairness required in relation to s 9(3), an ordinary discrimination claim. On the facts, it did.

The *Van Heerden* case concerned the question whether non-members of the designated group can be included in the beneficiary class. But what if the socio-economically advantaged group are in fact members of the status group? Can the beneficiary category include those who, while sharing the status of the disadvantaged group, are no longer socio-economically disadvantaged themselves, possibly because of the effectiveness

of the measures themselves? This question arose in the Canadian case of *Kapp*, which concerned the federal government's strategy to enhance aboriginal involvement in commercial fishing. [25] As part of the strategy, the government had issued a communal fishing licence to three aboriginal bands permitting only fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, commercial fishers, mainly non-aboriginal, were excluded from the fishery during this 24-hour period. They argued that the communal fishing licence discriminated against them on the basis of race.

Section 15(2) of the *Canadian Charter* permits ameliorative measures whose object is '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'. The court was therefore required to establish whether the three Indian bands were an 'identifiable disadvantaged group' for the purposes of s 15(2) of the *Canadian Charter*. The court, having identified the distinction as being based on race, went on to examine whether, as required by s 15(2), the programme targeted a 'disadvantaged group identified by' race. For this, it referred to both status disadvantage – 'the legacy of stereotyping and prejudice against Aboriginal peoples' – and socio-economic disadvantage – 'the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures'. However, it did not require the classification to be solely concerned with the latter disadvantage. Thus, it held that not all members need be disadvantaged: 'The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.' [26] This approach to the relationship between socio-economic disadvantage and status inequality may work when there is a substantial overlap, as in the case of the First Nation tribes in the *Kapp* case. However, as affirmative action measures become more effective, and some members of the status group begin to prosper, questions arise as to whether the whole group should be entitled to affirmative action.

A different response might therefore be to overlay status with socio-economic disadvantage in demarcating the group of beneficiaries. To qualify for the benefit, the individual must show socio-economic disadvantage as well as membership of the status group. This can be seen in India. The Indian Constitution permits special provision to be made for two categories of disadvantaged groups. The first is 'Scheduled Castes and

Scheduled Tribes' which are specified by the President. [27] The second category is referred to as 'socially and educationally backward classes of citizens', [28] or other 'backward classes'. [29] The latter classes are specified in a list drawn up by the National Commission for Backward Classes. [30] The equality guarantee in the Indian Constitution provides that special provision may be made for the advancement of any these categories. [31] Particularly controversial has been the question of whether the reservations should be available to the 'creamy layer', or those members of the certified groups who are in fact no longer socially or educationally disadvantaged. In two of the foremost cases on reservations, the Indian Supreme Court has made it clear that exclusion of the creamy layer is not an additional principle, but one that goes to the very purpose of the reservation. As Justice Jeevan Reddy stated in *Indra Sawhney's* case, '[i]n our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class as a backward class'. [32] Similarly, the Chief Justice in *Ashoka Kumar Thakur* stated: 'To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of "creamy layer" is essential.' [33] In other words, the definition of the beneficiary class must correspond with the purpose of the provision, namely to advance those who are disadvantaged. However, the requirement that a group display both status and class disadvantage is only imperfectly executed. On the

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one hand, there is no creamy layer exclusion for the Scheduled Tribes or Scheduled Castes. On the other hand, there is no provision for reservation in favour of disadvantaged Muslims.

The South African courts have tended to lean in the other direction, emphasising status rather than class. This is to some extent driven by the focus on status in both the Constitution and statutory provisions. We have already seen that s 9(2) the Constitution refers to measures to protect or advance persons disadvantaged by unfair discrimination, which tends to suggest the status groups designated in the Constitution and the Employment Equity Act 55 of 1998 (EE Act). This is reinforced by the central emphasis on the principle of representivity in both the Constitution and statutory implementation under the Employment Equity Act. Section 195 of the Constitution provides that 'public administration must be broadly representative of the South African people, with employment and

personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation'. [34] Such provisions are echoed in statutory provisions relating to public services. [35]

Representivity is also emphasised in the EE Act, which was the subject in both *Barnard* and *Correctional Services*. The preamble to the Act recognises that the disparities in the labour market resulting from apartheid and other discriminatory laws and practices 'create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws'. It therefore aims, inter alia, to 'achieve a diverse workforce broadly representative of our people'. Section 15 of the Act refers to representivity as a primary aim of the affirmative action measures required by the Act. Affirmative action measures must include measures to 'ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce'. [36] Notably, however, the EE Act explicitly excludes quotas. [37]

Importantly, the Act also refers to other aims, including measures designed to further diversity in the workplace based on equal dignity of and respect for all people; making reasonable accommodation for people from designated groups; and implementing training measures. [38] In addition, the Act requires people to be 'suitably qualified'. These provisions were referred to in passing by Moseneke ACJ in *Barnard*. As he put it, '[t]he Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public'. [39]

Nevertheless, it is on the notion of representivity that the Constitutional Court has largely focused, to some extent in *Barnard*, and more emphatically in *Correctional Services*. *Barnard* concerned a challenge by a white woman, who had been refused promotion by the National Commissioner of the Police Service although she scored higher than any other applicants. The reason given was that her appointment would worsen the representivity of the grade in question, Level 9, at which white women were already over-represented. Since failing to fill the post would not affect service delivery, it was decided not to fill the post, and in the

interim, a white man was transferred to fill the vacancy. She claimed that she had been discriminated against on grounds of race. The Police Service argued that it had acted lawfully in pursuit of a legitimate employment equity plan.

The Constitutional Court rejected her claim. The potential conflict between the claims of white women, a designated group, and those of black men and women, was not, however, presented as the issue which the court was required to address. Instead, the case was dealt with on the basis of her claim of discrimination on grounds of race. This meant that the case was decided as if it were a classic contest between a privileged individual claiming race discrimination and the legitimacy of affirmative action. The potential conflict between different designated groups, here black men and women on the one hand, and white women on the other, was rendered invisible.

Moseneke ACJ made it clear, as he had done in *Van Heerden*, that provided a measure fell within s 9(2), it would not be determined on the basis of whether it was fair or unfair discrimination. Instead, the question was whether it was a legitimate restitutionary measure within the scope of s 9(2). To fall within s 9(2), a measure should target a particular group of people who have been susceptible to unfair discrimination; be designed to protect or advance those classes of persons; and promote the achievement of equality. [40] Once the measure fulfils these criteria, it is neither unfair nor presumed to be unfair. Both the Constitution itself and the EE Act provide explicitly that affirmative action measures are not unfair. Instead, the question is how strict the court's scrutiny of the affirmative action measure should be. Similarly, the court had power to decide whether a valid employment equity plan has been lawfully implemented. Moseneke ACJ did not find it necessary to define the standard conclusively. What he did say was that at the very least a legitimate restitution measure must be rationally related to the terms and objects of the measure. 'It must be applied to advance its legitimate purpose and nothing else'. [41]

It was also in relation to strictness of scrutiny rather than competing status groups that the other judges differed. Cameron, Froneman and Majiedt JJ took the view that the rationality standard posited by Moseneke J was not fit for the task of setting an appropriate supervisory role for the court. Instead, they argued for a standard based on fairness. Van der Westhuizen J, instead, argued for a standard of proportionality. Although Cameron, Froneman and Majiedt regarded proportionality as encompassing fairness, it is submitted that proportionality could risk re-importing a necessity standard, which substantive equality aims to

leave behind. Fairness too is risky in that it seems to import the standard of 'unfair discrimination' from s 9(3) into s 9(2). [42]

In the *Correctional Services* case, the conflict between status groups was more clearly in focus, in this case, between coloured and black African workers. The Employment Equity Plan drawn up by the Department of Correctional Services set numerical targets to be attained within its workforce within a five-year period. The targets aimed to achieve a workforce which reflected the population of the country, based on population estimates issued by Statistics South Africa. This meant that at the end of the five-year period, the workforce should contain 9.3% white men and women; 79.3% African men and women; 8.8% coloured men and women and 2.5% Indian men and women. The applicants, who were coloured men and women, were denied appointment to certain posts in the Western Cape, despite being recommended for appointment by the respective interview panels. The reason given for this decision was that they were coloured persons, and coloured person were already over-represented in the relevant occupational levels. It is notable that the EE programme included a principle regarding relative disadvantage, which stated that the programme should recognise that even among the designated groups, varying levels of representivity did exist. Interventions should therefore ensure equitable representation among these groups. This gives important emphasis to intersectionality issues, particularly the situation of African women. [43] However, here too the focus was entirely on status groups rather than socio-economic disadvantage.

Zondo J's judgment puts great emphasis on what he calls the *Barnard* principle. In his view, the court in *Barnard* upheld the principle that it is was legitimate to refuse promotion to Miss Barnard on the basis that white people were already over-represented in the occupational level. [44] The question before the court in the *Correctional Services* case was whether this principle only applied to white people or could also apply to designated groups. Can an employer refuse to appoint an African, coloured, or Indian person on the basis that African, coloured or Indian people were already over-represented or adequately represented in the grade to which the person seeks appointment? The same is true for gender or disability. In other words, is there a level of representation which each group must achieve, or is it sufficient for each group to have a presence, no matter how insignificant?

For Zondo J, the answer was clear: 'The level of representation of each

group must broadly accord with its representation among the people of South Africa'. [45] This meant that 'a designated employer is entitled, as a matter of law, to deny an African or coloured person or Indian person appointment to a certain occupational level on the basis that African people, coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level'. [46] This is

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true too for men and women. In the case in question, the employer was therefore in principle entitled to deny appointment to coloured applicants on the basis that they were already over-represented in a grade.

This, however, left open the question of how to determine representivity. The Court held that it was wrong to use national population statistics for the Western Cape, where the coloured population is largely concentrated. The apartheid policy of excluding African workers from the Western Cape while giving coloured workers preference was responsible for this demographic pattern. The EE Act at that time specified that the equitable representation should be 'in relation to the demographic profile of the national and regional economically active population'. [47] Since the Department used only national statistics, to the exclusion of regional population data, it was held to have acted in breach of its obligation. The result was that the determination of over-representivity had been wrongly made. Because the basis relied on to justify refusing to employ coloured and female individual applicants was incorrect, the refusal amounted to acts of unfair discrimination. [48] The refusal to appoint should therefore be set aside. Where the relevant posts had remained unfilled, the individual applicant should now be appointed, with retrospective effect, including remuneration. If the posts had been subsequently filled, the applicants, who were all in lower positions in the Service, should be accorded the difference in pay and benefits.

III Representation and substantive equality

The differing emphases of the Canadian, Indian and South African courts raise important questions as to how competing disadvantage should be dealt with through affirmative action measures. The South African cases assume that competing disadvantage can be solved by reflecting population demographics in individual workforces. This reflects too the powerful argument of Fiscus, who maintains that affirmative action should be understood as a measure of redistributive justice rather than compensatory justice. The requirement that outcomes reflect the proportion of racial groups in society, he argues, does not aim to compensate or punish,

but to ensure that everyone has the chance she would have had in the absence of racism. [49]

The main target of Fiscus' argument is to rebut the claim that affirmative action based on proportional representivity unfairly punishes or burdens innocent white men. However, neither the South African cases nor Fiscus gives any indication of how competing disadvantage within status groups can be dealt with. Where status disadvantage and socio-economic disadvantage overlap, this issue might not raise too many challenges. But what if status is no longer a fully reliable proxy for socio-economic disadvantage? The Indian courts address this by requiring individuals to manifest both socio-economic disadvantage and status membership of an out-group. However, this assumes that the function of affirmative action is only in relation to the socio-economic dimension of status wrongs. On this view, pure socio-economic disadvantage without status wrongs, and pure status wrongs without socio-economic disadvantage both fall outside the affirmative action purview.

It could be argued that affirmative action is an inappropriate response in cases in which status wrongs need to be addressed but socio-economic disadvantage is no longer an issue. On this view, status-only wrongs are better addressed through other measures, such as prohibitions on discrimination and harassment. [50] Indeed, to continue to use affirmative action for purely status wrongs could, on this view, simply reinforce stereotypes. However, this unnecessarily narrows the role of affirmative action. Its aim should not be regarded as merely redistributive. Just as socio-economic disadvantage should not be hidden under an approach which focuses on status, so class should not obscure the ongoing effect of status. Indeed, it should go further. Affirmative action measures should take into account all four dimensions of affirmative action: redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; facilitating voice and participation; and accommodating difference and achieving structural change; and the interaction between them, including potential conflicts.

Can the principle of representation in the South African cases achieve substantive equality in this sense? Moseneke J, as we have seen, regards the main aim as restitutionary. However, the class of beneficiaries in the current generation might not be identical to the victims of past discrimination under apartheid. Representation is therefore more than a restitutionary measure on an individual level. There are several further ways it could function. The first is to address hidden prejudice and other structural obstacles. In the absence of barriers, there should be a broadly representative spread of men and women, blacks and whites, and members

of different ethnic groups across the labour force and government. This means that the very fact that a group is seriously under-represented in a sphere or activity is evidence of the subtle operation of invisible barriers. In practice, despite apparently objective eligibility standards and ostensible equal opportunity policies, there remain many hidden obstacles to the advancement of women, historically disadvantaged South Africans, minorities and others. Hidden prejudices can be more easily overcome by affirmative action than by individual claims for unfair discrimination. Rather than relying on litigation by individual victims, the employer is required to take the initiative. Nor is it necessary to prove unfair discrimination. Instead, it is sufficient to demonstrate a clear pattern of under-representation. In this way, implicit or hidden discriminatory selection criteria are unequivocally removed: requiring outcomes to be representative makes it impossible for such criteria to be reintroduced surreptitiously through subjective decision-making.

Phrased in this way, affirmative action as representation can be legitimated as an effective means of redressing ongoing stereotyping and prejudice, bringing the second dimensions into play. At the same time, this formulation reveals its limited role in relation to redressing disadvantage, facilitating voice, participation and structural change. While preference policies based on representivity may change the racial composition of some higher paid occupations, they do not challenge the underlying structural and institutional forces leading to the discrimination. As Iris Marion Young argues, [51] affirmative action diagnoses the problem as one of maldistribution of privileged positions, with the result that its objective is limited to the redistribution of such positions among under-represented groups. However, this narrow definition of racial justice leaves out the equally important issues of institutional organisation and decision-making power. The under-representation of disadvantaged South Africans in higher positions in the employment ladder, both public and private, is only partially solved by inserting some black South Africans into those positions. It is not surprising that, in practice, affirmative action is often found to do no more than favour the relatively privileged of the disadvantaged group. [52] While some 'make it to the top', the vast majority will remain in poorly paid, low status jobs. For fundamental change to occur, the structural and institutional causes of exclusion need to be changed. This requires more attention to be paid to the need for structural change, as required by the fourth dimension.

A different justification for a principle of representivity as the goal of affirmative action is that such an approach provides diversity in an educational institution or workplace. As we have seen the EE Act mentions diversity as one of the aims of affirmative action measures. This has been at the forefront of legitimating arguments for affirmative action in US Supreme Court jurisprudence. In *Bakke,* Powell J justified affirmative action in university admissions thus: 'An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlook, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.' [54] In other words, where a group has been excluded from a particular setting, be it a workforce or an educational institution, the likelihood is that the perspectives and experiences of members of the excluded group, particularly those relating to its exclusion, will be undervalued, misunderstood or ignored by the dominant group, making it impossible for the excluded group to change its disadvantaged position. Together with redressing past discrimination, diversity has become one of the very few permissible goals of affirmative action in the US. For example, the court in *Grutter* upheld a race conscious policy by the University of Michigan on the grounds that it furthered the legitimate aim of diversity in higher education. [55] Diversity could be a strong candidate for explaining a principle of strict representation, including both floors and ceilings. However, on closer examination, especially under the lens of the four-dimensional approach to substantive equality, diversity appears more problematic. [56] As a start, it has a strongly instrumental flavour. Rather than redressing disadvantage, addressing stigma, and facilitating voice in the disadvantaged group, it is depicted as enhancing the educational experience of members of dominant groups. Outside of the educational context, where there is clearly a value in richer educational experience, diversity is even more instrumental, generally justified as creating a better experience for customers, or a

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more responsive public service. This does not meet the first dimensional requirement of redressing disadvantage. It certainly falls into the trap of essentialising groups, thereby infringing on the second dimension (stereotyping) and the fourth dimension (changing underlying structures).

A different way of justifying the focus on representation maintains that the very presence of historically disadvantaged South Africans in higher

status positions will lead to structural changes. Since gender and race remain such strong determinants of a person's life experience, the overwhelming predominance of one gender or race in decision-making fora make it unlikely that the experience and perspectives of the excluded group will be articulated. [57] Indeed, a study in Britain demonstrated that the biggest barriers to advancement for ethnic minorities within the Civil Service are cultural and leadership climates. Lack of black, Asian and ethnic minority role models in senior civil service positions is demoralizing, and many feel that it is still the case that progression is based on whether 'your face fits'. Unconscious bias and discrimination persist. [58] On this view, it is possible to characterise the presence of historically disadvantaged groups as functioning to open up new perspectives on decision-making, to cast light on assumptions that the dominant group perceives as universal, and to enhance the store of 'social knowledge'. Furthermore, affirmative action can provide role models for excluded groups, piercing stereotypes and giving them the self-confidence to move into non-traditional positions.

On the face of it, this approach resonates with the third dimension, or the need for voice and participation. By highlighting the distinct perspectives of historically disadvantaged groups, which the very process of exclusion negates, it strongly supports the need for such groups to be guaranteed a place in deliberative decision-making. In addition, it demonstrates the necessity for a critical mass both to reflect differences in interests in question and to make the common interests more audible. At the same time, such an approach risks essentialising a status group, assuming that all members share the same interests or perspectives. This makes us question the very definition of status groups, which is at the basis of a representation based approach to affirmative action. Iris Marion Young argues that groups are better understood, not as fixed categories with impermeable boundaries, but as a set of relationships between different people. Such a relational understanding moves beyond the notion that a group consists of members who all share the same fixed attributes and have nothing in common with members of other groups. Instead, a group is characterised as a social process of interaction in which some people have an affinity with each other. Assertion of affinity with a group may change with social context and with life changes; and members may have interests which differ from other members of the

group but are similar to members of other groups. [59] This suggests that the sole use of population statistics to determine representivity, as in the *Correctional Services* case, is too rigid. By contrast, applying the four-dimensional approach entails paying attention to the possibility of tension between the dimensions. Here giving voice to a group as if all members had unitary interests could without more infringe on the second dimension, namely to redress stereotyping. To achieve voice and participation, while also avoiding stereotyping, would require more than simply a goal of representation of broader population statistics.

This is well illustrated by the Canadian Supreme Court in *Action Travail des Femmes v Canadian National Railway Co*. [60] Upholding of an employment equity programme (in this case setting a quota of one woman in four new hirings until a goal of 13 per cent women in certain blue collar occupations was reached), Chief Justice Dickson incorporated several of the key dimensions. Firstly, the aim is not to compensate past victims, but 'an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears'. [61] As the Chief Justice concluded: 'It is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future.' [62] This reflects the first dimension, redressing disadvantage. Secondly, he held, the insistence that women be placed in non-traditional jobs allows them to prove that they really can do the job, thereby dispelling stereotypes about women's abilities. This was particularly evident in the case at hand, in which the quotas ordered by the tribunal concerned traditionally male jobs such as 'brakeman' or signaller at Canadian National Railways. This reflects the second dimension, addressing stereotyping, stigma, prejudice and violence. Furthermore, an employment equity programme helps to create a 'critical mass' of women in the workplace. Once a significant number of women are represented in a particular type of work, 'there is a significant chance for the continuing self-correction of the system'. [63] The critical mass overcomes the problem of tokenism, which would leave a few women isolated and vulnerable to sexual harassment or accusations of being imposters. It would also generate further employment of women, partly by means of the informal recruitment network and partly by reducing the stigma and anxiety associated with strange and unconventional work. Finally, a critical mass of women forces management to give

women's concerns their due weight and compels personnel offices to take female applications seriously. This reflects the third dimension, to facilitate voice and participation

At the same time, it is important to stress the limitations of affirmative action as a strategy. The introduction of new perspectives, while an important goal, can only have a limited impact on their own: entrenched structures are often resilient and indeed have powerful conformist pressures. Disadvantaged groups may find themselves forced to hide their views and ignore their own needs and interests in order to ensure that their continued participation is viable. Even if they do articulate their perspectives, the process of recognition and affirmation is halting and erratic. Thus, it is the fourth dimension, requiring transformation of institutional and structural barriers, that is the most difficult to achieve through affirmative action.

It is argued here that a four-dimensional approach to substantive equality requires explicit attention to be paid to cross-currents of disadvantage within status groups. By regarding all members of a status class as identically positioned economically and socially, an undiluted focus on representation can reinforce internal differences within groups and further marginalise the weakest in the group. Affirmative action measures should not ignore socio-economic disadvantage, but should also avoid collapsing status into class. They should also take account of the importance of participation and voice, and the need to transform underlying structures. Very small minorities, such as Indian women, can be excluded for the very reason that they are such a small minority, as occurred in the case of *Naidoo.* Yet Indian women are subject to stereotyping and marginalisation, specifically at the intersection of gender and race discrimination. [65] A four-dimensional approach requires a nuanced analysis of the power relations and the different aspects of an individual's social position. This gives a more incisive account of the complex relationships which situate her than a reliance on pure population statistics. As we have seen, there are some potential indications in the EE Act of a more complex approach. On the one hand, the requirement that candidates be suitably qualified inevitably favours those who have been in a position to benefit from access to quality education. On the other hand, the Act also refers to the need to make reasonable accommodation for people from designated groups, and implement training measures. [66] The focus of the

recent Constitutional Court cases on representation risks overshadowing the potential of the latter requirements.

At the same time, it is important to stress the limitations of affirmative action as a strategy, particularly in achieving structural change. Affirmative action should be seen as only one part of a broad based and radical strategy, which does more than redistribute privileged positions but refashions the institutions which continue to perpetuate exclusion. As Moseneke concluded in *Barnard*, '[w]e must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity'. [67]

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1 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29.

2 Ibid para 30.

3 Ibid para 29.

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4 Hurst E, Fitzgibbon H, Nurse A *Social Inequality: Forms, Causes, and Consequences* 9 ed (2016) 215–20.

5 Ibid.

6 *Barnard* (n 1).

7 *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC).

8 This draws on the analysis in S Fredman 'Substantive equality revisited' (2016) 4(3) *I-CON* 712–38; S Fredman *Discrimination Law* 2 ed (2011), ch 1; S Fredman 'Reversing discrimination' (1997) 113 *Law Quarterly Review* 575–600. See also O Dupper 'In defence of affirmative action in South Africa' (2004) 121 *SALJ* 187; Ronald Fiscus *The Constitutional Logic of Affirmative Action* (1992).

9 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253; Cathi Albertyn and Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality (1998) 14(2) *SAJHR* 248.

10 S Fredman, *Women and the Law* (Oxford Monographs in Labour Law, Oxford University Press, Oxford 1997); S FreS Fredman, *Discrimination Law* (Clarendon Law Series, Oxford University Press, Oxford 2002); S Fredman *Discrimination Law* 2 ed (2011); Fredman 'Reversing discrimination' (n 8).

11 Constitution of the Republic of South Africa, 1996, s 9(2).

12 *Minister of Justice v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (South African Constitutional Court)

13 Ibid para 30.

14 *Barnard* (n 1) para 93.

15 See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

16 *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1

17 See Fredman (n 8).

18 S Fredman *The Future of Equality in Great Britain* (Working Paper No.5, Equal Opportunities Commission, Manchester 2002); Fredman (n 8).

19 See further D Réaume 'Dignity, equality and comparison' in Hellman and Moreau (eds) *Philosophical Foundations of Discrimination Law* (2013).

20 For a full discussion of this approach, see Fredman 'Substantive equality revisited' (n 8).

21 Understood in this context as the concept that likes should be treated alike, or that a person should not be treated less favourably on the ground of her race than a similarly situated comparator of a different race.

22 *Barnard* (n 1) para 36.

23 *Van Heerden* (n 12) para 39.

24 Ibid para 40.

25 *R. v. Kapp*, [2008] 2 S.C.R. 483.

26 Ibid para 59.

27 Constitution of India, available at http://lawmin.nic.in/coi/coiason29july08.pdf arts 341(1), 342(2).

28 Ibid s 15(4).

29 Ibid art 16(4).

30 Ibid art 340(1); the list can be found at http://ncbc.nic.in/backward-classes/index.html.

31 Article 15(4).

32 *Indra Sawhney* 724.

33 *Ashoka Kumar Thakur* (n 16) para 149.

34 Constitution of the Republic of South Africa, 1996, s 195(1)*(i)*.

35 Public Service Act 111 of 1984, s 11(1), s 11(2)*(b)*; Correctional Services Act 111 of 1998, s 96(3)*(c)*.

36 Employment Equity Act 55 of 1998, s 15(2)*(d)*(i).

37 EE Act, s 15(3).

38 EE Act, s 15(2).

39 *Barnard* (n 1) para 41.

40 Ibid para 36.

41 Ibid para 39.

42 For a valuable analysis of the differing emphases in the *Barnard* judgment, see C Albertyn 'Adjudicating affirmative action' (2015) 132 *SALJ* 711.

43 *Correctional Services* (n 7) para 13.

44 Moseneke *ACJ* in *Barnard* referred to the fact that white women were over-represented in Grade 9 to reject the argument that quotas were being imposed.

45 *Correctional Services* (n 7) para 40.

46 Ibid para 49.

47 EE Act, s 42*(a)*.

48 *Correctional Services* (n 7) paras 81–2.

49 Fiscus (n 8) ch 1 at, especially, 19.

50 See further Réaume (n 19).

51 I Young *Justice and the Politics of Difference* (1990) 193.

52 Rulof Burger, Rachel Jafta and Dieter von Fintel 'Affirmative action policies and the evolution of post-apartheid South Africa's racial wage gap' United Nations University World Institute for Economic Research (May, 2016) 20; WF Menski 'The Indian experience and its lessons for Britain' in B Hepple and E Szyszcak (eds) *Discrimination and the Limits of the Law* (1992) 300 at 330.

53 *Regents of the University of California v Bakke* 438 U.S. 265 (1978) (United States Supreme Court).

54 Ibid 314, 2760. Upheld in *Grutter v Bollinger* 539 U.S. 306; 123 S. Ct. 2325 (2003) (US Supreme Court).

55 *Grutter v Bollinger* (n 54) 328.

56 See eg Dupper (n 8).

57 A Phillips 'Whose community? Which individuals?' in D Miliband (ed) *Reinventing the Left* (1994) 52.

58 'Identifying and Removing Barriers to Talented BAME Staff Progression in the Civil Service' (Ethnic Dimension: March 2015) https://www.gov.uk/government/publications/identifying-and-removing-barriers-to-talented-bame-staff-progression-in-the-civil-service.

59 Young (n 51) 171–2.

60 *Action Travail des Femmes v Canadian National Railway Co* [1987] 1 SCR 1114, 40 DLR (4th) 193.

61 Ibid 213.

62 Ibid 215.

63 Ibid 214.

64 *Naidoo v Minister of Safety and Security and Others* 2013 (3) SA 486 (LC).

65 H Papacostantis and M Mushariwa 'The impact of minority status in the application of affirmative action: *Naidoo v Minister of Safety and Security 2013* 5 BLLR 490 (LC)' (2016) 19 *PER*, available at http://dx.doi.org/10.17159/1727–3781/2016/v19i0a1160.

66 EE Act, s 15(2).

67 *Barnard* (n 1) para 33.

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