TOWARDS A TRANSFORMATIVE APPROACH TO AFFIRMATIVE ACTION IN SOUTH AFRICA

Nomfundo Ramalekana

DPhil(Law) Candidate, Lady Margaret Hall

Januray, 2021

ABSTRACT

The South African courts' affirmative action jurisprudence lacks coherence and clarity on important issues that shape what is possible through affirmative action. In light of the importance of affirmative action to eradicating inequality and the courts' powerful role, my thesis explores how the commitment to transformative constitutionalism and substantive equality should guide the courts' affirmative action jurisprudence.

Part I explores the contested meaning(s) of transformative constitutionalism and substantive equality. I argue that these should guide the development of a transformative approach to affirmative action. The core of this approach is a focus on eradicating group-based disadvantage.

Part II draws from Part I's foundation and suggests how the courts should grapple with several contested issues in its affirmative action jurisprudence. The first is the role that the courts should play in the judicial review of affirmative action. I argue for a value-driven proportionality assessment which is tilted in favour of preserving affirmative action measures. The second is whether there is a duty to take affirmative action. I argue that there is a duty to take positive steps to fulfil the right to equality, in some cases, through affirmative action. The third issue is whether the courts can order affirmative action as a remedy. I argue that affirmative action is available as one of the appropriate, just and equitable remedies available to courts.

Still drawing on the foundation in Part I, Part III explores and provides guidance on four important issues which arise in the design and implementation of affirmative action: the purposes that these measures should pursue (for what?); the criteria for the demarcation of the beneficiary groups (for whom?); focussing on quotas, the range of permissible forms that affirmative action could legitimately take (through what means?); and whether there is an end-date for affirmative action (for how long?).

Word Count: 105 000

ACKNOWLEDGEMENTS

I am thankful to my supervisor and mentor, Sandy Fredman, for trusting the project and supporting and guiding me through the years. I didn't trust that I could be someone capable of producing knowledge until she did. More than guiding me through the thesis, she gave me an example of what it looks like to teach and lead with love, care and compassion. The only gift I could ever give is to promise to pass this on, be half as good a teacher and leader, be half as loving, caring, and compassionate towards students, colleagues, everyone really.

I am grateful for the research community that Sandy created and welcomed me into. Thursday afternoons walking up to Pembroke College were the highlight of my time in Oxford. The Research Group helped refine my ideas, my writing and challenged my personal and political. Thank you to Meghan Campbell, Miles Jackson, Helen Taylor, Victoria Miyandazi, Ndjodi Ndeunyema, Richard Martin, Gautam Bhatia, Tom Lowenthal, Toel Koyithara, Rishika Sahgal, Max Harris, Farrah Raza, Jason Brickhill, Monica Arango-Olaya and Gauri Pillai.

My research was deeply enriched by years of careful reading and conversation with Sanya Samtani. Thank you for the coffee dates, for being a trusted grammar hero and for Teams calls to teach me how to format things. For times we spent at conferences together, to nights celebrating your engagement, wedding. It's been over five years of friendship, and I know I would not be the woman and academic-in-training that I am if it hadn't been for your company.

Through the years, a lot of love poured into me, love that helped sustain me. To Nhlakanipho Mkhize and Karen Mumba, who arrived with me in 2015 and have never left my side – I am eternally indebted to your friendship. To Kuukuwa Manful and Martin Williams, for friendship, for meals, for creating a home and garden that I could run to whenever I needed to replenish my spirit. To Larona Somolekae, Mary Jiyani, Karima Chiuri, Nelisa Ntebeka Nchimunya and the multiple communities of Black women that I have held communion with through the years. To Thembelihle Nene and Joel Modiri for reminding me that home is a place in my heart, not on a map - that I belonged somewhere, that I was missed.

I had the pleasure to work at the Africa Oxford Initiative, thank you to Anne Makena and Kevin Marsh for the work you do for African students at Oxford. Thank you for allowing me to be a part of and help support the incredible and growing community of African Scholars in Oxford.

I am grateful for the generous financial support that has enabled many opportunities for intellectual growth during my time at Oxford: the Rhodes Trust, the Oppenheimer Memorial Trust and the Law Faculty Graduate Scholarship. A special thank you to Mary Eaton at the Rhodes Trust. Thank you for always having your door open, for listening, caring and encouraging me to keep going.

To my partner, Munya Ziyenge, I do not remember life before you. Thank you for welcoming me into your family and sharing their love and support with me. Thank you for love, security and stability.

Finally, my deep appreciation is due to my family for their support over many years. Thank you to my grandparents, Margaret Ramalekana and Lassie Kheswa, for giving me the courage to try anything – for pushing me to go beyond the world they knew. To my mother, Thandi Ramalekana, for always finding a way for me to be free in the world – I watched you work your bones tired so that I could have the privilege of former Model-C schools and time to read. To my sister Nompumelelo Mndebele, and our two beautiful boys, thank you for bringing light into my life. You have gifted me the best things in the world. To my great-grandmother, for standing tall over us, allowing us to rest in the shade of her sacrifice – Nomshado Emily Mndebele. Those who didn't live to see this – an ancestral army that crossed oceans with me – I see you everywhere. Sarah Mndebele-Mkhonto, Olga Mandovu Nkosi, Makhosonke Mndebele, Aaron Mndebele, Marienkie Malepe. Ngiyabonga.

Table of Contents

TABLE OF ABBREVIATIONS AND SHORT FORMS

Alta. L. Rev	Alberta Law Review
BU L Rev	Boston University Law Review
Cal. L. Rev.	The California Law Review
Cambridge L.J.	Cambridge Law Journal
CCR	Constitutional Court Review
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRPD	Convention on the Rights of People with Disabilities
CUP	Cambridge University Press
DUP	Duke University Press
Harv. L. Rev	Harvard Law Review
HUP	Harvard University Press
I.C.L.Q	International & Comparative Law Quarterly
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICON	International Journal of Constitutional Law
Mich. L. Rev.	Michigan Law Review
Mod. L. Rev.	Modern Law Review
NZ Law Review	New Zealand Law Review
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PELJ	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
PUP	Princeton University Press
SAJHE	South African Journal of Higher Education
SAJHR	South African Journal of Humana Rights
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
U. Chi. Legal F.	University of Chicago Legal Forum
UTLJ	The University of Toronto Law Journal
WM & Mary L Rev	William & Mary Law Review
YUP	Yale University Press

TABLE OF CASES

SOUTH AFRICAN CASES

INDIAN CASES

US CASES

CANADIAN CASES

AFRICAN COMMISSION

TABLE OF STATUTES AND CASE MATERIALS

STATUTES

CASE MATERIALS

CHAPTER ONE: BACKGROUND AND OVERVIEW

'Restitutionary measures, sometimes referred to as "affirmative action", may be taken to promote the achievement of equality.'[1]

1. Situating the Thesis

This thesis is a doctrinal and normative exploration of affirmative action as one of the tools to eradicate inequality in South Africa. In particular, it seeks to map a path for developing a transformative approach to affirmative action. This approach places disadvantaged groups rights to equality and dignity at the centre of the design, implementation and interpretation of affirmative action. It is rooted in the commitment to transformative constitutionalism and a substantive approach to equality.

Following the democratic transition, a lot of hope was placed on the South African Constitution, 1996 (the Constitution) to help eliminate inequality and transform society, an ideal that has captured South African constitutionalism - transformative constitutionalism. While I will define transformative constitutionalism in more detail in Chapter Two, broadly, it refers to a 'long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic participatory and egalitarian direction'.[2] The definition engages the commitment of the executive, the legislature and the courts to pass, interpret and enforce laws in a manner that will dismantle prevailing inequality in society.

However, there is a stark tension between the promise of transformative constitutionalism and the lived reality of inequality, poverty and high levels of unemployment

[1] *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) [28].

[2] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146, 150.

based on the same fault lines that marked colonial and apartheid domination and oppression – in particular, race and gender.[3] Flowing from the persisting inequality is a well-founded contestation of the meaning and value of transformative constitutionalism as well as the possibility of achieving its broad goals.[4]

My thesis enters the conversation on constitutionalism and inequality by exploring one aspect of the right to equality, affirmative action, as a tool for transformation. While I will define affirmative action in more detail later in this Chapter, broadly, I mean positive measures taken to redistribute or allocate jobs, contracts and other resources to disadvantaged groups in order to achieve a specific societal aim. Through a doctrinal and normative exploration of affirmative action in South Africa, the thesis argues that it is possible to design, implement and interpret affirmative action measures in a manner that will help eradicate inequality and draw us closer to the egalitarian vision in the Constitution, a notion embodied in the s 9 equality right.

Section 9(2) of the Constitution provides that, in promoting 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'. While affirmative action does not exhaust the range of measures that can fall under s 9(2) of the Constitution, the provision is the textual foundation for affirmative action in South Africa. In addition to s

[3] For a general analysis of inequality and poverty trends in South Africa see, Victor Sulla and Precious Zikhali, 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (World Bank Group 2018) <http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities> accessed 12 July 2019; Jeremy Seekings and Nicoli Nattrass, *Policy, Politics and Poverty in South Africa* (Palgrave Macmillan 2015); Jeremy Seekings and Nicoli Nattrass, *Class, Race, and Inequality in South Africa* (YUP 2005); Sampie Terreblanche, *A History of Inequality in South Africa:1652-2002* (University of KwaZulu-Natal Press 2003).

[4] See, Joel M Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' [2018] SAJHR 300; Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 1 Stell Law. Rev. 123; Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' 22 Stell LR 482; Mogobe Bernard Ramose, 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996' (2018) 34 SAJHR 326.

9(2), s 174(2) of the Constitution provides that when judicial officers are appointed, the 'need' for the judiciary to broadly reflect the gender and racial composition of South Africa must be considered. In the context of the public administration, s 195(1)(j) of the Constitution provides that the public administration must be broadly representative of the South African people.

Several pieces of legislation give effect to the s 9(2) promise. These include the Preferential Procurement Policy Framework Act, 5 of 2000, the Broad-Based Black Economic Empowerment Act, 53 of 2003, the Mineral and Petroleum Resources Development Act, 28 of 2008 and provisions of the Higher Education Act, 101 of 1997. However, two statutes have been particularly salient for the courts and in the academic literature - the Employment Equity Act, 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (the EEA and Equality Act respectively and collectively, the Equality Statutes). In the employment context, the EEA provides for affirmative action measures 'to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce'.[5] The EEA defines designated groups as South African citizens who are women, persons with disabilities and Black people – African, Coloured, Indian and Chinese.[6] Echoing s 9(2) of the Constitution, s 14(1) of the Equality Act provides that taking measures 'designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons' is not unfair discrimination.

[5] Employment Equity Act 55 of 1998, s 2(b).

[6] ibid s 1. As I will explore in Chapter Six, these racial classifications are rooted in colonial and Apartheid segregationist laws and policies and the white-supremist racial ideology underlying them. Chinese South Africans were initially not included as Black persons. However, in *Chinese Association of South Africa v Minister of Labour and Others* case no 59251/200 (2008). The North Gauteng High Court held that Chinese South Africans should be included as 'Black' under the EEA and the Broad Based Black Economic Empowerment Act 53 of 2003.

As is clear from the text of the provisions discussed above the South African Constitution expressly provides for taking positive steps to fulfil the right to equality. In line with these provisions, the South African Constitutional Court (Constitutional Court or Court) has embraced a substantive approach to equality. According to the Court, the equality right 'embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality'.[7] In its first case under s 9(2), *Van Heerden*, the Constitutional Court held that s 9(2) measures were not a derogation from the right to equality and did not amount to unfair discrimination. Instead, they were a substantive part of the commitment to realising the right to equality.[8]

Section 9(2) of the Constitution and the Equality Statutes have opened up opportunities for historically disadvantaged groups in South Africa, especially in public sector employment.[9] However, as in other jurisdictions,[10] affirmative action is controversial. In South Africa, affirmative action is currently the subject of well-resourced strategic litigation primarily led by the conservative, Afrikaner-nationalist trade union, Solidarity and AfriForum, a non-profit organisation with the aim of protecting 'the rights of Afrikaners as

[7] *Van Heerden* (n 1) [31].

[8] ibid [32].

[9] See, Department of Labour '20th Commission For Employment Equity Report 2019-20' (South African Department of Employment and Labour 2020) <http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf> accessed 25 September 2020.

[10] A sample of the debates in the United States Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (Vintage Books 2013); Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (YUP 2004); Carl Cohen and James Sterba, *Affirmative Action and Racial Preference: A Debate* (OUP 2003); Shelbey Steele, *The Content of Our Character: A New Vision of Race in America* (Harper Perrenial 1998); Stephen Carter, *Reflections of an Affirmative Action Baby* (Basic Books 1991); Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment* (PUP 1977); Barry Gross, *Reverse Discriminaation* (Prometheus Books 1977); For similar analysis in Inidia Zoya Hassan, *Politics of Inclusion: Castes, Minorities, and Affirmative Action* (OUP 2011); Vidhu Verma, *Non-Discrimination and Equality in India: Contesting Boundaries of Social Justice* (Routledge 2012); Ashwini Deshpande, *Oxford India Short Introductions: Affirmative Action in India* (OUP 2013); Vinay Sitapati, 'Reservations' in Sujit Choudry, Madhav Khosla and Pratab Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

a community' in South Africa.[11] At the same time, the prevailing deeply entrenched structural inequality has led to many questioning the role of law, within the current Constitution, as a vehicle that can help in the struggle to eradicate inequality.[12] While the courts have tried to protect these measures, affirming them as integral to achieving the egalitarian vision in the Constitution,[13] they have not been able to carve a clear and coherent framework to preserve affirmative action and map a path for a transformative approach thereto.

As will be apparent later in the Chapter, the current jurisprudence reveals a lack of clarity about the meaning and demands of a commitment to transformative constitutionalism and substantive equality in the affirmative action context. In particular, there is a lack of clarity in relation to the appropriate standard of review for affirmative action; whether there is a duty to take affirmative action; and whether the courts can order affirmative action as a remedy. More fundamentally, affirmative action measures can pursue a range of purposes, take different forms and thus target different beneficiary classes. The language in s 9(2) of the Constitution and in the Equality Statutes is wide, and the courts have not provided clarity on the range of purposes that affirmative action can legitimately pursue; the demarcation of the beneficiary classes; or whether there should be a sunset to South Africa's affirmative action regime. In addition, in the pursuit to realise the purposes of affirmative action, it is not clear which kinds of measures are permissible and which not. In particular, while quotas are prohibited under the EEA,[14] it is not clear whether they could be legitimate affirmative

[11] For information about the ideology of these organisations see, Solidarity, 'Who Are We'< https://solidariteit.co.za/en/who-are-we/> accessed 5 April 2021 and Afriforum 'Vision and Mission' <https://afriforum.co.za/en/about-us/> accessed 5 April 2021. For an analysis of the strategic litigation these organisations have been involved in see, Steven Budlender, Gilbert Marcus and Nick Ferreira, 'Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons' [2014] Atlantic Philanthropies, 16.

[12] See citations in fn 4.

[13] *Van Heerden* (n 1) [26]-[27]; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) [29]; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) [1]-[2].

[14] EEA, s 15(3).

action measures under s 9(2) of the Constitution and under the Equality Act. Moreover, the basis for the prohibition of quotas under the EEA is not clear.

My thesis seeks to advance and strengthen the affirmative action regime in South Africa by mapping the possibility of a transformative approach thereon. By 'transformative approach' I mean an approach to affirmative action, that, to the fullest extent possible, will centre the commitment to realising the rights to equality and dignity of historically disadvantaged groups. Against the background of the normative commitments to transformative constitutionalism and substantive equality and based on a doctrinal analysis of the legislative and policy framework for affirmative action under s 9 of the Constitution, the Equality Statutes, and lessons from the comparative experience in India, the United States and Canada, the thesis will argue that affirmative action measures are an integral part of the commitment to eliminating inequality and achieving the goals of transformative constitutionalism.[15] Accordingly, they should be designed, implemented and interpreted in a manner that furthers the goals of transformation.

2. Argument and Structure

To do this work, in Part I of the thesis, encompassing Chapters Two and Three, I define and explore the meaning(s) of transformative constitutionalism and substantive equality. In Chapter Two, having explored and pushed against the critique of transformative constitutionalism, I argue that transformative constitutionalism requires a purposive, generous and contextual approach to adjudication grounded in the Constitution's normative values and the commitment to using the law to eliminate inequality. In Chapter Three, I

[15] *Van Heerden* (n 1) [31]; *Barnard CC* (n 13) [29]; Klare, 'Legal Culture' (n 2) 154; Catherine Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' [1998] SAJHR 248, 249; Justice Pius Langa, 'Transformative Constitutionalism' (2006) 3 Stell LR 351, 352; Dikgang Moseneke, 'Transformative Adjudication' [2002] SAJHR 309, 317.

explore different approaches to substantive equality. In particular, I critique the Court's dignity-centric approach to substantive equality and argue in favour of a multi-dimensional conception of substantive equality which encompasses a concern with the redistribution of resources, recognition, participation, freedom and structural change.[16]

Based on a critical and doctrinal analysis of the legislation and the Constitutional Court's affirmative action jurisprudence, Part II of the thesis, Chapters Four and Five, tackle questions related to the institutional role of courts in the judicial review of affirmative action. While the Constitutional Court set out a conceptual framework for the standard of review in *Van Heerden,* the test established in that case is under-developed in that it remains unclear whether it entails mere rationality review or a higher standard of review.[17] Further, the appropriate standard under the Equality Statutes remains unclear. In its second affirmative action decision, the first under the EEA, the Constitutional Court took four different approaches to this question – including rationality, reasonableness, and a proportionality standard derived from the limitations clause in s 36(1) of the Constitution.[18]

---

[16] This approach draws from the rich body of literature on the right to equality in South Africa, especially - Sandra Fredman, *Discrimination Law* (Second, OUP 2011); 'Substantive Equality Revisited' (2016) 14 ICON 712; 'Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action' [2017] Acta Juridica 124; Catherine Albertyn and Sandra Fredman, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' [2015] Acta Juridica 430; Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' [2018] SAJHR 441; Catherine Albertyn, 'Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act - An Opportunity Missed - South African Police Service v. Solidarity OBO Barnard' [2015] SALJ 711; Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253; Henk Botha, 'Equality, Plurality and Structural Power' [2009] SAJHR 1; John Baker, Kathleen Lynch and Sara Cantillon, *Equality: From Theory to Action* (Palgrave Macmillan 2004).

[17] For commentary on the Court's standard of review see - Jan Pretorius, 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 SALJ 398; Jan Pretorius, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence' [2010] SAJHR 536; Marie McGregor, 'Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures' [2013] SALJ 650; Albertyn, 'Adjudicating AA' (n 16); Chris McConnachie, 'Affirmative Action and Intensity of Review : South African Police Service v Solidarity Obo Barnard - Affirmative Action' [2015] CCR 163.

[18] *Barnard CC* (n 13).

Drawing on the growing academic commentary on the appropriate standard of review for affirmative action,[19] in Chapter Four, I argue that the best approach to the judicial review of affirmative action is to read the *Van Heerden* case as having set a relatively deferent proportionality standard, one that best fits the affirmative action context.[20] This proportionality test is suited to the context of affirmative action. It allows for a balancing of the competing rights and interests that arise in affirmative action cases but gives more weight to the importance served by affirmative action and the rights of the intended beneficiaries. In addition, it excludes the requirement of necessity and requires the courts to optimise the different dimensions of substantive equality. While applied with a measure of deference, the suggested approach is not so deferent that it would let pass muster measures which entrench or create new patterns of disadvantage for those adversely affected thereby. Thereafter, I argue that the framework in *Van Heerden* and the suggested reading of the *Van Heerden* test should be applied to the Equality Statutes.

All the cases that the Constitutional Court has decided under s 9(2) have been unfair discrimination claims from the perspective of persons adversely affected by these measures. Therefore, it remains open whether there exists a duty to take affirmative action. The same can be said in the context of the Equality Statutes.[21] The obligations under the EEA extend to private employers, and private parties can defend affirmative action measures under the

[19] See materials in fn 17.

[20] The approach is similar to that by Albertyn, 'Adjudicating' (n 16); McConnachie, 'Intensity of Review' (n 17); Lauren Kohn and Raisa Cachalia, 'Restitutionary Measures Properly Understood and the Extension of the Quota Ban - Locating SARIPA in the s 9(2) Van Heerden Framework' [2017] Acta Juridica 146.

[21] See *Dudley v City of Cape Town and Another* [2008] ZALAC 10 where the Labour Appeal Court left this question open. For commentary on this, see David Thompson and Adriaan Van der Walt, 'Affirmative Action: Only a Shield? Or Also a Sword? Harmse v City of Cape Town (2003) 24 ILJ 1130 and Dudley v City of Cape Town (2004) 25 ILJ 305 (LC)' (2007) 28 Obiter 636; Neil Coetzer, 'Affirmative Action: The Sword versus Shield Debate Continues: Analyses' (2009) 21 SAMLJ 92.

Equality Act.[22] However, it is not clear whether these provisions can be used as a 'sword' by the intended beneficiaries. Thus, in Chapter Five, I argue that s 7(2), the duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights, read with the s 9 equality right and the interpretive obligations in ss 39(1) and (2) of the Constitution,[23] can be read as creating a power plus duty to take positive steps to fulfil the right to equality, in some cases, this will be through affirmative action. Relatedly, it remains unclear whether the courts' remedial powers extend to using affirmative action as a remedy to vindicate violations of the right to equality. Accordingly, I also argue that the courts have, within the range of available 'just and equitable'[24] remedies, the power to order affirmative action to vindicate the right to equality.

Drawing on the analysis in Parts I and II, Part II explores four important questions which have yet to be fully canvassed by the South African courts. First, what legitimate purposes can be pursued through affirmative action, the 'for what?' question. Second, what criteria should be used to demarcate the beneficiaries of affirmative action, the 'for whom?' question. Third, what kinds of measures are permissible, in particular, can quotas be used as a legitimate form of affirmative action, the 'through what means?' question. Fourth, should there be a sunset-clause to South Africa's affirmative action regime the 'for how long?' question.

In Chapter Seven, I focus on the first two questions, 'for what?' and 'for whom?'. In relation to the 'for what?' question, s 9(2) of the Constitution merely provides for measures

---

[22] *Du Preez v Minister of Justice and Constitutional Development and others* 2006 (5) SA 592 (EqC) (the court applied the Equality Act to an employer that is not in the public service).

[23] Section 39(1) of the Constitution provides that 'When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. In addition, s 39(2) obliges the courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.

[24] Section 172(1)(b) of the Constitution empowers the courts, when deciding a constitutional matter within its power, to make any just and equitable order.

which promote equality through the advancement and protection of disadvantaged groups; it is not clear what specific objectives can legitimately be pursued under s 9(2) of the Constitution. For example, is the pursuit of diversity a form of advancement or protection of disadvantaged groups? Does the use of the terms' remedial' and 'restitutionary' in the Constitutional Court's s 9(2) jurisprudence limit s 9(2) to concerns with compensatory rather than redistributive justice? Under the EEA, does the focus on achieving employment equity through demographic representation based on race, gender and disability status fit the broader purpose of s 9(2) of the Constitution? Responding to these questions, I argue that the multiple dimensions of substantive equality explored in Chapter Three (redistribution, recognition, participation, freedom and structural change) offer a framework within which a wide range of purposes, which seek to eradicate disadvantage, can legitimately be pursued under s 9(2) and the Equality Statutes. The suggested approach traverses the boundaries between the compensatory versus distributive justifications and the divide between moral and instrumental purposes of affirmative action. Instead, it focusses on the specific harms that arise in equality claims and the ways in which affirmative action can be used to redress these.

In relation to the 'for whom?' question, s 9(2) of the Constitution is vague on who the beneficiaries of affirmative action under the constitutional provision are. It merely mentions 'persons, or categories of persons, disadvantaged by unfair discrimination'. There are several issues which arise from this provision. First, there is no clarity about the criteria to be used to determine disadvantage. What is the relationship between using race and gender with economic disadvantage? Juxtaposed against the Constitution's commitment to 'non-racialism' and 'non-sexism', how can we justify using these statuses to redistribute resources? What is the basis for the choice of some and not other groups? Second, while disadvantage can arise from a single ground, for example, race, gender or disability status, intersectionality theory has shown how it also manifests based on multiple, intersecting identities. The

question that arises is whether it should be possible to demarcate the benefits of affirmative action using multiple criteria to prioritise the most disadvantaged within and between the different beneficiary groups. Responding to these complex questions, I draw from the multiple dimensions of substantive equality and argue that affirmative action should seek to redress the different forms of disadvantage identified by the different dimensions – encompassing the complex intersection between social, economic and other forms of disadvantage. In addition, in light of the multiple and complex forms in which disadvantage arises and intersects, the demarcation of affirmative action beneficiaries should take varying degrees of disadvantage and intersectionality into account. Further, I argue that there must be room for flexibility. Disadvantage is not static. As new patterns of group-based disadvantage emerge, it should be possible to recognise new beneficiary classes.

Having grappled with the 'for what?' and 'for whom?" questions, Chapter Seven explores the question 'through what means?' Affirmative action measures can take different forms. An emerging principle in the literature and the lower court judgements is that s 9(2) of the Constitution prohibits quotas *under all* circumstances.[25] While the Constitutional Court has not confirmed this principle, it is an area ripe for litigation. The core argument made against quotas is that their rigidity, defined as the failure to take individual merit, skills and expertise of persons adversely affected thereby into account, violates the right to dignity. I argue that if this argument holds, such an approach could substantively limit the design and implementation of affirmative action, tying the hands of the State and other parties in the pursuit to eliminate inequality. Thus, applying the proportionality standard in Chapter Four and underlined by the commitments to transformation and substantive equality in Chapters

[25] *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 (3) SA 95 (SCA); *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* 2015 (2) SA 430 (WCC); Kohn and Cachalia (n 20). Jan Pretorius, 'The Limitations of Definitional Reasoning Regarding "Quotas" and "Absolute Barriers" in Affirmative Action Jurisprudence as Illustrated by Solidarity v Department of Correctional Services' [2017] Stell LR 269.

Two and Three, I argue that quotas will not always be a disproportionate means of achieving substantive equality goals. There will be cases where we need as rigid a tool as a quota.

Concluding the thesis, Chapter Eight explores the 'for how long?' question. I consider whether there *should* be a 'sunset' to affirmative action and explore some of the difficulties that arise in determining the extent to which the goals of affirmative action have been achieved. I conclude that finding the endpoint for affirmative action will be a difficult task. Rather than set a clear date or measure success purely based on the extent of representation, for example, meeting the numerical targets under the EEA, the better approach is to ask, looking at all the dimensions of substantive equality, whether and the extent to which the different forms of disadvantage have been redressed.

It bears emphasis that the primary responsibility for realising the goal of transformation is with the executive and legislature. However, the thesis focusses on the courts as they play an important role in setting the boundaries for what is and what is not possible through affirmative action. They provide a 'forum for citizens to make claims for inclusion in social and economic life, and for the State to defend its positive and redistributive measures'.[26] Overall, I argue that affirmative action is a legitimate and necessary aspect of promoting the achievement of equality as a part of the constitutional commitment to transformation. Through an exploration of the issues above and within the framework of transformative constitutionalism and substantive equality, the thesis seeks to contribute towards a transformative approach to affirmative action. Hopefully, this approach will guide, support, and hold the judiciary, executive, and legislature accountable in the fight to eliminate inequality and transform South African society.

[26] Albertyn, 'Contested Equality' (n 16) 454.

3. Methodology

Building on the commitment to transformative constitutionalism and substantive equality, my thesis argues for a transformative approach to affirmative action. To do this work, I use three different, though interconnected methodologies: doctrinal, normative and comparative.

Doctrinal methodology seeks to identify the rules applicable to a specific area of law, to systematically analyse and critique the relationship between these rules and reveal underlying tensions and inconsistencies – all in search of some legal coherence or to reveal the lack thereof.[27] It 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.[28] I use the doctrinal analysis to identify the issues where the commitment to transformative constitutionalism and substantive equality should be used to develop a transformative approach to affirmative action. The doctrinal analysis reveals the lack of coherence and clarity in relation to the issues that form each substantive Chapter of this thesis. Rather than predict future development, I rely on my second methodological approach and suggest how these areas *should* develop for a transformative approach to affirmative action – one aligned with the egalitarian vision in the Constitution.

Relying on a normative methodology, which seeks not only to describe the laws as they are, and 'make the best sense of them…to offer more coherence and more justifiable interpretations of these laws, or to suggest alternative approaches'.[29] I take each substantive

[27] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin Law Review 83; Christopher McCrudden, 'Legal Research and the Social Sciences' [2006] The Law Quarterly 632.

[28] Hutchinson and Duncan (n 27) 101.

[29] Deborah Hellman and Sophia Moreau, 'Introduction' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 1.

issue identified in the doctrinal analysis and suggest how these should, in line with the commitment to substantive equality and transformative constitutionalism, develop.

Through the thesis, I rely on comparative methodology to help identify the key doctrinal issues and consider the best approach for South Africa. The thesis ascribes to the argument that constitutional comparison is essential 'for the falsification of hypotheses, for ensuring that the right questions are being identified and answered, and from preventing hypotheses or arguments proceeding unchallenged down narrow, windowless corridors of the mind'.[30] In line with this, I use comparative law in two respects. First, the fact that the questions dealt with in each substantive Chapter have been ventilated in all or some of the comparator jurisdictions affirmed that these issues were important in setting the path for a transformative approach to affirmative action. Second, some of the issues that I grapple with have yet to be decided on by the South African courts. However, the comparator jurisdictions reveal the different possible approaches and allow me to support and illustrate why one approach better fits the South African context and the development of a transformative approach to affirmative action.

While controversial in some jurisdictions,[31] comparative methodology is widely accepted in the South African courts. One reason is that the Constitution expressly permits considering comparative law. Section 39(1)(c) of the Constitution provides that foreign law may be considered when interpreting the rights in the Bill of Rights. In *Fetal Assessment*, Moseneke J held that 'Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence'.[32] In the equality context, the South African courts have considered comparative law, the rationale for this use was captured by the Constitutional

[30] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2013) 14.

[31] A classic example being some judges of the US Supreme Court, see Antonin Scalia, 'Foreign Legal Authority in the Federal Courts' [2004] ASIL Proceedings of Annual Meeting.

[32] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) [31].

Court in *Prinsloo,* the Court held that South Africa shared patterns of inequality with jurisdictions across the globe; thus, the development of the equality right 'would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity'.[33] More specific to affirmative action, in *Van Heerden*, the Constitutional Court used comparative methodology to explain the judicial review of affirmative action by distinguishing it from the US Supreme Court's approach.[34]

However, as Chaskalson CJ warned in *Makwanyane*[35] when selecting comparative materials, it is important to be mindful of the different historical, political, social and economic context out of which the Constitution was born. Thus, in selecting comparator jurisdictions and when I used these comparative examples, I was careful to consider the similarities and differences between the South African Constitution, the Equality Statutes and the comparative materials.[36] While there are many textual, institutional and historical differences in the jurisdictions chosen, there are several reasons why the key jurisdictions relied on are appropriate and relevant for the development of a transformative approach to affirmative action.

First, they are all common law jurisdictions, they all have a history of inequality based on the subjugation of specific groups - the history of slavery and racial discrimination in the US, caste-based discrimination in India and the oppression of aboriginal people in Canada. Second, in some form or another, all these jurisdictions have taken measures to advance

[33] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 [20]. The reference to s 8 is to the right to equality in Interim Constitution, 1993 the equivalent to (though not identical) s 9 of the Constitution.

[34] *Van Heerden* (n 1) [29] (Moseneke J) and [145] (Sachs J).

[35] *S v Makwanyane and Another* 1995 (3) SA 391 [39].

[36] *Fetal Assessment* (n 32) [31]; *Brink v Kitshoff NO* 1996 (4) SA 197 [39].

previously disadvantaged groups: 'affirmative action'[37] in the US, 'reservations'[38] in India and' ameliorative measures'[39] in Canada. Furthermore, the Indian Constitution and the Canadian Charter of Rights and Freedoms share the South African Constitution's transformative vision.[40]

Nevertheless, the use of a comparative methodology has been subject to critique, chief among these being that of cherry-picking - that comparator jurisdictions are chosen not on a principled basis, but to support one's findings.[41] I refute this by relying on Fredman's conception of comparative methodology – one that views comparative law as a non-binding aid in deliberative reasoning.[42] For Fredman, comparative materials are not binding precedents: 'they need only be chosen for the force of their reasoning, rather than for their legal status in foreign countries'.[43] The deliberative reasoning approach accepts the textual, historical, social and economic differences in the comparative jurisdictions and that these may require different approaches to resolving similar problems. As discussed above,

---

[37] On affirmative action in US see for example: Kennedy (n 10); Elizabeth Anderson, *The Imperative of Integration* (PUP 2010); Cohen and Sterba (n 10).

[38] On reservations in India, see Indian Constitution, 1949 Art. 15 and 16; Mark Galanter, *Competing Inequalities* (OUP 1984); Deshpande (n 10); Verma (n 10). Through this thesis, I use 'reservations' and 'affirmative action' interchangeably. While reservations undoubtedly encompass more than affirmative action as defined in this thesis, they at least include these.

[39] On ameliorative measures in Canada see Canadian Charter of Rights and Freedoms, 1982, s 15(2); *R v Kapp* [2008] 2 SCR 483; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* [2011] 2 SCR 670. Through this thesis, I use 'ameliorative measures' and 'affirmative action' interchangeably. While ameliorative measures undoubtedly encompass more than affirmative action as defined in this thesis, they at least include these.

[40] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins 2019) ch 2 (on India); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' [2017] The American Journal of Comparative Law 527; Daniel Bonilla Maldonaldo (ed), *Constitutionalism of the Global South The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

[41] Scalia (n 31) 305; Robert Leckey, 'Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights' [2009] Colum. Hum. Rts. L. Rev. 425, 433; Richard Posner, 'The Supreme Court 2004 Foreword: A Political Court' [2005] Harv. L. Rev.

[42] Sandra Fredman, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law' [2015] I.C.L.Q 631.

[43] ibid 634.

my use of comparative methodology is to illuminate some of the questions that arise in affirmative action cases. Further, through a critical analysis of the resolutions in those jurisdictions, I suggest the best approach for the South African context, in particular, for the development of a transformative approach to affirmative action. Moreover, the thesis uses comparative examples to the extent that, on my assessment, there is something that we can learn. Thus, some chapters will focus on a specific jurisdiction's comparative experience and not others.

4. Scope

Affirmative action in South Africa could encompass a wide range of measures, and it gives rise to many complex questions that I will not be able to cover in this thesis. First, I will limit the thesis to an analysis of s 9(2) of the Constitution and the Equality Statutes – the EEA and Equality Act. This leaves out a wide range of other legislation and policy which could fall within the ambit of the definition of affirmative action below. The reason for this focus is that all the cases considered by the Constitutional Court thus far have been in the context of affirmative action measures under s 9(2) and the EEA. In addition, per the principle of constitutional supremacy, the principles developed in the context of s 9(2) of the Constitution, if accepted, should have an impact on the approach taken under all other legislation. This focus means that many of the examples relied on will be in relation to affirmative action measures taken by the State and its organs as well as the duty bearers under the EEA. While private persons could also bear the duties under the Equality Act and possibly affirmative action measures under s 9 of the Constitution, I have restricted the thesis to focus on the State and its organs and not private persons. The latter task could be the subject of a separate thesis.

Second, while the thesis will draw from lower court judgments, especially in cases where the Constitutional Court has yet to consider a question, it will focus on the Constitutional Court's case-law. This narrow focus is because of the volume of cases,

especially in the context of the EEA. The lower court decisions are not irrelevant: as will be seen in the thesis, some reveal the problems which arise when there is a lack of clarity and coherence. For example, the different, conflicting lower court decisions in *Barnard* illustrate the lack of clarity about the meaning of substantive equality and the appropriate role of courts in affirmative action cases.[44] Nevertheless, the Constitutional Court is the highest court of appeal, and its jurisprudence binds all lower courts. By focussing on this court's jurisprudence and exploring how a transformative approach to affirmative action can develop – this approach should, in due course, be followed in the lower courts. Similarly, the comparative case law is largely that of the apex courts in each jurisdiction – the Indian Supreme Court, the US Supreme Court and the Canadian Supreme Court.

Third, the thesis is primarily concerned with a specific kind of affirmative action, 'strong preference affirmative action'.[45] Affirmative action is difficult to define. For example, some definitions of affirmative action include:

> 'Policies that offer individuals deemed to be affiliated with a beneficiary group a preference over others in competitions for employment, education, or other valued resources'.[46]

> [A] wide array of measures…which grant preferential treatment in the allocation of scarce resources…to the members of underrepresented, ascriptive groups formally targeted for discrimination'.[47]

> 'Any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through "outreach" (targeting the group for publicity and invitations to participate) or 'preference' (using group membership as criteria for selecting participants)'.[48]

---

[44] *Solidarity obo Barnard v South African Police Services* 2010 (10) BCLR 1094 (LC); *South African Police Services v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC); *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA).

[45] This approach is discussed in David Banatar, 'Justice, Diversity and Racial Preference: A Critique of Affirmative Action' [2008] SALJ 274, 278. In this article, the author critiques this approach to affirmative action as particularly indefensible in South Africa.

[46] Kennedy (n 10) 20.

[47] Daniel Sabbagh, *Equality and Transparency A Strategic Perspective on Affirmative Action in American Law* (Palgrave Macmillan 2007) 2.

[48] Anderson (n 37) 135.

The quotes above show that the *form* (preference or outreach), *purpose* (diversity, representation, remedying injustice), *beneficiaries* (women, economically disadvantaged) and *field* (in employment, political representation, higher education admissions) are different and will likely respond to the specific historical, socio-economic and political context of a jurisdiction.

In this thesis, I am concerned with laws, policies and other measures which seek to realise the right to equality for disadvantaged groups by, amongst other measures, giving them preference to benefits over other groups or excluding other groups in the context of the allocation of resources such as employment, education or other valued resources.[49] I am particularly interested in measures which give preference in cases where, in the context of employment or admissions, for example, the beneficiaries are not 'equally qualified' to the non-beneficiary class. In this way, these measures disrupt the merit principle and extend beyond formal equality of opportunity as I will explore in Chapter Three.

For emphasis, this definition captures three important features: (i) they are asymmetrical and target disadvantaged groups; (ii) in competition for valued resources, they sanction the preference of disadvantaged groups in the allocation of resources or specifically target disadvantaged groups as beneficiaries to the exclusion of other groups; (iii) they challenge the merit principle in competition for valued resources.

The constructed definition is deliberately broad and is not prescriptive as to the purposes that affirmative action should be able to pursue; the beneficiary classes (the disadvantaged); or the form that these measures can legitimately take under s 9(2) and the Equality Act. These questions will be answered in detail in different chapters of the thesis.

[49] This definition is adapted from Kennedy (n 10) 20. Cohen and Sterba (n 10) 200 (for a simialr definition of affirmative action - capturing preference for disadvantaged groups).

For example, in Chapter Six, relying on the multiple dimensions of substantive equality mapped in Chapter Three, I will explore the range of purposes that affirmative action should legitimately pursue and how to demarcate affirmative action beneficiaries. In Chapter Seven, applying the proportionality standard set out in Chapter Four, I argue that affirmative action measures can take different forms, including quotas, preferential treatment, just so long as they are proportionate to achieving the goals of substantive equality and transformation. Accordingly, the different chapters of the thesis help provide a more comprehensive definition of affirmative action – one grounded in the multi-dimensional conception of substantive equality and the commitment to transformation.

Further, this definition fully encompasses affirmative action as defined under the EEA. The EEA obliges all designated employers[50] to implement affirmative action in favour of designated groups under the statute,[51] as noted earlier, this is women, persons with disabilities and Black people. All designated employers under the EEA have an obligation to prepare and implement an employment equity plan (EEP).[52] The EEP must include the designated employer's affirmative action measures; a yearly time table for when the employer will meet the objectives of the plan; and, where there is an underrepresentation of people from designated groups, the EEP must include numerical goals 'to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals'.[53]

[50]A designated employer is an employer who employs more than 50 employees; an employer who has fewer than 50 employees but who has an annual turnover that meets a specific threshold; a municipality; organs of states excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; an employer who, bound by a collective agreement that appoints it as a designated employer - EEA s 1.

[51] ibid s 13(1).

[52] ibid s 20(1).

[53] ibid s 20(2)(c).

Section 15(1) of the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. Further, the EEA clearly sets out what must be included in such measures. In this regard, s 15(2)-(3) of the EEA provides that:

> '(2) Affirmative action measures …*must* include-
> (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
> (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
> (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
> (d) subject to subsection (3), measures to-
> (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and
> (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
> (3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.'

The provision above is broad and easily includes outreach affirmative action measures and measures that aim to remove initial barriers into entry, for example, discriminatory practices. However, they also explicitly aim for achieving equitable representation at all occupational levels of the workforce. Moreover, the EEA expressly provides for the preferential treatment of the beneficiaries. This preferential treatment is not limited by 'equal merit'. This is because of the very wide definition of suitably qualified under the EEA. Section 20(3) of the EEA provides that 'a person may be suitably qualified for a job as a result of any one of, or any combination of that person's formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable time, the ability to do the job'. Further, when determining whether a person is suitably qualified for a job, an employer must review all the factors listed above and determine whether that person has the ability to do the job in terms

of any one of, or any combination of those factors. Moreover, when determining whether a person is suitably qualified, the EEA prohibits discrimination based on relevant experience.[54]

As will be clear in the chapters that follow, much of the debate and controversy has to do with the scope of the provisions in the EEA. First, what is the difference between numerical targets and quotas? Second, in light of designated employers focus on demographic representation to meet their numerical targets, what does 'equality of opportunity' under the EEA mean? Is it merely a form of, as the trade union Solidarity has argued, 'race and gender norming' or a form of social engineering?[55] More controversial, how do we make sense of the suitable qualification criterion and their perceived challenge to individual merit and the rights to equality and dignity of those adversely affected by these measures?

5. Contribution

My thesis makes three contributions to the literature on affirmative action in South Africa. **First,** a lot has been written on the meaning of substantive equality and transformative constitutionalism and their relationship with the right to equality more broadly. However, with the exception of Katiyatiya-Moyo, Albertyn and Fredman's work,[56] there has not been a focus on what the demands of substantive equality and transformative constitutionalism mean for affirmative action in particular.

While Katiyatiya-Moyo's work focusses on affirmative action as a poverty-alleviation strategy, Albertyn and Fredman's analysis lays the foundation of how their multi-dimensional conception of substantive equality should guide the development of affirmative action in

---

[54] ibid s 20(5).

[55] Dirk Groenewald, 'Answering Affidavit, *Barnard CC*' [27].

[56] Luyando Katiyatiya-Moyo, *Substnative Equality, Affirmative ACtion and Alleviation of Poverty* (Lambert Academic Publishing 2017); Fredman, 'Reimagining Power Relations' (n 16); Albertyn, 'Adjudicating AA' (n 16).

relation to specific issues. Albertyn has used this approach to justify a specific approach to the judicial review of affirmative action.[57] Fredman's work on this area has shown how the multiple dimensions of substantive equality can help understand the basis for the EEA's focus on achieving demographic representation and how it can help navigate intra-group competition for the scarce resources allocated by affirmative action.[58]

Other works on affirmative action in South Africa focus on specific issues in silos - answering different questions without considering the connections between them and between affirmative action under s 9 of the Constitution and under the EEA and the Equality Act. For example, while there has been writing on whether the EEA creates an obligation to implement affirmative action – the corollary being a claim on the part of the beneficiaries of affirmative action,[59] there has not yet been an exploration of whether s 9 of the Constitution could create such an obligation. Moreover, thus far, a lot of the literature has been concerned with the appropriate standard of review for affirmative action.[60] While this work has engaged several questions considered in this thesis, that analysis has been secondary.

Second, this thesis's comparative approach adds insight into how other jurisdictions have grappled with similar questions in their affirmative action jurisprudence and illustrates the possibilities and limitations of these approaches. **Lastly,** the thesis engages with recent

[57] Albertyn, 'Adjudicating AA' (n 16).

[58] Fredman, 'Reimagining Power Relations' (n 16).

[59] Emma Fergus and Debbie Collier, 'Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation' [2014] SAJHR 484; Coetzer (n 21); Marie McGregor, 'The Nature of Affirmative Action: A Defence or a Right?' [2003] SAMLJ 421; Thompson and Van der Walt (n 21).

[60] Catherine Albertyn, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity' [2018] SALJ 403; Albertyn, 'Adjudicating AA' (n 16); Kohn and Cachalia (n 20); McConnachie, 'Intensity of Review' (n 17); Pretorius, 'Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: Solidarity Obo Barnard v South African Police Services' (2013) 130 SALJ 32; 'Fairness in Transformation' (n 17); Pierre De Vos, 'The Past Is Unpredictable: Race, Redress and Remembrance in the South African Constitution' SALJ 73.

critiques of the value of a commitment to transformative constitutionalism.[61] While this approach has been met with equally strong constructivist approaches to constitutionalism,[62] by offering a map towards a transformative affirmative action jurisprudence, my thesis adds to an approach to the study of Constitutional norms that offer hope for the struggle to eradicate inequality and realise the egalitarian vision in the Constitution. The specificity of focusing on the possibility of a transformative approach to affirmative action will show, at least in one area, how constitutional rights can be interpreted and implemented in a transformative manner.

[61] See citation in fn 4 above.

[62] In the specific context of the equality right see Albertyn, 'Contested Equality' (n 16); Shireen Hassim, 'Decolonising Equality: The Radical Roots of the Gender Equality Clause in the South African Constitution' [2018] SAJHR 342. More broadly, see, Firoz Cachalia, 'Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal' [2018] SAJHR 375; Dennis Davis, 'Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?' [2018] SAJHR 359.

PART I: CONTESTED TRANSFORMATIVE CONSTITUTIONALISM AND SUBSTANTIVE EQUALITY

CHAPTER TWO: TRANSFORMATIVE CONSTITUTIONALISM AND AFFIRMATIVE ACTION

Introduction

My thesis is concerned with the development of a transformative approach to affirmative action. As discussed in Chapter One, this approach is rooted in a commitment to transformative constitutionalism and substantive equality. Thus, in the next two chapters of the thesis, I define and explore these concepts and their relationship to affirmative action, starting with transformative constitutionalism.

In Chapter One, I noted that the right to equality, in particular, the positive redistributive measures under s 9(2) of the Constitution are central to the Constitution's transformative mission. However, transformative constitutionalism's promise of social change and the elimination of inequality is contested.[63] Thus, before delving into what a transformative approach to affirmative action should look like, this chapter defines transformative constitutionalism, explores the critique levelled against its promise and justifies the value for fighting for a transformative approach to affirmative action.

My core argument in this chapter is that it is possible to give meaning to, interpret and implement the rights in the Constitution in a manner that, to the fullest extent possible, can help eradicate inequality. Focussing on affirmative action, I argue that while these measures are weak at effecting structural change, in the sense that they do not question the scarcity of existing resources or the underlying structures which produce the scarcity, they can be interpreted, designed and implemented in a manner that at least undermines prevailing inequality.

---

[63] Modiri, 'Conquest' (n 4); Sanele Sibanda, *"Not Yet Uhuru" - The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy* (PhD thesis, University of the Witwatersrand 2018); Madlingozi (n 4).

In making this argument, I have divided the chapter into five sections. The first section defines transformative constitutionalism by exploring two important aspects. First, I argue that the Constitution has features that depart from classical liberal constitutions. These features set the table for effective change in the sense of redressing past injustice and achieving an egalitarian society. Second, I argue that the Constitution invites the courts to interpret the provisions in the Constitution and other statutes in a manner that furthers the political goals of transformation – transformative adjudication. Having defined transformative constitutionalism, the second section, explores the critiques levelled against it, in particular, the critique that the Constitution is a negotiated settlement embedded in western liberal constitutionalism and, by design, perpetuates inequality and cannot lead to any meaningful transformation.

The third section tackles the critique head-on. I argue that the critique erroneously assumes that the Constitution's text is absolute and cannot be interpreted and applied in a transformative manner. In addition, I argue that the critique unduly centres the law, the failing of lawyers and the courts in the transformative project. While my thesis focusses on the role of law and the courts, the larger project of transformation is dependent on other branches of government and larger global economic and social forces. Thus, rather than characterise the Constitution as a hindrance to transformation, we must locate it within this broader context and commit to imagining how we could use it to redress past injustice and achieve its egalitarian vision.

In the fourth section, I explore the implications of the commitment to transformative constitutionalism to the specific context of affirmative action. Broadly, I argue that the commitment to transformative adjudication requires a purposive, generous and contextual approach to interpretation and an approach to judicial review (and thus the separation of powers principle) that bends towards transformation. Before concluding the chapter, the fifth section locates affirmative action within what Fraser calls 'non-reformist'

reform,[64] acknowledging that alone, affirmative action will not lead to deep structural change. However, it can be a powerful instrument to undermine inequality and pave the path for more radical interventions in the struggle to eliminate inequality in South Africa.

1. Defining Transformative Constitutionalism

Transformative constitutionalism is the preeminent approach to South African constitutionalism. Thus, there is a lot of literature on this concept, all defining different features of this idea and expressing diverging opinions on its meaning and value.[65] According to the Constitutional Court, transformation aims to redress the historical imbalance caused by past unfair discrimination.[66] This commitment to transforming society is evident in the preamble of the Constitution which states that the Constitution was adopted in recognition of past injustice and to heal divisions of the past, our colonial and apartheid past, 'establish a society based on the democratic values, social justice and fundamental human rights' and to 'Improve the quality of life and free the potential of each person'.

The idea that the post-apartheid constitutional dispensation would bring or require transformation precedes the Constitution.[67] However, the American scholar, Karl Klare, introduced the term 'transformative constitutionalism' in relation to the Constitution in his

[64] Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso 2003) 74.

[65] A small sample includes Klare, 'Legal Culture' (n 2); Elsa Van Huyssteen, 'The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism' [2000] African Studies 2; Adriaan Van der Walt, 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 Fundamina 1; Moseneke (n 15); Langa (n 15); Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 Stell LR 258; Jason Brickhill and Yana Van Leeve, 'Transformative Constitutionaslism - Guiding Light or Empty Slogan?' [2015] Acta Juridica 141.

[66] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) [71] (at fn 3).

[67] Sibanda, *Not yet Uhuru* (n 63) 194–200 (For an analysis of early references to transformation and constitutionalism).

1998 article, 'Legal Culture and Transformative Constitutionalism'.[68] Rooting his analysis in the US's critical legal studies movement, Klare defined transformative constitutionalism as a 'long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[69]

There are many other definitions of transformation and transformative constitutionalism.[70] For example, for Albertyn and Goldblatt, transformation requires the 'complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines'.[71] According to Liebenberg, the Constitution aims to 'facilitate the construction of a new political, social and economic order', one that improves the quality of life and frees each person's potential. Similar to Albertyn and Goldblatt, she acknowledges that this will require redressing past injustice and the 'deep restructuring of the underlying institutional arrangements which generate various forms of political, economic and cultural injustice'.[72] For Van Huyssteen, the Constitution is transformative in the sense that:

> It expands the basis of popular participation in political decision making, entrenches government accountability, facilitates the redistribution of resources, and creates spaces for the legitimate expression of differences in the face of the nation-building imperative, it can provide the basis for the shifts in social, political and economic power relations.[73]

---

[68] Klare, 'Legal Culture' (n 2).

[69] ibid 150.

[70] For an analysis of comparative approaches to transformative constitutionalism see Hailbronner (n 40); Oscar Vihena Viera, Upendra Baxi and Frans Vijoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013).

[71] Albertyn and Goldblatt (n 15) 249.

[72] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 27.

[73] Van Huyssteen (n 65) 247–8.

The definitions above have several important features. First, apparent from the breadth of transformative constitutionalism's goals is the idea that transformation would not happen immediately – it is a 'long-term process'. Second, transformation requires the engagement of all the branches of government – those who pass, implement and interpret the law as well as society more broadly. No complete 'restructuring' is possible without the commitment of all political and other social institutions. Third, while the term 'transformation' is value-neutral and says nothing about the *from* and *to* what of 'transform', transformative constitutionalism is tied to redressing the injustice rooted in South Africa's colonial and apartheid past (the from) and towards the goal of creating a democratic, participatory and egalitarian society (to what). Fourth, it is concerned with altering unequal power relations in society and a fair distribution of resources - making the right to equality central to achieving its aims.

In addition to the selected definitions above, a lot has been written about the South African courts' failure to meet the demands of transformation,[74] and the possibility or impossibility of transformation within the context of the current Constitution.[75] Before engaging with this critique and rather than a full canvass of the life of transformative constitutionalism in the literature and as used by the courts, the section that follows explores why Klare and others consider the South African Constitution to be 'transformative'. This analysis will help set the scene for my response to the critique levelled against transformative constitutionalism and serve as a foundation for defining what a transformative approach to affirmative action entails.

[74] See for example, Dennis Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 SAJHR 403; Dennis Davis, 'Transformation: The Constitutional Promise and Reality' [2010] SAJHR 85.

[75] Modiri, 'Conquest' (n 4); Sibanda, *Not yet Uhuru* (n 63); 'Purpose Made' (n 4); Ramose (n 4); Madlingozi (n 4); Karen Van Marle, 'Transformative Constitutionalism As/And Critique' (2009) 20 Stell LR 286.

1.1. A Departure from Classic Liberal Constitutions

The core of the argument that the Constitution is transformative is its 'post-liberal' features, which, according to Klare, invited a 'new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals'.[76] To understand the significance of this classification, I briefly discuss some features of what Klare considered to be aspects of a 'classic liberal constitution' and explore how the Constitution departs from these to constitute a *text* that is transformative.

At the core of classic liberal ideology is a commitment to individual freedom, autonomy, equality before the law and an abstentionist, neutral state.[77] For the purpose and function of constitutions, liberalism has three important ramifications which, reading Klare, characterise the classic liberal constitution: the neutrality of the state and the law; the public/private divide; and that rights give rise to negative as opposed to positive obligations. According to Klare, in contrast with 'classic liberal documents',[78] the Constitution was '*social, redistributive, caring, positive,* at least partly *horizontal, participatory, multicultural,* and *self-conscious* about its historical setting and transformative role and mission'.[79] For Klare, these characteristics contradicted the features of the classic liberal constitution.

Classic liberalism defines individual liberty in the negative sense – liberty is the absence of interference and coercion. Thus, liberal constitutions are 'most commonly' thought of as defining and limiting the reach of the state from interfering with individual

---

[76] Klare, 'Legal Culture' (n 2) 156.

[77] Sandra Fredman, *Women and the Law* (Clarendon 1997) (For a detailed history of liberal ideology and its relationship with the right to equality, in particular, women's right to equality).

[78] Klare doesn't define what he means by classic liberal documents, but from the body of his argument, he identifies features including – the separation of law and politics, focus on individual rights and the focus on objectivity and neutrality in the interpretation and adjudication. 'The goal is to maintain the law/politics boundary by describing rational decision-procedures (deduction, balancing, purposive reasoning etc) with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order', Klare, 'Legal Culture and Transformative Constitutionalism' (n 2) 158.

[79] ibid 153–155 (my emphasis).

liberty.[80] Thus, in order to respect individual liberty, the *state* as well as the *law,* must be neutral between persons and not intrude in the exercise of individual choices.[81] This understanding of the role of law and of the state means that the state cannot pursue any distributive or social justice aims – they must remain neutral and objective.[82]

Rather than remain neutral, Klare argued that the Constitution recognised that the law could not be 'neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization'.[83] For this, he primarily relied on s 9(2) of the Constitution, noting an express commitment to substantive equality which he defined as 'equality in lived, social and economic circumstances and opportunities needed to experience human self-realization'.[84] In addition to the commitment to substantive equality, the presence of a justiciable Bill of Rights, according to Klare, was emblematic of a commitment to ensure that persons have access to the resources they need to exercise the political freedoms.[85]

Second, under classic liberalism, there is a divide between the public and the private. On this view, the state can only interfere with what is public, and not the private, largely defined as including the family and the market place. In relation to constitutions, this is 'the idea that the Constitution is especially concerned with the limitation of "public" power and, by the same token, that it is not ordinarily concerned with the regulation of other, "private,"

[80] Richard Kay, 'The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law' Constitutional Commentary 329, 338.

[81] Fredman, *Women and the Law* (n 77) 6.

[82] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 11; *Women and the Law* (n 77) 7.

[83] Klare, 'Legal Culture' (n 2) 194.

[84] ibid 154 (fn 15).

[85] ibid 153.

sources of power'.[86] This divide is often argued to be 'constitutive for constitutionalism'.[87] In his paper, Klare noted the express provision for both the horizontal and vertical application of rights in the Bill of Rights. Section 8(2) of the Constitution provides that the rights in the Bill of Rights bind 'natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[88] Further, the prohibition of unfair discrimination in s 9 of the Constitution applies horizontally.[89]

Third, and closely related to the public/private divide is the idea that under classic liberalism, rights can only give rise to negative obligations. The state does not have a duty to act or ensure the realisation of rights. This is because such obligations would be seen as violating individual freedom and the exercise of choice as well as the public/private divide. In order to protect individual liberty, the state must refrain from violating or interfering with the enjoyment of rights. Thus, classic liberal constitutions tend to serve to protect persons from state intervention by placing duties of restraint rather than positive obligations on the state.[90] By contrast, Klare noted that the provisions in the Bill of Rights imposed positive obligations on the state 'to combat poverty and promote social welfare, to assist people in

[86] Kay (n 80) 330.

[87] Dieter Grimm, *Constitutionalism: Past, Present and Future* (OUP 2016) 2.

[88] See, *Khumalo and Others v Holomisa* 2002 (8) BCLR 771. The Court confirmed that there is room for the direct, horizontal application of at least certain rights in the Bill of Rights, [33]. See also, *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* 2011 (8) BCLR 761 (CC). The Court held the purpose of section 8(2) of the Constitution was 'not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights' but to 'require private parties not to interfere with or diminish the enjoyment of a right', [58]. More recently, in *Daniels v Scribante and Another* 2017 (8) BCLR 949 (CC). Madlanga J extended this and opened the door for the horizontal application of rights even in relation to imposing positive obligations on private persons, [39].

[89] Section 9(4) of the South African Constitution provides that 'No person may unfairly discriminate directly or indirectly against anyone'.

[90] Fredman, *Human Rights Transformed* (n 82) 9.

authentically exercising and enjoying their constitutional rights, and to facilitate and support individual self-realization'.[91]

Fourth, he argued that the Constitution was historically self-conscious in the sense that it was 'an instrument committed to social transformation and reconstruction'.[92] This contradicts the idea of law as static, neutral and objective. 'It rejects the fiction that the political community is founded at a single magic moment of social contract, thereby ratifying the pre-existing hierarchy and distribution of social and economic power'.[93]

For Klare, these departures from classic liberalism were an indication of the possibility of transforming South African society by working with the text of the Constitution. This brings us to the second aspect of Klare's argument. To be able to achieve the goals of transformation, he argued, there needed to be a change in the approach to working with the text and values which underlie the Constitution.[94] He thus advocated for *transformative adjudication* by judges as well as a change in the legal culture to make achieving the Constitution's transformative goals possible. In the section that follows, I discuss the meaning of transformative adjudication.

1.2. Transformative Adjudication

According to Klare, transformative adjudication is a method of adjudication that is politically engaged without amounting to 'illicit "judicial legislation"'.[95] The courts are required to interpret and apply the provisions in the constitution in a manner that seeks to achieve the

[91] Klare, 'Legal Culture' (n 2) 154.

[92] ibid 155.

[93] ibid.

[94] ibid 156.

[95] ibid 150.

political goals embodied in the provisions.[96] This approach to adjudication is in contrast with the strict separation between law and politics and the idea that judges should 'check their politics at the courthouse door' and act as neutral and objective arbiters of legal disputes – liberal legalism.[97] Transformative adjudication contemplates 'new conceptions of judicial role and responsibility' and the examining of the prevailing judicial mindset and methodology to promote equality, a culture of democracy and transparent governance.[98]

The Constitutional Court has sanctioned the commitment to transformative adjudication in its judgements,[99] as well as in extra-curial commentary by its judges.[100] For Moseneke J, transformative constitutionalism demands that in fulfilling its mandate, the 'courts should search for substantive justice, which is to be inferred from the foundational values of the Constitution'.[101] These values include equality, human dignity and freedom.[102] However, the Constitutional Court has not been clear on its role in the process, with some judgements suggesting a deferent approach to other decision-makers on how to go about achieving the goals of transformation.

For example, in *Bato Star*, O'Regan J specifically held that because the 'goals of transformation can be achieved in a myriad of ways….The manner in which transformation

[96] Marius Pieterse, 'What Do We Mean When We Talk about Transformative Constitutionalism?' [2005] SAPL 155, 164. Former Chief Justice Langa has argued that 'Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.', Langa (n 15) 353.

[97] Klare, 'Legal Culture' (n 2) 157.

[98] ibid 156.

[99] See, *City Council of Pretoria v Walker* 1998 (2) SA 363 [101] (Sachs J).

[100] See, Moseneke (n 15) 316; Langa (n 15) 354.

[101] Moseneke (n 15) 316.

[102] See, South African Constitution s 1 (Founding Provisions).

is to be achieved is, to a significant extent, left to the discretion of the decision-maker'.[103] She thus seems to envision a limited role for the courts in achieving the goals of transformation. However, as I will explore later in the chapter, some judgements see a more active, purpose-oriented role for the courts, exercising more or less deference in relation to the specific context of the case and what is at stake – an approach that fits the commitment to transformative adjudication. The stance on the side of deference in O'Regan J's statement is arguably emblematic of the still conservative legal culture observed by Klare.

In his article, Klare argued that one of the barriers to transformation in South Africa was its conservative legal culture. He defined legal culture as 'professional sensibilities, habits of mind, and intellectual reflexes' which determined the 'rhetorical strategies' used; the kinds of and range of possible arguments that are considered to be valid; the political and ethical commitments which influence professional discourse; the assumptions about politics, social life and justice.[104] The legal culture defines 'what qualifies as a proper legal problem, an authoritative legal rule or principle concerning that problem and a valid argument or methodology in applying the rule or principle to the problem'.[105]

According to Klare, the South African legal culture was conservative in its 'strong faith in the precision, determinacy and self-revealingness of words and texts'.[106] This lead to a process of legal interpretation that was 'highly structured, technicist, literal and rule-bound'.[107] Further, he argued that these 'expressions of faith in the constraining power of

[103] *Bato Star* (n 66) [35].

[104] Klare, 'Legal Culture' (n 2) 166–7.

[105] Van der Walt (n 65) 17.

[106] Klare, 'Legal Culture' (n 2) 168.

[107] ibid; See also Van der Walt (n 65) 18 (Drawing on Klare, he defines legal culture/tradition as referring to a 'set of intellectual habits that are embedded in more or less uncritical acceptance of doing things the way they are usually done; the way they have been done for a long time'.)

legal texts and ritual invocation of the law/politics boundary' could induce 'intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history'.[108]

Classic liberal devices such as 'formalism, deference to legislative choices, and dichotomous conceptions of negative and positive rights, public and private law and politics',[109] hinder the possibility of transformation.[110] For Klare, the commitment to transformative constitutionalism, in particular, the shift from constraining liberal legalism, ways of seeing and lawyering would have to change to ensure that they did not limit the possibility of transformation.

However, Klare acknowledged that changing a legal culture is difficult. Lawyers are trained to see the characteristics of the culture as normal.[111] The ignorance of the embeddedness in a legal culture prohibits critical reflection on how the prevailing legal culture can limit transformation.[112] As Van der Walt notes, under 'the hegemonic force' of legal tradition, 'new perspectives, alternative views and different arguments or ways of thinking are routinely or at least easily excluded or rejected and creative, alternative and unconventional solutions become difficult if not impossible to conceive, promote or

[108] Klare, 'Legal Culture' (n 2) 171.

[109] Liebenberg (n 72) 43.

[110] For an analysis of the tensions between the Constitution and the South African legal culture see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013) ch 5; Van der Walt (n 65); Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' [2004] SAJHR 383.

[111] Klare, 'Legal Culture' (n 2) 167.

[112] Van der Walt (n 65) 18.

defend'.[113] If an argument does not fit the legal culture, it is dismissed and considered as not possible. Thus, a conservative legal culture has a restraining effect on transformation.[114]

The lack of self-consciousness and reflection on the reliance on culturally available tools and instincts from the past, according to Klare, 'exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation'.[115] Klare's remedy for this limitation was that there should be a 'searching and critical examination of the legal culture and its multifaceted and diffuse influences on interpretive practices'.[116]

Overall, transformative constitutionalism, as defined in this section, is rooted in the idea that there have been some departures from classic liberal constitutionalism, departures which empower the courts, and arguably the broader community of constitutional interpreters to pursue an approach to the Constitution that seeks to eliminate inequality and disrupt unequal power relations. More important for my thesis, one of the important aspects of transformative constitutionalism is a commitment to substantive equality, in particular, taking positive redistributive measures in favour of disadvantaged groups.[117]

However, it has been over two decades of the Constitution and the judicial and academic 'life' of transformative constitutionalism. During this time, levels of inequality, high unemployment amongst historically disadvantaged groups and the abject poverty in which many South Africans find themselves has rightly placed the Constitution, more specifically, transformative constitutionalism, under intense scrutiny. In the section that follows, I

[113] Van der Walt (n 65) 18.

[114] ibid 17, 30.

[115] Klare, 'Legal Culture' (n 2) 168.

[116] ibid.

[117] Albertyn and Goldblatt (n 15) 249.

explore the different critiques levelled against transformative constitutionalism. Thereafter, I offer a modest response in defence of transformative constitutionalism and thus the possibility and utility of a transformative approach to affirmative action.

2. A Departure Without Rupture?

Broadly, the critique can be separated into four approaches. In the **first critique**, Sibanda points at the inclusion of the separation of powers principle, a feature of classic liberal constitutions, and thus rejects the characterisation of the Constitution as post-liberal.[118] His argument challenges the idea that the Constitution marked a departure from the liberal tradition.[119] He distinguishes between an 'orthodox or liberal democratic approach to constitutionalism' and the 'transformative approach to constitutionalism'.[120] According to Sibanda, the latter is concerned with both political and socio-economic transformation while the former is an ideal of having constitutional institutions and process - an independent judiciary, the respect for the rule of law, free press, free and fair elections.[121] He then argues that while transformative constitutionalism may entail some departure from 'liberal constitutionalism', it is still deeply embedded in liberal ideology.[122] For him, this embeddedness in liberalism means that despite the best intentions of those who interpret the Constitution, it 'has had the effect of defining the goods of constitutionalism in narrower terms than is in fact necessary or desirable for purposes of pursuing a truly transformative

[118] Sibanda, 'Purpose Made' (n 4).

[119] Roux makes the similar argument that, pointing at the inclusion of the separation of powers principle, core to liberal constitutionalism, the Constitution is not post-liberal. Instead, he argues that is a species of liberalism aligned with uniquely South African values, including *Ubuntu*. In constrat with Sibanda though, Roux questions the post-liberal status to make the point that the goals of transformation can be achieved without the commitment to Klare's idea of transformative adjudication, Roux (n 110) 203–208. See also, Brickhill and Van Leeve (n 65) 255–256.

[120] Sibanda, 'Purpose Made' (n 4) 484–5.

[121] ibid.

[122] ibid 486.

project of poverty eradication'.[123] Thus, it is 'ill-suited for achieving the social, economic and political vision it proclaims'.[124] At the core of Sibanda's argument is the fear that liberal constitutionalism's narrow focus on limiting state power will curtail the state from making radical interventions in favour of the poor.[125]

The **second critique** turns the focus to the relationship between the prevailing legal culture and the goals of transformative constitutionalism. As discussed in the previous section, Klare noted that transformation could only occur with a real commitment to transformative adjudication and a sufficient change in the legal culture. Sibanda argues that the reliance on interpretation for transformation is a substantial barrier to achieving the purpose of transformation. In this regard, he notes that if the goals of transformative constitutionalism are primarily driven through the process of interpretation of lawyers and judges 'of different political persuasions and inclinations' these goals will be at risk of being undermined or mere rhetoric.[126]

Essentially, Sibanda is concerned that transformative constitutionalism is too reliant on interpretation by a conservative legal community. This, together with its liberal 'roots' leaves the whole project susceptible to the limitations of liberal constitutionalism.[127] He thus argues that without a 'shared transformative consciousness deriving from the Constitution, its underlying values, rights framework and democratic institutions',[128] all that we have left

[123] Sibanda, 'Purpose Made' (n 4) 486.

[124] ibid.

[125] ibid 498. Sanele Sibanda, 'Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman's "Liberal Constitutionalism, Property Rights and the Assault on Poverty"' [2013] Stell LR 329, 332. Jackie Dugard, 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' [2008] SAJHR 214 (For the argument that the Court's jurisprudence has not been pro-poor).

[126] Sibanda, 'Purpose Made' (n 4) 493.

[127] ibid 493–4. See also, Pieterse (n 110) 398.

[128] Sibanda, 'Rejoinder' (n 125) 331.

'is a prevailing system of liberal democratic constitutionalism with its emphasis on procedural democracy in the form of free and fair elections and the balancing of institutional power dynamics between the branches of government'.[129] More deeply, he argues that transformative constitutionalism's focus on the courts, lawyers, and legal academics enables 'elite capture by empowering courts and lawyers…without expanding the possibilities of greater democratic participation in the project of constitutional meaning making'.[130]

For Sibanda, transformative constitutionalism as defined here, promises more than it can deliver. This is because its goals could only be realised 'in a political and legal community where there is a shared sense of a particular ideologically laden transformative consciousness, alongside value-laden, forward-looking and purposive interpretive approach by a transformed legal community'.[131] Absent this, the project's dependence on a particular mode of interpretation is for him its 'fatal weakness'.[132]

Flowing from the critique that the prevailing legal culture does not show commitment to the goals of transformation, the **third critique** accepts Klare's vision of transformative constitutionalism. However, in examining the courts' jurisprudence, proponents of this approach argue that the courts have failed to realise the Constitution's transformative mission. According to Davis, the South African courts have not been faithful to the transformative mission of the Constitution.[133] In particular, he argues that 'the community of constitutional interpreters' has been subversive to the Constitution's

[129] Sibanda, 'Purpose Made' (n 4) 494.

[130] Sibanda, *Not yet Uhuru* (n 63) 194.

[131] ibid 220–1; For a similar argument Madlingozi (n 4) 144.

[132] Sibanda, *Not yet Uhuru* (n 63) 221.

[133] Davis, 'Constitutional Promise' (n 74).

transformative ambition.[134] This is because not much has been done 'to deconstruct the core of the South African legal system' and disrupt 'laws that have sustained dispossession and patterns of economic inequality that continue to run so markedly along race lines'.[135]

In contrast with the critiques discussed above, the **fourth strand of critique** rejects not only transformative constitutionalism, or the possibility of achieving its aims within the current legal culture, but the Constitution itself.[136] This approach critiques the text of the Constitution, in particular, the property clause, as emblematic of maintaining the status quo. Proponents of this argument, what Cachalia calls 'postcolonial criticism'[137] argue that the Constitution entrenches colonial and apartheid privileges and power relations, necessarily making transformation impossible.

According to Modiri, there exists a '(dis)continuity' between colonial conquest and settler colonialism and the Constitution, a constitution made in the image of 'western liberal democracy'.[138] This '(dis)continuity' explains the persisting injustice and inequality in South Africa. Modiri's argument is not that nothing has changed, but rather that 'forms and visions of change being employed are not able to successfully dismantle the reigning order at the level of its constitutive or foundational structural elements'.[139] Thus, he notes that while the street names and government have changed, and apartheid laws are repealed, the 'arrangements of economic power, land and property ownership, spatial segregation,

[134] Davis, 'Constitutional Promise' (n 74) 100.

[135] Davis, 'Is the Constitution an Obstacle?' (n 62) 372.

[136] Madlingozi (n 4); Modiri, 'Conquest' (n 4); Ramose (n 4); Ndumiso Dladla, 'The Liberation of History and the End of South Africa: Some Notes towards an Azanian Historiography in Africa, South' [2018] SAJHR 415.

[137] Cachalia (n 62) 378.

[138] Modiri, 'Conquest' (n 4) 6.

[139] ibid 16.

epistemic violence, Western imperialism, psychic trauma and labour exploitation' have not.[140] He thus argues that the 'failure to redress the structural continuity of colonial-apartheid renders the constitution's extension of universal suffrage, citizenship and human rights to Black people hollow and abstract'.[141]

Similarly, Madlingozi argues that the 'post-1994 constitutional re-arrangements are transforming society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social configuration' – what he calls 'neo-apartheid constitutionalism'.[142] Drawing from African nationalist and Black consciousness thought, he argues that within the current Constitutional order, 'an anti-black bifurcated societal structure' has emerged. On the one side of this structure are the privileged classes, white people and the Black middle class. This group is governed through a system of liberal democracy. On the other side, a system of 'patronage, appropriation, and repression remain politics *du jour*'.[143] This system, he argues, has kept the majority Black population impoverished and oppressed, while legitimating the State by creating the mirage of transformation.[144]

Overall, the ideal of transformative constitutionalism and the possibility of achieving its goals are rightly under intense scrutiny. In the section that follows, I argue that there is still room to work in the folds of the 'departures' from classic liberal constitutionalism

---

[140] Modiri, 'Conquest' (n 4) 16.

[141] ibid 17.

[142] Madlingozi (n 4) 125. The opposite view has been put forward by many commentators, perhaps the most opposing language is that used by Ackerman. Ackerman argued that the new Constitution embodied a 'constitutional revolution' even while he acknowledges that the embeddedness of the new Constitution in the past, noting that 'There was no discontinuous legal fracture with the old legal order. The revolution was commenced by a parliamentary statute of that old order (namely, the IC) and controlled by it, and the Constitutional Court was created by it', Laurie Ackermann, 'The Legal Nature of the South African Constitutional Revolution' (2004) 20014 NZ Law Review 633, 42–43.

[143] Madlingozi (n 4) 124–5.

[144] ibid 129.

outlined earlier in the chapter and to recommit the community of constitutional interpreters to what I believe is still possible – eradicating inequality and redressing the injustice of past domination and oppression. A part of this is accepting the limitations of law, legal interpretation and process in effecting change while also constructively working to contribute to the legal culture necessary to allow for transformation – something that this thesis attempts to do in the context of affirmative action.

3. Imagining and Committing to the Adjacent Possible

The first critique is rooted in the separation of powers principle. For Sibanda, the inclusion of this principle is emblematic of the limitations placed on the state in seeking to realise the transformative vision in the Constitution.[145] One response to this critique is that the commitment to transformative constitutionalism invites a new conception of the separation of powers - a notion of the separation of powers that is suitable for achieving the purposes of transformation. Later in this chapter, I will outline this approach, in response to this critique and in relation to the specific context of affirmative action.

The second critique, in particular, Sibanda's concern that transformation cannot occur unless there is a change in the legal culture and a convergence of purpose and ideological commitment to transformation,[146] is a concern that Klare too shared and which is the root of the third strand of critique against transformative constitutionalism (that the courts have betrayed the Constitution's transformative vision). My response to this argument is that the fact that the legal culture in South Africa has not completely changed need not be the end of the story. As I discussed earlier in the chapter, transformation is a process, so too is changing a legal culture and heralding a shift in ideological commitment. The legal culture can change to better align with the commitment to transformative constitutionalism 'through

[145] Sibanda, 'Purpose Made' (n 4) 498.

[146] Sibanda, *Not yet Uhuru* (n 63) 221.

critical awareness of and resistance against the hegemonic effect of legal culture and tradition'.[147] As Van der Walt argues, judges, lawyers and the community of constitutional interpreters 'should actively seek for and discover the dynamic potential for transformation inherent in the other, often marginal, experiences and interpretations of the law that are traditionally and routinely excluded or side-lined by mainstream legal consciousness and practice'.[148]

I am still hopeful that the community of interpreters can work with the 'postliberal' features identified by Klare and, in the act of subverting the dominant legal culture and tradition, fashion new and novel arguments that push towards the goal of transformation. However, transforming a legal culture is about more than changing the ways of thinking about law. It also requires a change in the composition of the legal community. As Sibanda illustrates, if a legal culture comprises of persons whose interests are threatened by transformation, they may not work towards it.[149] Thus, the inclusion of Black people, women, disabled people, people who come from other historically disadvantaged backgrounds can be instrumental in transforming the legal culture. However, in order to have a meaningful impact on legal culture, the inclusion of historically disadvantaged groups will have to occur alongside a change in legal education as well.[150]

The more difficult critique to respond to is the postcolonial critique. In my view, this critique rests on an uncomfortableness with what appears to be the lawfulness of an intolerable status quo - deeply entrenched structural and systemic inequality. It is thus rooted in a concern that I too share. However, I disagree with the critique in three important ways.

---

[147] Van der Walt (n 65) 31.

[148] ibid.

[149] Langa (n 15) 352.

[150] Joel M Modiri, 'Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education' [2013] Stell LR 455, 457.

First, the critique is embedded in a deep fatalism that assumes that the text of the Constitution is absolute and has closed off the possibility that it can be interpreted and applied in a manner that is transformative in the sense of aiding the struggle to eliminate inequality. This is a failure to see constitution-making as an ongoing process of construction and reconstruction, one in which different interpretive communities contribute.[151] As Van Huyssteen has argued 'The Constitution provides the foundation for transformative constitutionalism, but the extent to which this potential is realised will depend on the nature and outcomes of social and political struggles and contestation, as well as of clashes before the Court'.[152] These struggles are not yet complete; they are happening in the courts, they are in the texts of the many service delivery protests that occur, they are in the debates in parliament, the forming of committees to consider the question whether the right to property should be amended.[153]

Cachalia makes the point that Constitutions in democratic societies are provisional in the sense that their meaning is subject to contestation, thus, 'Their legitimacy and efficacy have to be established in each generation through democratic politics'.[154] This captures the idea that the characterisation of the Constitution as a negotiated compromise is incomplete. The Constitution is both a negotiated and *negotiating* text, as Du Plessis has noted, the Constitution:

> [W]as not formulated to suggest that once its wording had been agreed upon, ideological tensions among the constitutional negotiators were settled, and that the negotiators were desirous for the written constitutional text to reflect such a settlement. Agreement on a written text was possible only on the condition that the

[151] Van Huyssteen (n 65) 247.

[152] ibid 247–8.

[153]Amendment of Section 25 of the Constitution: Project Details available at <https://www.parliament.gov.za/project-event-details/285> accessed 15 October 2020. For a possible approach to grappling with land dispossession in South Africa Nkanyiso Sibanda, 'Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership' [2019] SAJHR.

[154] Cachalia (n 62) 381.

> ideological tensions would remain — and visibly so — to be negotiated and renegotiated every time the text is reread with an interpretive eye.[155]

The quote above makes it clear that the Constitution need not and was perhaps not meant to close off the ideological tensions that underlined the negotiating process. For example, that the Constitution includes a property clause need not be the end of the question whether it can be interpreted in a manner that allows for large-scale land redistribution and compensation for the injustice of land dispossession under colonial and apartheid domination.[156] Further, as I will argue in Chapter Five, that s 9(2) of the Constitution uses permissive language does not, taking into account the commitment to transformation and substantive equality, foreclose the possibility of imposing a duty to take positive redistributive measures under this provision.

Second, the critique does not give proper regard to the fact that even as a negotiated settlement, the Constitution also embodies a culmination of multiple struggles for liberation in South Africa, other African countries as well as larger global struggles against domination and oppression. Hassim and Albertyn have shown how the right to equality, more specifically, is a product of women's struggles against racial and gendered domination and oppression in South Africa.[157] As Albertyn notes:

> Ideas of equality in South Africa emerged from the crucible of struggles against the deep political, social and economic inequalities that were inscribed and normalised in colonialism, segregation, apartheid, patriarchy and South Africa's particular brand of racialised accumulation and capitalism.[158]

---

[155] Du Plessis Lourens, 'Interpretation' in S Woolman and others, *Constitutional Law of South Africa* (Second, OS 2012) ch 32.3.

[156] See, Jackie Dugard and Nompumelelo Seme, 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act Re Restitution and Expropriation' SAJHR 33 (The authors review the Constitutional Court's s 25 judgements and argue that while there has been som progressive legal interpretation, the courts have yet to develop a comprehensive and coherent approach to realising the transformative potential in s 25, the property clause). See also, Sibanda, 'Amending Section 25' (n 153).

[157] Hassim (n 62) 348; Albertyn, 'Contested Equality' (n 16) 443.

[158] Albertyn, 'Contested Equality' (n 16) 443.

Similarly, Cachalia has argued that though incomplete, the Constitution is a product of radical anti-colonial resistance.[159] Negating this history is to erase these struggles and makes light of the promise that the right to equality and the other rights in the Bill of Rights makes to many South Africans.

Third, the critique unduly centres the law, the failing of lawyers and the courts in the transformative project. This places too much weight on the Constitution for doing the work of transformation. An alternative approach would be to acknowledge the limitations of law and legal interpretation and also locate the law in the context of other economic and political failings. Transformative constitutionalism is a commitment to struggle in the legal, economic and political realm – using legal and non-legal methods of struggle.[160] A commitment to transformative constitutionalism need not centre the law or the courts as this would disempower people, by limiting the range of other sites of struggle.[161] We have to acknowledge the need for other methods of struggle and the role of other branches of government.

More deeply, the Constitution is neither the cause nor the only remedy for prevailing inequality. As Cachalia argues, 'Questions of fundamental structural change present additional questions of political choice as well as of constraint on policy-making under conditions of global capitalism and democratic politics. Such questions cannot be treated simply as ones about the constitutional text and its interpretation'.[162] Further, as I discussed earlier in the chapter, transformation is a process, 'a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being

[159] Cachalia (n 62) 389.

[160] Van Huyssteen (n 65) 259; Albertyn, 'Contested Equality' (n 16) 454.

[161] ibid.

[162] Cachalia (n 62) 388.

are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant'.[163]

The text and the normative foundation of the Constitution did not lock us in time. The Constitution worked to get us through the negotiation of the democratic transition. The contents of the Constitution should not be seen as having closed the door for normative disagreement.[164] Rather, the Constitution has given us a 'framework for dealing with these unresolved questions through democratic practices of dialogue and contestation'.[165] The outcomes will depend on the work by lawyers and judges, in the legislative choices made in parliament and decisions by the executive – all this against the background of larger global and local movements.

In relation to the work in this thesis, my argument is that it is possible to develop and entrench an approach to equality which will enable a disruption if not the elimination of prevailing material and other forms of inequality – substantive equality – one that can be used as a frame for the design, implementation and interpretation of positive redistributive measures, in particular, affirmative action. I agree with Hassim that the equality clause in the Constitution 'is the imperfect, partial and incomplete product of a century of struggle (at least) by ordinary people in the very real conditions of the dehumanising and exploitative conditions in racial-capitalist South Africa'.[166] It is to this tradition that my thesis seeks to add onto. Thus, in the section that follows, I explore the implications of transformative constitutionalism towards the development of a transformative approach to affirmative action. In particular, I argue that the commitment to transformative constitutionalism

[163] Langa (n 15) 354.

[164] Cachalia (n 62) 383.

[165] ibid 385.

[166] Hassim (n 62) 348.

requires a theory of interpretation and an approach to judicial review that best fits the commitment to achieving the egalitarian vision in the Constitution.

4. Towards a Transformative Approach to Affirmative Action

4.1. An approach to interpretation

As discussed earlier in the chapter, the commitment to transformative adjudication requires the Constitution to be interpreted in a manner that is 'as responsive as possible to the disjuncture between lived experiences of poverty and deep power imbalances and the Constitutional ideal of social justice'.[167] This requires a process of adjudication grounded in the normative value system of the Constitution.[168] First, s 7 of the Constitution provides that the rights in the Bill of Rights are the 'cornerstone of democracy' and that they affirm the democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil the rights in the Bill of Rights.[169] Second, s 39(1)(a) of the Constitution requires the promotion of the values that underlie an open and democratic society based on human dignity, equality and freedom. Similarly, s 39(2) requires the courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. These provisions underlie the commitment to a transformative approach to interpretation.

Accepted in the Constitutional Court's jurisprudence,[170] the most fitting interpretive approaches to the value commitments mentioned above are 'non-formalist, non-legalist and

---

[167] Liebenberg (n 72) 34.

[168] The South African Constitution is said to be underlined by a normative value system. While it is not clear what this normative system specifically entails, the values of human dignity, equality, freedom are certainly at the core thereof. See *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) [54]-[55]; *Geldenhuys v Minister of Safety and Security and Another* [2002] 3 All SA 82 (C); Ackermann, *Lodestar* (n 30).

[169] South African Constitution, s 7(2).

[170] *S v Zuma and Others* 1995 (4) BCLR 401 (SA) [14]-[15] (on a generous interpretation). *S v Mhlungu & Others* 1995 (3) SA 867 (CC) [3]-[8] (On purposive interpretation). *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 [17] (The Court made a connection between the purposive and generous approach to interpretation). See also, *Makwanyane* (n 35)[10] (Chaskalson P, describing the contextual approach). O' Regan

non-literalist approaches to constitutional interpretation'.[171] Thus, instead of literalism, originalism or textualism,[172] transformative constitutionalism requires purposive, generous and contextual interpretations of the Constitution and legislation.[173] Purposive interpretation requires a provision to be interpreted in a manner that gives effect to its purpose or object.[174] Generous interpretation is an approach which requires the least restrictive interpretation to provisions.[175] These two approaches are closely related to each other - the purposive approach to interpretation will often be one which calls for a generous interpretation.[176]

While a purposive and generous approach to interpretation will likely lead to more transformative ends than literal, originalist or textual approaches, they may at times lead to outcomes that go against transformative ends. Thus, these methods of interpretation should be embedded in the context that the Constitution seeks to redress past injustice and achieve an egalitarian society. Accordingly, they must bend towards interpretations that further rather than restrict these goals. The Constitution, as a 'historically conscious' document, requires its provisions to be interpreted in light of the historical, economic, social and political context - it must 'not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself'.[177]

J's judgement in *Brink* (n 36) [40] (For a discussion of the historical context within which the s 9 equality right must be interpreted).

[171] Lourens (n 155) ch 32.3. See, Mohamed J in *Mhlungu* (n 170) [3]-[8], for an analysis of of the limitations and dangers of a literal approach to interpretation.

[172] Lourens (n 155) ch 32.3.

[173] ibid; Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta 2013) ch 3.

[174] *Makwanyane* (n 35) [11].

[175] *Zuma* (n 170) [14]-[15]; *Mhlungu* (n 170) [8]; *Soobramoney* (n 170) [17].

[176] *Soobramoney* (n 170) [17].

[177] *Makwanyane* (n 35) [10].

As I will discuss in detail in Chapter Three, in the equality context, the focus on context is an important feature of the commitment to substantive equality. In particular, the equality right must be interpreted against the context of a history of colonial and apartheid domination and oppression, which has culminated in the present inequalities in South Africa. The importance of this context is summarised by O'Regan J in *Brink,* where she held that the right to equality:

> Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life...The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[178]

As Albertyn and Goldblatt have argued, the commitment to transformative constitutionalism requires the equality right to be interpreted in a manner that enables 'the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality'.[179] In addition to this method of interpretation, it also requires a transformative approach to judicial review.

4.2. An approach to judicial review

As established earlier in the chapter, the commitment to transformative constitutionalism rejects the idea of neutrality in the adjudication process and the divide between politics and law.[180] By contrast, it mandates 'the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a "culture of justification" for every exercise of public power'.[181] However, there are constraints to this process. Sibanda's critique that transformation will not be possible within

[178] *Brink* (n 36) [40].

[179] Albertyn and Goldblatt (n 15) 249.

[180] Pieterse (n 110) 398; Langa (n 15) 353; Klare, 'Legal Culture' (n 2) 159.

[181] Klare, 'Legal Culture' (n 2) 150.

the paradigm of a classic liberal approach to separation of powers is a particularly important barrier to this approach to judicial review.

Fortunately, in the *First Certification* case, the Constitutional Court left room for the development of a uniquely South African conception of the separation of powers principle. It held that there was no universal model of the separation of powers:[182] it was 'not a fixed or rigid constitutional doctrine' rather, it was 'given expression in many different forms and made subject to checks and balances of many kinds'.[183] While leaving room for the development of such an approach, a 'distinctively South African content' of the separation of powers principle has not yet developed.[184] According to Hodgson, this failure has left 'an implicit liberal approach to constitutionalism in South Africa – even in the guise of 'transformative constitutionalism' which has resulted in an 'unwillingness to focus on interpretations of separation of powers consistent with the radical aims of the Constitution: the eradication of poverty and elimination of inequality'.[185] Ringing truth to Sibanda's fears. However, the fact that this has yet to happen does not mean that it is not possible.

Relying on the drafting history of the Constitution, its text – especially the normative commitments in the Bill of Rights, Hodgson has offered a good idea of what an indigenous approach to the separation of powers should entail. He argues for a purposive approach to the separation of powers principle, one 'oriented towards the purpose of eliminating inequality and eradicating poverty'.[186] The purposive separation of powers doctrine requires

---

[182] *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) [108].

[183] ibid [111].

[184] Timothy Fish Hodgson, 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers : Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution' [2018] SAJHR 57; Karl Klare, 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach' 26 Stell LR 445.

[185] Hodgson (n 184) 59.

[186] ibid 75.

collaboration between the different branches of government in realising the goals of transformation. Under this approach, the government, all its branches, play an active role in the realisation of the rights guaranteed in the Bill of Rights. As Hodgson argues, no one branch has a 'monopoly on the ability to interpret and give content to rights and no branch of government or state institution is beyond the ability to either abuse its power or assist in the realisation of the Constitution's aims of eradicating poverty and eliminating inequality'.[187]

Glimpses of the purposive approach to separation of powers can be seen in *Mwelase*.[188] In this case, Cameron J held that the 'mythical spell' of the separation of powers doctrine must be broken. According to Cameron J, 'with cooperation, goodwill, humility and respect – and without necessarily adversarial combat' the courts and government can act cooperatively and purposively to realise the vision in the Constitution.[189]

> The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.[190]

As will be discussed in Chapter Four of the thesis, the conception of the separation of powers discussed above will in some cases require the Courts to give room to other branches of government in the design and implementation of affirmative action measures, in others it will require less deference to protect those adversely affected by these measures, especially in cases where they too are disadvantaged – justifying the approach to proportionality advanced in Chapter Four.

---

[187] Hodgson (n 184) 82.

[188] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC).

[189] ibid [46].

[190] ibid.

Another aspect of transformative adjudication is that the exercise of the court's remedial discretionary powers must also be transformative. Section 172(1)(a) of the Constitution empowers the courts to make just and equitable orders. As I will argue in Chapter Five of the thesis – this has many implications for the kinds of remedies that are possible in equality cases – including ordering affirmative action as a form of 'just and equitable remedy'.

The need for transformative adjudication and the change in the legal culture is an acknowledgement of the risk that rights or laws which are progressive can be interpreted in ways that limit their transformative potential. As Albertyn & Goldblatt note in the context of equality, 'Conservatively interpreted and applied, the right to equality can be used to restrict legal and administrative measures in favour of disadvantaged groups or to entrench privilege rather than remedy disadvantage'.[191] In this section of the chapter, I have argued that the commitment to transformative adjudication requires an approach to interpretation, judicial review and the exercise of remedial power that furthers the goals of transformation. This is how the courts can contribute towards a transformative approach to affirmative action – and thus to the larger goal of eradicating inequality in South Africa, bearing in mind that, as discussed below, affirmative action is a limited tool for this purpose.

5. The Limits of Transformation through Affirmative Action

Before moving onto the next chapter, it is important to state that affirmative action measures allow for a reallocation of already existing resources – they do not change or challenge the underlying causes of inequality in society. Thus, they should be understood as a relatively limited instrument towards effecting structural change. Even so, as I discuss below – a transformative approach to affirmative action can be instrumental in undermining inequality

[191] Albertyn and Goldblatt (n 15) 250.

and pave the path for deeper structural change. In this way, it is a form of what Fraser calls 'non-reformist' reform.

Fraser distinguishes between affirmative and transformative strategies for achieving justice. According to Fraser, affirmative strategies' aim to correct inequitable outcomes of social arrangements without disturbing the underlying social structures that generate them'.[192] In contrast, transformative strategies' aim to correct unjust outcomes precisely by restructuring the underlying generative framework'.[193] The key difference between these is that 'whereas affirmation targets end state outcomes, transformation addresses root causes'.[194] The kinds of affirmative action measures grappled with in this thesis are affirmative strategies to eradicating inequality. They do not interfere with the underlying structural arrangements that have caused and perpetuate inequality in South Africa. Thus, they have to be pursued alongside other interventions. As Moseneke J held in *Barnard*:

> We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity…Our state must direct reasonable public resources to achieve substantive equality "for full and equal enjoyment of all rights and freedoms." It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable.[195]

Affirmative action measures should be a part of larger schemes of 'social justice' reforms that aim to eradicate systemic and structural inequality– land reform and restitution, the provision of comprehensive welfare through social security as well as publicly funded education, healthcare – as a part of the schema of social and economic rights guaranteed in the Bill of Rights.

---

[192] Fraser and Honneth (n 64) 74.

[193] ibid.

[194] ibid.

[195] *Barnard CC* (n 13) [33].

Affirmative action is also limited in that, as will be discussed in more detail in Chapter Six, these measures are likely to benefit the more privileged members of the disadvantaged beneficiary groups. Even so, as I will argue through ought this thesis, a transformative approach to affirmative action can at least be an instrument to undermine inequality. Further, while Fraser's 'transformative strategies' are preferable, they are difficult to effect.[196] Thus, even she sees the value of some affirmative strategies. She thus argues that there are affirmative strategies that are still worthwhile in the struggled for equality, what she calls 'nonreformist reforms'. These are affirmative strategies that can have *transformative effects* if they are radically and consistently pursued.[197] Fraser argues that 'nonrefomist reforms' have a double-face.

> [O]n the one hand, they engage people's identities and satisfy some of their needs as interpreted within existing frameworks of recognition and distribution; on the other hand, they set in motion a trajectory of change in which more radical reforms become practicable over time. When successful, nonreformist reforms change more than the institutional features they explicitly target. In addition, they alter the terrain upon which later struggles will be waged.[198]

By enabling the preference for and the targeting of disadvantaged groups to have access to valuable resources, affirmative action is a form of non-reformist reform. As I will argue in Chapter Six, these measures can serve a wide range of purposes that can be instrumental in uplifting the position of historically disadvantaged groups in society. Targeting different forms of disadvantage and ultimately, undermining the subordination, domination and oppression of historically disadvantaged groups. In essence, while I acknowledge that affirmative action measures will not achieve deep structural change, in this thesis, I argue that they can at least be instrumental in undermining inequality.

---

[196] Fraser and Honneth (n 64) 78.

[197] ibid.

[198] ibid 79–80.

6. Conclusion

This chapter explored the meaning of transformative constitutionalism in South Africa. I illustrated that at the core of this approach to constitutionalism is a departure from some features of classic liberal constitutionalism. Because my thesis is concerned with a transformative approach to affirmative action, I explored the critique levelled against transformative constitutionalism and argued that it was possible to interpret the rights in the Constitution and the Equality Statutes, in a manner that would realise the goals of transformation – redressing past injustice and achieving a more egalitarian society.

I argued that while I share the concern held by the postcolonial critics, I do not agree with the fatalism of their arguments. Further, while it is true that the courts have often failed to further the goals of transformation and that the legal culture has not sufficiently transformed – I think there is still room and time for this to occur. There is a lot of academic scholarship which impress on me a commitment to take part in a constructivist process towards realising the goals of transformation. Court judgements too reveal the courts' concern with redressing past injustice and transforming society. This thesis is in this spirit. I showed how the commitment to transformative constitutionalism requires the courts to take on a specific approach to interpretation – a purposive generous and contextual approach. It also required a purposive approach to the separation of powers principle, an approach that would see the court exercise review and remedial powers with the aim of eradicating inequality.

CHAPTER THREE: A MULTI-DIMENSIONAL CONCEPTION OF SUBSTANTIVE EQUALITY

'Substantive Equality is envisaged when section 9(2) unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms."'[199]

Introduction

Building the normative foundation of this thesis, I explored the meaning of transformative constitutionalism in the previous chapter. In this chapter, I focus on the contested meaning of substantive equality and support what I consider to be the best approach for the development of a transformative approach to affirmative action.

As noted in Chapter One, the Constitutional Court has committed to a substantive approach to equality.[200] However, its meaning and content are under-developed in the courts' jurisprudence.[201] Thus far, the Court's dominant approach has been to centre dignity as the harm which substantive equality seeks to eradicate. Over the years, this approach has accumulated rich academic commentary, with some supporting the dignity-based approach[202] and others arguing for alternative approaches.[203] The focus on dignity is critiqued for several reasons – including that it is abstract, devoid of meaning and thus not sufficient to give substance to the right to equality.[204] It has also been argued that the singular focus on

[199] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 [62].

[200] ibid 60–61; *Van Heerden* (n 1) [31]–[32].

[201] See Albertyn, 'Adjudicating AA' (n 16) 723.

[202] See Ackermann, *Lodestar* (n 30); Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' [2001] SAJHR 34.

[203] Dennis Davis, 'Equality: The Majesty of Legoland Jurisprudence' [1999] SALJ 398 (For the development of the value of equality in the South African context). Chris McConnachie, 'Human Dignity, Unfair Discrimination and Guidance' [2014] OJLS 609 (For the focus on redressing patterns of disadvantage); Albertyn and Fredman (n 16) (For the multi-dimensional approach advanced in this chapter).

[204] Davis, 'Legoland Jurisprudence' (n 203).

dignity, in particular, an individualistic conception of dignity, subsumes the concern with redressing other forms of disadvantage, for example, material disadvantage, that do not easily map on to dignity.[205]

Moving away from an approach that would centre the value of dignity in giving meaning to the right to equality, I argue in favour of Albertyn and Fredman's multi-dimensional conception of substantive equality. This approach encompasses the redistribution of material resources, redressing stigma, prejudice and violence, participation, structural change and freedom.[206] This approach incorporates the values of dignity, equality and freedom, values which are the cornerstone of the South African Constitution.[207] In addition to capturing these three values, the approach highlights the different forms of disadvantage which arise in equality claims and which substantive equality seeks to redress. Thus, they provide a clear and coherent framework for what a transformative approach to affirmative action should seek to redress – the different forms of disadvantage highlighted by this approach.

I have divided the chapter into four sections. The first section explores the meaning(s) of substantive equality and their relationship with the text of the equality rights in the Constitution, the Equality Statutes and affirmative action as defined in Chapter One. I show how neither the equality of results nor narrow equality of opportunity approaches to substantive equality provide an appropriate framework for affirmative action in South Africa. In relation to the text, I explore how the Constitutional Court has grappled with the tension

[205] Fredman, *Discrimination Law* (n 16) ch 1; Albertyn, 'Substantive Equality and Transformation' (n 16); Catherine Albertyn and Sandra Fredman, 'Equality beyond Dignity' (n 16) 26.

[206] See Fredman, *Discrimination Law* (n 16); 'Substantive Equality Revisited' (n 16); 'Reimagining Power Relations' (n 16); Albertyn, 'Substantive Equality and Transformation' (n 16); 'Contested Equality' (n 16); Botha (n 16); Albertyn and Fredman (n 205).

[207] Albertyn and Fredman (n 16) 432.

between the prohibition of unfair discrimination and the express provision for positive measures to achieve equality, including affirmative action.

In the second section, I briefly explore the Constitutional Court's dignity-based unfair discrimination jurisprudence, and the commentary levelled against this approach. In this regard, I argue that while the Constitutional Court has rightly embraced a substantive approach to equality, its excessive focus on the value of dignity, particularly in the limited sense of protecting an individual's inherent worth, and treating them with equal concern and equal respect could be a barrier for a transformative approach to affirmative action. Instead, I consider an alternative, more collective conception of dignity, which encompasses a concern with redressing material disadvantage, with community, and a shared responsibility to redress past injustice. While more promising than the dominant approach, I argue that even this rich account of dignity is also insufficient. It requires an overburdening of the value of dignity in a manner that could exacerbate the lack of clarity and coherence in the courts' approach to substantive equality.

With its focus and roots in the different kinds of disadvantage that arise in equality claims, including but not exclusive to dignity based harm, in the third section of the chapter, I argue in favour of Albertyn and Fredman's multi-dimensional conception of substantive equality. This conception will be used, alongside the insights from Chapter Two of the thesis, to argue for a transformative approach to affirmative action in the remaining chapters of this thesis.

1. The Right to Equality

This section of the chapter explores the meaning(s) of substantive equality and their relationship with affirmative action as defined in Chapter One and the text of the equality right in the Constitution and under the Equality Statutes.

1.1. Substantive Equality: context, asymmetry and a focus on dismantling systemic and structural group disadvantage

Substantive equality is rooted in critical approaches to law and politics, which sought to challenge the liberal ideal of formal equality of treatment, exposing that approach as entrenching and perpetuating inequality.[208] A formal conception of equality is rooted in the idea that 'likes should be treated alike'.[209] Under a formal conception of equality, unequal treatment is arbitrary and irrational.[210] A formal approach to equality requires equal treatment, even when this can have outcomes that entrench and perpetuate inequality.[211] As discussed in Chapter Two, formal equality is rooted in classic liberalism's commitment to an abstract ideal of equal treatment and the need for an abstentionist, neutral state.

In contrast, substantive equality requires the recognition that 'human beings as rooted in their social context of concrete inequality and disadvantage'.[212] Under a substantive approach to equality, the law must 'recognise the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person's ability to compete on an equal footing'.[213] It pays 'attention to actual social and economic inequalities in society'.[214] It thus aligns with transformative constitutionalism's idea of a historically self-

[208] See Albertyn, 'Contested Equality' (n 16) (For an analysis of different roots of substantive equality in the different liberation struggles in South Africa). See also, Albertyn and Goldblatt (n 15); Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' [1994] SAJHR 149 (For an early mapping of the substantive approach to equality in predominantly American feminist and critical literature.).

[209] Fredman, *Discrimination Law* (n 16) 8; Catherine Albertyn and Beth Goldblatt, 'Equality' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, 2008) ch 35.1 (c).

[210] Albertyn and Goldblatt (n 209) ch 35.1 (c).

[211] Fredman, *Discrimination Law* (n 16) 2.

[212] Albertyn and Goldblatt (n 15) 251.

[213] ibid 251.

[214] See Albertyn and Fredman (n 205) 434; Albertyn, 'Substantive Equality and Transformation' (n 16) 259.

conscious Constitution, one that is concerned with context and seeks to redistribute power and resources towards an equal society.[215]

Substantive equality is asymmetric. It is concerned with the real social, economic and political context within which structural and systematic group-based disadvantage resides and seeks to dismantle these. It 'expressly seeks to address and overcome the structural, social and economic, public and private inequalities of race, gender and so on, inherited from our past'.[216] Recognising the impact of systems such as white supremacy, patriarchy, ableism and homophobia on the lives of those who belong to the subordinated groups created by these systems, substantive equality focusses on 'women rather than men, black people rather than whites, people with disabilities rather than able-bodied, or gay people rather than heterosexuals'.[217] Substantive equality's core insight is that it draws attention to inequality as related to asymmetries in power and resource distribution, it is 'A social relation of rank ordering, typically on a group or categorical basis—higher and lower, more and less, top and bottom, better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate'.[218]

In contrast with formal equality's focus on the individual, a substantive approach to equality requires the recognition that disadvantage adheres to groups. This has been acknowledged in the Constitutional Court's equality jurisprudence. It has held that the right to equality was adopted – 'in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our

[215] Klare, 'Legal Culture' (n 2) 153; Albertyn and Goldblatt (n 15) 249.

[216] Albertyn, 'Contested Equality' (n 16) 442.

[217] Fredman, 'Substantive Equality Revisited' (n 16) 728–729.

[218] Catharine MacKinnon, 'Substantive Equality: A Perspective' [2011] Minnesota Law Review 1, 11.

society'.[219] Substantive equality's concern with the group is in acknowledgement that individuals experience disadvantage based on group membership. As Bhatia has argued, this approach acknowledges that the individual's actual or perceived group membership is the terrain upon which disadvantage abides.[220] Thus, to get to the individual, we have to go through the group. The individual within the group is not rendered invisible. As McKinnon notes, 'substantive inequality can be visited on a single person, so long as it is grounded in the concrete historical discriminatory social reality of group membership'.[221]

While the Constitutional Court has rejected formal equality, in favour of a substantive approach to equality,[222] and thus the equality debate in South Africa has largely moved past the formal versus substantive equality argument,[223] in some cases, it has crept into the Constitutional Court's equality jurisprudence.[224] Further, while aspects of the approach to substantive equality described above are evident in the South African courts' equality jurisprudence, its meaning and content remain contested. This is because within substantive equality's concern with context there are different approaches still, as Joseph notes, 'while there is one formal concept of equality…there are a number of different substantive conceptions'.[225]

---

[219] *Brink* (n 36) [52].

[220] Bhatia (n 40) 91.

[221] MacKinnon (n 218) 13.

[222] *National Coalition* (n 199) [60]-[62].

[223] Albertyn, 'Contested Equality' (n 16) 442.

[224] ibid 456 (fn 80) where the author argues that the decision in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* 2002 (11) BCLR 1117, where the Court failed to find that the criminalisation of sex work was a form of gender discrimination, and in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), where the Court failed to extend benefits to a surviving partner because she was unmarried to the deceased - ignoring the vulnerable position of women in relationships and the constrained context in which the 'choice' to or not to marry exist, were emblematic of a formal approach to equality. See also, Botha (n 16) 9 fn 38.

[225] Lawrence Joseph, 'Some Ways of Thinking about Equality of Opportunity' [1980] The Western Political Quarterly 393, 394.

The most prominent approaches focus on *equality of results* or *equality of opportunity*. Equality of results is an approach to equality that accepts unequal treatment to achieve a certain result, the most notorious example being the use of race or gender quotas to increase the representation of disadvantaged groups in institutions from which they had previously been excluded.[226] A key limitation to the focus on results is that it leaves the underlying structures and systems within which inequality is rooted intact. Thus, for example, the EEA's focus on increasing the representation of historically disadvantage groups in the workplace may come at the cost of redressing the underlying barriers which limited their entry into the workplace to begin with.[227] Similar to the equality of results approach, equality of opportunity also recognises that equal treatment can perpetuate inequality. However, equality of opportunity is distinct from equality of results in that it focusses on equalising the starting point rather than the end result.[228] In its most basic form, equality of opportunity 'means that people should be enabled to attain some particular social good on the basis of their natural abilities and/or actual achievement and not on the basis of arbitrary or ascriptive factors such as race, religion, sex, social class origins'.[229] Within the equality of opportunity paradigm, there are different approaches still.[230]

One approach to equality of opportunity requires the removal of barriers such as institutionalised discrimination, prejudice and the preference of specific groups over others – formal equality of opportunity.[231] Cohen summarises this approach with an example of

---

[226] Fredman, 'Substantive Equality Revisited' (n 16) 721.

[227] Fredman, *Discrimination Law* (n 16) 16.

[228] ibid 18.

[229] Joseph (n 225) 394.

[230] Balan Sergiu, 'Formal and Substantive Equality of Opportunity' [2012] Cogito: Multidisciplinary Res J 85, 85–86; Fredman, 'Substantive Equality Revisited' (n 16) 720–724.

[231] This approach is called 'formal equlaity of opportunity' Joseph (n 225) 394.

how in the employment context, this approach to equality of opportunity would require the removal of 'old-boy networks'. He thus notes how 'Reaching out to the larger community in announcing opportunities, in offering scholarships, in posting available jobs' is justified because, 'Qualified members of all ethnicities, of both sexes, are entitled to have the same educational and employment opportunities that white males have traditionally enjoyed'.[232] The limitation of this conception of equality of opportunity is that it fails to account for pre-existing disadvantage—for example, poor access to education, training and skills.

A second approach to equality of opportunity requires that all persons have genuine access to opportunities. This approach requires positive measures that will ensure equal access to quality education and training for disadvantaged groups to allow them to compete on more equal terms.[233] However, this approach assumes that once people have equal access to initial inputs (quality education and training), they can compete equally. As Fredman summarises, 'an equal opportunities approach aims to equalise the starting point…Once all have equal opportunities, they should be judged on individual merit'.[234] The problem with this approach is that it leaves the underlying framework of merit and resource distribution intact. Only those within the disadvantaged group who can meet the norms set by the dominant group can benefit. Moreover, it erroneously assumes that once the initial start has been levelled, there will be no other barriers for disadvantaged groups.

The EEA's definition of affirmative action, discussed in Chapter One, includes the removal of employment barriers and the elimination of unfair discrimination to achieve

---

[232] Cohen and Sterba (n 10) 40.

[233] Fredman, *Discrimination Law* (n 16) 19.

[234] Fredman, 'Substantive Equality Revisited' (n 16) 723. A leading proponent of this argument in the South African context is the trade union Solidarity, see for example, 'Fourth Respondent's Heads of Argument, *SARIPA CC'* [67.2].

equality of opportunity in the workplace.[235] Unfortunately, 'equality of opportunity' is not defined. Moreover, as noted in Chapter one, affirmative action measures under the EEA include the use of numerical targets to achieve equitable representation in the workforce and preferential treatment for the beneficiary classes – modelling an equality of results approach. Thus, the equality of results versus equality of opportunity argument has been raised in cases challenging affirmative action measures under the EEA. More specifically, as I will explore in Chapter Seven, the trade union Solidarity has argued that the EEA's use of numerical targets is a form of 'race and gender norming' and impermissible 'social engineering'.[236] These arguments are underlined by the trade union's assertion that the right to equality requires an equality of opportunity and not an equality of results approach to substantive equality.[237]

Unfortunately, the Constitutional Court has not grappled with these arguments. Instead, it has accepted the EEA's focus on specific outcomes – using numerical targets to achieve demographic representation in the workforce – arguably approving the EEA's equality of results model. In the Labour Appeal Court judgement in *Correctional Services*, Rabkin-Naicker J specifically rejected 'tiebreaker equality of opportunity'. Responding to Solidarity's argument that 'equal opportunity' under the EEA required the equal treatment of all persons,[238] Rabkin-Naicker J made it clear that equality of opportunity could not be interpreted in the narrow sense of requiring equal treatment.[239] Capturing her approach to equality of opportunity, she held:

> I reject the notion that the restitutionary measures the EEA promotes amount to equal opportunity for designated groups to compete with the prime beneficiaries of past systemic

[235] EEA, s 15(2).

[236] Groenewald (n 55) [26]; Respondents Heads of Argument, *Barnard CC* [57.4], [67], [71]; See also, *Solidarity v Department of Correctional Services and Others; In Re: Solidarity and Others v Department of Correctional Services and Others, Solidarity and Others v Department of Correctional Services and Others* [2014] 1 BLLR 76 (LC) [23].

[237] Respondents Heads of Argument, *Barnard CC* (n 236) [57.4], [67], [71]; *Correctional Services LC* (n 236) [23].

[238] *Correctional Services LC* (n 236) [23].

[239] ibid.

> and institutionalised discrimination. It is noteworthy that no claim was made in the submissions before me that a level playing field had been reached for the enjoyment of these equal opportunities. Of course, no such submission would withstand scrutiny.[240]

In the quote above, Rabkin-Naicker J seems to reject the first conception of equality of opportunity, but she is open to the second. Once the playing field has been levelled, affirmative action would not be permissible. My argument is that, neither the equality of results nor the equality of opportunity's approach can provide a foundation for the development of a transformative approach to affirmative action in South Africa. While the EEA's focus on equitable representation fits the equality of results approach, this is only one aspect of affirmative action under the EEA – it requires reasonable accommodation, places an obligation on employers to provide skills development and training. Moreover, the narrow focus on outcomes obscures, as will be seen later in the chapter, the different forms of disadvantage that can be redressed by increasing the representation of disadvantaged groups in institutions from which they have previously been excluded. Further, the equality of opportunity approach too would limit the extent to which we would be able to disrupt 'merit' as a neutral criterion and dismantle disadvantage not related to the distribution of 'initial inputs'.

The bulk of the Court's equality jurisprudence has been in the unfair discrimination context; it has thus not engaged with the equality of results versus equality of opportunity approaches. Instead, its approach to substantive equality has been to focus on the value of dignity. I explore and critique the Court's dignity-centric approach to substantive equality in section three of this chapter, before this – it's important to provide a descriptive and doctrinal analysis of the equality right in s 9 of the Constitution and the comparable provisions in the Equality Act and the EEA. I turn to this below.

---

[240] ibid [30].

1.2. The Text of the Section 9 Equality Right

There are three key sections to the s 9 equality right in the Constitution. The first, s 9(1), provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The second section, s 9(2), provides that the right to equality includes the full and equal enjoyment of all rights and freedoms. In addition, s 9(2) provides that, in promoting 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'. Section 9(3) of the Constitution prohibits direct and indirect unfair discrimination on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin. Another relevant section is s 9(5), this provision provides that unfair discrimination on a listed ground in s 9(3) is presumed to be unfair.

In *Van Heerden*, the Constitutional Court held that the provisions in s 9 of the Constitution, together, herald the 'start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity'.[241] Accordingly, when interpreting the meaning, content and relationship between the guarantee of equal protection and benefit of the law in ss 9(1), 9(2) and the prohibition of unfair discrimination in s 9(3), the Constitutional Court committed itself to a substantive approach to equality.[242] The Court has specifically held that the equality right 'read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality'.[243] However, as noted above, substantive equality can take different forms. Currently, there is no clarity on the meaning of substantive equality and its relationship with the text of s 9 of the Constitution and the

[241] *Van Heerden* (n 1) [25].

[242] See *National Coalition* (n 199) [58]–[64].

[243] *Van Heerden* (n 1) [31].

equality provisions in the Equality Statutes – this being the root of some of the problems that arise in affirmative action cases.

Looking at the text, s 9 (1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. This provision has been interpreted in two ways. First, 'equality before the law' is understood as entitling everyone to equal treatment by the law and courts.[244] 'It makes clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered'.[245] The second aspect is that it prohibits the State from taking action that is arbitrary and irrational.[246] Thus, while acknowledging that it is impossible for the State not to differentiate between persons, to respect the equality right, this 'mere differentiation' must be rational and not arbitrary.[247] This approach merely requires the State to establish a defensible purpose for any differentiation and that it bears some relation to the purpose.[248] This is a relatively deferent standard and largely captures the formal requirement of equal treatment and neutrality in law. It thus seems to contradict the commitment to substantive equality.

However, a different, more substantive reading of s 9(1) has been suggested. In an early analysis of the comparable provision in the Interim Constitution, Albertyn and Kentridge argued that the provision:

> [E]ncompasses laws which afford benefits as well as laws which prohibit or regulate. *It also opposes subordination and disadvantage in and through the law*. The promise of equal protection means, in addition, that the state will foster equality *by protecting vulnerable persons and groups from domination by more powerful individuals and groups, whether within the public or the private domain.* In the light of our history and aspirations, the promise of "equality before the law

[244] *Prinsloo* (n 33) [22].

[245] ibid.

[246] ibid; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1; *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC).

[247] *Prinsloo* (n 33) [24]-[25].

[248] Albertyn and Goldblatt (n 209) ch 35.3, 21–22.

> and equal protection of the law" entails a commitment to redressing subordination and inequality, to making reparation and restitution.[249]

In the quote above, the authors envisioned a more substantive role for s 9(1) towards the goal of achieving substantive equality. Their argument embodies the idea that in order to confer equality before the law and equal benefit and protection of the law, substantive equality requires us to consider existing inequalities within and between groups – failing which we cannot say that we have conferred equal benefit and protection of the law or that all are equal before the law.[250] In Chapter Five, I will return to this argument in the context of whether there is a duty to take measures to fulfil the right to equality, in some cases, affirmative action.

The second provision, s 9(2), is the keystone for affirmative action under the Constitution. The first part of s 9(2), provides that the right to equality includes 'full and equal enjoyment of all rights and freedoms'. But for affirming that this embodies a commitment to substantive equality,[251] this provision has not been given substantive content. The focus has been on the second section which provides that in promoting 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'. As noted in the previous chapters, s 9(2) poses a challenge to the idea that equality requires equal treatment under all circumstances - it provides the textual basis for unequal treatment whose purpose is to advance and protect disadvantaged groups.[252] In *Van Heerden*, the Constitutional Court

[249] Albertyn and Kentridge (n 208) 160, (my emphasis).

[250] Albertyn and Goldblatt have argued that the inclusion of 'equal benefit' in s 9(1) of the South African Constitution supports the argument 'for reading the subsection substantively and more expansively since it entails recognising that equality is not just a negative right but may well require positive measures to ensure that the goal of equality', Albertyn and Goldblatt (n 15) 266–267.

[251] *National Coalition* (n 199) [62].

[252] Fredman, *Discrimination Law* (n 16) 232–236.

held that, unlike in some jurisdictions,[253] measures taken under s 9(2) are not a derogation from the right to equality: they are a substantive part thereof: '[t]their primary object is to promote the achievement of equality'.[254] However, whether this embodies an equality of results, formal equality of opportunity or other substantive conception of equality is unclear.

While all the provisions in s 9 embody a substantive approach to equality, the Constitutional Court has set a different threshold for measures to pass scrutiny under s 9(2) than the standard applicable under ss 9(1) and 9(3). Affirmative action measures under s 9(2) escape the s 9(3) unfair discrimination scrutiny if they comply with the internal test in *Van Heerden* - they must target persons or categories of persons disadvantaged by unfair discrimination; they must be designed to protect or advance such persons or categories of persons; and, they must promote the achievement of equality – the *Van Heerden* test.[255] Unfortunately, the Constitutional Court has not had many chances to develop its approach in *Van Heerden* and the lower courts have not consistently applied the *Van Heerden* test.[256] In the context of the EEA, where the Constitutional Court had an opportunity to bring clarity and coherence to the *Van Heerden* test and to the standard of review under the EEA, it failed to do so. As I will explore in Chapter Four, in *Barnard*, four concurring opinions suggested at least three different approaches to the standard for the review of decisions made pursuant to affirmative action under the EEA, 'bare minimum' rationality,[257] fairness,[258] and a

[253] *Van Heerden* (n 1) [29], Moseneke J distanced the South African approach from the US Supreme Court's approach to affirmative action.

[254] ibid [32].

[255] ibid [37].

[256] For example, none of the three lower court decisions in *Barnard* actually applied the *Van Heerden* test - *Barnard LC* (n 44); *Barnard LAC* (n 44); *Barnard SCA* (n 44).

[257] *Barnard CC* (n 13) [39].

[258] ibid [76].

proportionality[259] inquiry. This has left a confusing approach to the judicial review of affirmative action and s 9(2) measures more broadly – confusion rooted in the Court's lack of clarity of what the commitment to substantive equality and transformative constitutionalism demand.

Section 9(3) prohibits direct and indirect unfair discrimination. The relationship between s 9(1) differentiation and s 9(3) unfair discrimination is that differentiation that meets the threshold in s 9(1), in the sense that it is rational and not arbitrary, can still be a breach of the equality right if it amounts to unfair discrimination under s 9(3).[260] The test for unfair discrimination was established in the *Harksen* case – the *Harksen* test.[261] As will be seen in the next section of this chapter and in more detail in Chapter Four, the test sets a high threshold that hinges on whether a claimant's dignity has been infringed. Thus, the s 9(3) unfair discrimination inquiry is the root of the Court's dignity-based approach to substantive equality.

The practical relationship between the provisions described above is that measures which meet the requirements of s 9(2) of the Constitution do not violate the guarantee of equal protection and benefit of the law in s 9(1). Further, even when based on a listed ground in s 9(3), they do not attract the presumption of unfairness in s 9(5) and are not a form of unfair discrimination. Thus, s 9(2) acts as a defence in unfair discrimination claims under ss 9(3) and (5).[262] However, if a measure fails to meet the threshold in s 9(2), it can still be saved if it is shown to be fair under s 9(3)-(5).[263]

---

[259] *Barnard CC* (n 13) [165].

[260] *Prinsloo* (n 33) [26].

[261] *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 [42]-[54].

[262] According to Jafta J, s 9(2) 'insulates from attack measures adopted to protect or advance people who were disadvantaged by unfair discrimination' *SARIPA CC* (n 13) [38].

[263] *Van Heerden* (n 1) [36].

1.3. The Text of the Equality Right in the Equality Statutes

In addition to s 9 of the Constitution, as noted in Chapter One, I am also looking at affirmative action in the context of the Equality Statutes. Similar to s 9(3) of the Constitution, the Equality Act prohibits unfair discrimination by the state and between persons.[264] Section 14 of the Equality Act provides that affirmative action measures are not a form of unfair discrimination.[265] Accordingly, an unfair discrimination claim brought under the Equality Act could be defended on the basis that it is an affirmative action measure.

The EEA was enacted to give effect to the equality right in the employment context. Section 6(1) of the EEA prohibits direct and indirect unfair discrimination on several grounds including and going beyond the grounds listed in s 9(3) of the Constitution.[266] However, s 6(2)(a) of the EEA expressly provides that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the EEA. These purposes are clearly set out in s 2 of the EEA. They include implementing affirmative action measures 'to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce'.[267] While these statutes will be explored in more detail in Chapters Four, Five and Six, it is clear that the tensions between the prohibition of unfair discrimination and affirmative action discussed in the context of s 9 of the Constitution are also present under these statutes.

The analysis above shows that in expressly providing for measures to advance and protect disadvantage groups under the Equality Act and the EEA - expressly providing that affirmative action measures are not a form of unfair discrimination - the text of the equality

---

[264] Equality Act s 6.

[265] See, *Solidariteit Helpende Hand NPC & another v Minister of Basic Education & others* [2017] ZAGPPHC 1220. See also, Albertyn, 'Getting It Right' (n 60).

[266] The additional grounds include, family responsibility, HIV status and political opinion.

[267] EEA s 2(b).

provisions described above embody a substantive approach to equality. However, what this means in practice has been much harder for the Constitutional Court to articulate and implement in a clear, consistent and coherent manner. In most, but not all of its unfair discrimination jurisprudence, it has elevated dignity as the disadvantage which substantive equality seeks to protect against. In the section that follows, I explore this approach and the problems that arise therewith in the affirmative action context.

2. The Dignity-Based Approach To Substantive Equality

As both a justiciable right and value, dignity permeates South African constitutional jurisprudence. As a value, dignity sits alongside the value of equality and freedom as foundational to the new democratic South Africa.[268] The right to dignity is protected in s 10 of the Constitution, which provides that every person 'has inherent dignity and the right to have their dignity respected and protected'. The value of human dignity has played an important role in the Constitutional Court's jurisprudence.[269] My focus in this section of the chapter is on the relationship between dignity and the equality right, specifically on how the Constitutional Court has placed dignity at the core of its approach to substantive equality. In this context, the value of dignity has been so central that some have termed it the 'lodestar'[270] or 'organising principle' of the equality right.[271] Through a doctrinal analysis of

[268] South African Constitution, s 1 (Dignity as a founding value); s 36(1) (The limitation of rights must be reasonable and justificable in an open and democratic society, based on the values of dignity, equality and freedom); s 7(1) (Dignity is one of three democratic values, the other two being equality and freedom). See also, *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 3 SA 936 [35] (On the value and importance of dignity).

[269] For an analysis of the role the dignity has played in the Constitutional Court's jurisprudence, see D Cornell and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (Fordham University Press 2013).

[270] Ackermann, *Lodestar* (n 30). For a critique of this approach see, McConnachie 'Human Dignity' (n 203).

[271] Cowen (n 202) 34.

the Constitutional Court's definition of and use of the value of dignity in its equality jurisprudence, I argue that the 'dignity-based' approach to substantive equality is insufficient for the development of a transformative approach to affirmative action.

2.1. The meaning of dignity: A focus on equal concern, respect and inherent human worth

The Constitutional Court has largely defined dignity as inherent human worth, requiring equal concern and respect of all persons.[272] The commitment to this conception of dignity can be seen in the Constitutional Court's description of human dignity as 'intrinsic human worth;'[273] 'the value and worth of all individuals;'[274] requiring that 'law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are'.[275] This approach to dignity makes sense against a background of racial and other forms of domination and oppression in South Africa.[276] As Ackermann notes, 'what lay at the heart of apartheid pathology…was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination'.[277] Some groups, specifically Black people, were 'treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity'.[278]

---

[272] See Cornell and others (n 269); Ackermann, *Lodestar* (n 30).

[273] *Dawood* (n 268) [35].

[274] *National Coalition* (n 199) [28].

[275] ibid [135].

[276] *Dawood* (n 268) [35].

[277] Ackermann, *Lodestar* (n 30) 9.

[278] *Prinsloo* (n 33) [31]. See also, *Barnard CC* (n 13) [129].

The conception of dignity described above has played an important role in the Constitutional Court's two-stage unfair discrimination *Harksen* test.[279] In the first stage, dignity is used to distinguish between discrimination and mere differentiation. If differentiation is not on a ground specified in s 9(3) of the Constitution, 'whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.[280] In the second stage, the court must determine whether the discrimination is unfair.[281] If the discrimination is on a specified ground, the court will presume unfairness under s 9(5) of the Constitution. If not on a specified ground, the complainant will have to provide proof of the unfairness of the discrimination, 'The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation'.[282] The impact of discrimination is in turn determined considering a range of factors, including:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If a measure is aimed 'at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question…';

---

[279] *Harksen* (n 261) [51].

[280] ibid [46]. In *Hoffmann v South African Airways* 2001 (1) SA 1 (HIV status); *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) (citizenship).

[281] *Harksen* (n 261)[49].

[282] ibid.

(c) in relation to (a) and (b) above, and any other relevant factors, the Court also considers 'the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature'.[283]

As is apparent in the factors listed above, the factors taken into account to determine the impact of discrimination include impairments that are 'comparably serious' to dignity and whether the complainants have experienced patterns of disadvantage. This leaves room for other harms in the unfair discrimination analysis. Unfortunately, the Constitutional Court has largely focussed on the impairment of dignity in the sense of a concern with the impact on individual human worth, and whether a measure shows equal concern and respect for the individual.[284] This approach has led to many progressive judgments, especially in relation to the inclusion of groups that have been marginalised from society.[285]

However, it has been argued that the Court's dignity-based approach, rather than challenging the underlying institutional, and structural inequality that is the root of the exclusion and marginalisation of some groups, allows the underlying structures from which the exclusion is rooted to persist while creating a veneer of progress through the inclusion of these groups into the mainstream.[286] Further, commentators have pointed to the fact that the focus on dignity has in some cases led to outcomes which entrench inequality – for example, by affirming gendered stereotypes and norms.[287]

---

[283] *Harksen* (n 261) [52].

[284] Ackerman J has argued that this a distraction from the focus on dignity, Laurie Ackermann, 'Equality and Non-Discrimination: Some Analytical Thoughts' [2006] SAJHR 597, 599.

[285] For example, *National Coalition* (n 199) (Decriminalising sodomy); *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) (Affirming the right for same-sex couples to enter into civil marriage).

[286] Botha (n 16) 17–21; Albertyn, 'Contested Equality' (n 16) 457–459.

[287] Botha (n 16) 17–21.

In *Hugo*, the Constitutional Court upheld the constitutionality of a provision that gave Presidential pardons to female prisoners who were sole caregivers to young children, excluding male prisoners who were sole caregivers to young children. The pardon was upheld on the basis that it did not fundamentally impair the dignity of single fathers.[288] As noted in the separate judgements, this finding entrenched the gendered stereotype of women as primary caregivers for children and of men not being nurturing or suitable for caregiving roles.[289]

In the *Volks* case, the Constitutional Court refused to extend benefits under the Maintenance of Surviving Spouses Act, 27 of 1990, to the surviving partner of a permanent life partnership because they had chosen not to enter into a marriage.[290] According to the Court, this affirmed the 'important social institution' of marriage, an institution which has a 'central and special place, and forms one of the important bases for family life in our society'.[291] This, at the expense of recognising the vulnerability and economic dependence of many women, a fact Skweyiya J expressly acknowledged.[292] Instead, the Constitutional Court valorised the exercise of choice by the deceased as well as the surviving partner not to marry,[293] ignoring substantive equality's concern with real social and economic context, differences in power relations and material disadvantage which are important constraints to the exercise of choice.

---

[288] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 [67].

[289] ibid [82]-[83] (Krigler J), [92]-[94] (Mokgoro J), [112] (O'Regan J). See also, Fredman, 'Substantive Equality Revisited' (n 16) 726.

[290] *Volks* (n 224)[55].

[291] ibid [52].

[292] ibid [64]-[66].

[293] ibid [92].

The cases discussed above illustrate two problems with the dignity-based approach. First, dignity is vague and malleable.[294] In some cases, it can lead to progressive findings which advance disadvantaged groups and in others, it can lead to opposite results to the commitment to substantive equality.[295] Capturing this and based on an analysis of the Constitutional Court's early dignity-based jurisprudence, Davis opined that the Constitutional Court had given 'dignity both a content and a scope that make for a piece of a jurisprudential Legoland-to be used in whatever the demands of the judicial designer require form and shape'.[296] This content and shape is largely inclusionary rather than seek to disrupt and challenge the roots of the systems of domination and oppression from which the disadvantage is rooted.[297] Second, the Constitutional Court's dominant approach to dignity can subsume the concern with other forms of harm which a substantive approach to equality, within the context of a commitment to transformation, should seek to eradicate.[298] In *Hugo,* it entrenched gendered stereotypes about appropriate social roles in society. In *Volks*, it failed to redress the maldistribution of resources in relationships that are often underlined by unequal power relations.

Recognising the limitations of a dignity-based approach, in *Kapp*, the Canadian Supreme Court moved away from the dignity based analysis of the prohibition of discrimination on the basis that dignity was 'abstract', 'subjective', 'confusing and difficult to

[294] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] EJIL 655 (McCrudden argues that this is what makes dignity institutionally attractive for courts in the adjudication process, it allows them to navigate institutional constraints).

[295] Fredman, 'Substantive Equality Revisited' (n 16) 725.

[296] Davis, 'Legoland Jurisprudence' (n 203) 414.

[297] Albertyn, 'Substantive Equality and Transformation' (n 16); Botha (n 16).

[298] Albertyn and Fredman (n 16) 453.

apply'.[299] This is on the back of judgements such as *Gosselin*, where the Canadian Supreme Court held that welfare criteria which allocated less benefits to persons below the age of 30, unless they took part in education and training programmes, did not amount to discrimination based on age.[300] The basis of this finding was that, though the scheme would have a 'negative impact' on already vulnerable welfare recipients' economic circumstances, it did not undermine their human dignity.[301]

Fortunately, the Constitutional Court has, in some cases, extended their dominant approach to dignity, capturing different forms of disadvantage.[302] Drawing from the Constitutional Court's jurisprudence, Woolman has identified five different dimensions of dignity. The first two dimensions are that people should not be treated as a means to an end, they must not be treated as objects to the will of others and command 'equal concern' and 'equal treatment'.[303] For Woolman, this entails the right to equal treatment which requires that the law does not irrationally differentiate between people and does not show 'naked preference' and are not subject to unfair discrimination.[304] People must be accorded 'equal respect regardless of their membership of particular groups.'[305] These first two dimensions embody the bare minimum formal equality of treatment. The third dimension of dignity secures 'self-actualisation'. This dimension of dignity protects the right of individuals to

---

[299] *Kapp* (n 39) [22].

[300] *Gosselin v Québec* [2002] 4 SCR 429. See also, Fredman, 'Substantive Equality Revisited' (n 16) 726 (For an analysis of the Canadian Supreme Court's initial dignity-based approach); *Discrimination Law* (n 16) 24.

[301] *Gosselin* (n 300) [68].

[302] See Cowen (n 202); Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1 (In the context of socio-economic rights).

[303] S Woolman, 'Dignity' in S Woolman, T Roux and M Chaskalson (eds), *Constitutional Law of South Africa* (2nd edn, 2008) ch 36 p10.

[304] ibid.

[305] *Hugo* (n 288) [41].

'develop their humanity, their "humanness" to the full extent of its potential…to develop his or her unique talents optimally'.[306] The fourth dimension identified by Woolman is dignity as self-governance. This refers to the capacity of persons 'to reason their way to the ends that give their lives meaning'.[307] Of particular interest for this thesis is Woolman's fifth dimension of dignity - collective dignity.

According to Woolman, collective dignity is not solely concerned with an individual's ends but with society as a whole.[308] Woolman derives the collective notion of dignity from the Constitutional Court's socio-economic rights cases. In *PE Municipality*, a case concerning the eviction of families from land owned by the Municipality,[309] referring to the impact of forced removals, the Constitutional Court noted that:

> It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.[310]

This concern for community and responsibility for the well-being of others, especially more vulnerable groups, can also be seen in *Khosa*. The case concerned access to social welfare for non-citizen permanent residents. The Constitutional Court held that the exclusion of permanent residents created the impression that they were inferior and less worthy of social assistance. In addition to this, however, the Constitutional Court held that:

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.[311]

---

[306] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

[307] Woolman (n 303) ch 36 p13.

[308] Ibid 36 15.

[309] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [1].

[310] ibid [18].

[311] *Khosa* (n 280) [75].

The collective conception of dignity can be traced to *Makwanyane*. In that case, Langa J linked dignity to the African value of *Ubuntu*, noting that this value heralds:

> A culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by emphasising sharing and co-responsibility and the mutual enjoyment of rights by all.[312]

The first four dimensions centre the individual and embody the Constitutional Court's dominant approach to dignity *as* equality. The collective conception of dignity, especially when seen in relation to Ubuntu, encompasses a concern with community and the responsibility of all in the endeavour to ensure the full realisation of rights. The collective conception of dignity arguably leaves room for concern with other forms of disadvantage, including that which arise from the maldistribution of material resources. Nevertheless, as will be clear in the next section, even the collective conception of dignity is not sufficient to ensure the development of a transformative approach to affirmative action.

2.2. The limitations of a dignity-based approach to affirmative action

Affirmative action measures emphasise the relative importance of a particular characteristic (race, gender, disability) of persons over other attributes.[313] If dignity is defined as inherent human worth and equal concern and respect, as is the dominant approach in the Constitutional Court's unfair discrimination jurisprudence thus far, it will be difficult to resolve the tension between affirmative action's use of status to allocate scarce resources and the non-beneficiary's right to dignity. While this case will be explored in more detail in the next chapter, in *Barnard*, Van der Westhuizen J tried to resolve the tension between the individual right to dignity and affirmative action by leaning on the collective conception of

[312] *Makwanyane* (n 35) [224].

[313] *Barnard CC* (n 13) [168].

dignity. In the analysis of the impact that a decision made pursuant to an affirmative action measure had on the claimant in the case, he held that in the affirmative action context:

> An atomistic approach to individuals, self-worth and identity is not appropriate…we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are "social beings whose humanity is expressed through . . . relationships with others", find resonance in the South African idea of *Ubuntu*, which foregrounds "interdependence of the members of a community."[314]

Van der Westhuizen J's statement captures the idea that seen against the backdrop of concern with community, collective responsibility and concern for others, redistributive measures under s 9(2), including affirmative action, can be seen as tools to fulfil the right to dignity of the individual beneficiaries of affirmative action. These measures also affirm the dignity of society as a whole. The imperative for such measures is that a commitment to collective dignity cannot justify the subsistence of prevailing inequality. In a society where some groups have a disproportionate share of resources, the collective conception of dignity requires steps to be taken to redress this. The collective approach to dignity foregrounds the role that affirmative action measures play in the restoration of dignity for disadvantaged groups. Unfortunately, invoking collective dignity still hasn't resolved the tension between the individual right to dignity of the non-beneficiaries of affirmative action and the right to dignity and equality of the intended beneficiaries.

The problem here is, how do we go about determining whether and the extent to which an affirmative action measure does not violate the individual right to dignity while also being concerned with the risk of entrenching and perpetuating prevailing violations of the right to dignity and equality of the beneficiaries of affirmative action? One approach would be to say that the individual conception of dignity should yield to the collective conception. In this regard, Van der Westhuizen J reasoned that the right to dignity is not absolute, 'Aspects of a person's right to dignity may sometimes have to yield to the

[314] *Barnard CC* (n 13) [174].

importance of promoting the full equality our Constitution envisages'.[315] In this statement, he still has not resolved the tension between individual and collective dignity. Instead, he seems to be arguing that the promotion of equality through affirmative action trumps the protection of an individual's right to dignity. However, it is not clear what the basis for this approach would be. Confusingly, referring to an abstract calculus between the claimant in the case's right to dignity and the dignity of those promoted through affirmative action, Van der Westhuizen J notes:

> [T]he dignity of millions of black people who were victims of apartheid's discrimination and who are still suffering its consequences can also not be weighed against the dignity of one white woman. The calculation required to restore the dignity of many after decades of unfair discrimination and the possible cost to the interests of individuals like Ms Barnard, was done when the Constitution was agreed on.[316]

The quote above starts with the idea that individual and collective dignity cannot be weighed against each other; they are both incommensurable. Van der Westhuizen J then seems to suggest that the calculation has already been made, creating a hierarchy between individual and collective dignity - the latter taking precedence. But he doesn't provide a basis for this approach and thus doesn't really resolve this tension.

The focus on dignity 'leaves little conceptual space to develop an understanding of positive measures that seek to advance members of historically disadvantaged groups'.[317] While the collective conception of dignity discussed above could arguably take us further than the individualised conception of dignity, it is not clear how we could go about resolving the tension between individual and collective dignity. Further, as Albertyn and Fredman note, 'Subsuming too much under the heading of dignity risks obscuring the different values and mediating principles that underlie equality and are visible, although not always explicit,

---

[315] *Barnard CC* (n 13) [169].

[316] ibid 178.

[317] Albertyn, 'Adjudicating AA' (n 16) 724..

in the court's jurisprudence'.[318] Moreover, dignity is not the only cornerstone value of the Constitution. All three values, equality, dignity and freedom, are an important aspect of the commitment to transformation.[319]

The arguments above do not take away from the importance of dignity-based concerns in relation to affirmative action. Dignity is an important value in giving meaning and content to the right to equality. It requires us to grapple with the complex histories of groups in relation to past apartheid and colonial racial discrimination, patriarchy, ableism, upon which the stereotyping, prejudice and violence perpetrated against some groups is rooted. It is important to 'address the harms of stigma, humiliation, stereotyping and prejudice',[320] related to the history of domination and oppression in South Africa. However, a too-narrow focus on dignity in the affirmative action context, even in its collective form, is not sufficient to support a transformative approach to affirmative action.

3. The Multi-Dimensional Conception of Substantive Equality

As an alternative to the Constitutional Court's dignity based understanding of substantive equality outlined above, a range of other approaches have been suggested for giving meaning to the right to equality in South Africa. In the unfair discrimination context, McConachie has argued in favour of an approach that focusses on eliminating patterns of group disadvantage.[321] Cowen has argued that the limitations of the dignity based approach are not inevitable. For her, the value of dignity can be applied in a manner that captures material disadvantage, one that is not individualistic and is concerned with the structural and systemic

[318] Albertyn and Fredman (n 16) 432.

[319] ibid.

[320] ibid 435.

[321] McConnachie, 'Human Dignity' (n 203).

nature of inequality.[322] I do not discuss these approaches in-depth because they focus on a single value, which is incorporated in the preferred, multi-dimensional conception of substantive equality discussed below.

The multi-dimensional conception of substantive equality is premised on the idea that equality resists capture by a single principle.[323] Accordingly, this approach provides a set of criteria to determine whether a law, policy, practice or institution is likely to fulfil the right to equality and to point to ways in which they should be reformed better to do so.[324] The dimensions provide a springboard from which we can develop a transformative approach to affirmative action, one that escapes the limitations of a focus on dignity and which is not limited by either a focus on equality of results or equality of opportunity as discussed earlier in the chapter.

3.1. The Dimensions

The approach to substantive equality advanced in this chapter is rooted in Albertyn and Fredman's work on equality in South Africa.[325] In an endeavour to further equality jurisprudence beyond the narrow focus on dignity, and in search of a more transformative approach to the equality right, writing together and separately, the authors have woven a rich approach to substantive equality. There are places of difference and disagreement between their approaches. For example, they take different approaches to the role that the value of freedom should play.[326] In more recent work, Albertyn uses the term 'values' and 'principles'

[322] See, Cowen (n 202) 53 where the author notes, 'dignity…is also capable of being used to justify state intervention aimed at material advancement and economic progress, and to encourage an analysis that takes account of forces that prevent their achievement'. For a comparative perspective see Denise Reaume, 'Discrimination and Dignity' [2003] Louisiana Law Review 645.

[323] Fredman, 'Substantive Equality Revisited' (n 16) 713.

[324] ibid 714.

[325] In more recent work, Albertyn calls this approach 'equality of condition' and 'transformative substantive equality', Albertyn, 'Contested Equality' (n 16) 462.

[326] Albertyn, 'Contested Equality' (n 16) 462; Fredman, 'Substantive Equality Revisited' (n 16) 729–730.

rather than dimensions. Albertyn further distinguishes her approach from Fredman by noting that disadvantage is not a separate dimension but a concern within each of the different values/principles of substantive equality.[327] Even so, there is a common thread in their work – one from which I pull and spin in this section of the chapter – noting areas of tension and disagreement. Integrating their approaches, the section argues that substantive equality has multiple dimensions – redressing economic/material disadvantage (redistribution); countering stigma, stereotyping, humiliation and violence (recognition); enhancing participation and voice (participation); accommodating difference and achieving structural change (structural change); enhancing and creating conditions for the exercise of a positive conception of freedom (freedom).

These dimensions are derived from an analysis of the different harms that underlie equality claims.[328] Rather than a narrow focus on the value of dignity, they also capture the values of equality and freedom. This is an acknowledgement that all three values (equality, dignity and freedom) are of fundamental importance,[329] and permeate through the body of the whole Constitution. They are listed in the founding provision of the Constitution;[330] they are the cornerstone of South Africa's democracy;[331] the limitation of the rights in the Bill of Rights must be 'reasonable and justifiable in an open and democratic society' based on these values.[332] Further, s 39(1) of the Constitution provides that when interpreting the rights in

[327] Albertyn, 'Contested Equality' (n 16) 466.

[328] Albertyn and Fredman (n 205) 430; Fredman, 'Substantive Equality Revisited' (n 16) 727.

[329] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) [21].

[330] South African Constitution, s 1(a).

[331] Section 7(1) of the South African Constitution provides that the rights in the Bill of Rights are the cornerstone of democracy and that the Bill of Rights are an affirmation of the values of equality, dignity and freedom.

[332] South African Constitution, s 36 (1).

the Bill of Rights, these values must be promoted. In the section that follows, I provide an analysis of these dimensions and illustrate why this conception of substantive equality offers a better approach for the development of a transformative approach to affirmative action.

3.1.1. Redistribution: Redressing the maldistribution of resources

The first dimension is aimed at redressing group-based disadvantage through the redistribution of resources.[333] The focus of this dimension is the elimination of economic inequality. It is concerned with 'whether people's resources are more equally distributed'[334] – the maldistribution of resources. At a minimum, this dimension recognises that the remedy for maldistribution of resources includes satisfying the basic needs of people and providing a social safety net against deprivation. It also includes addressing under-representation in jobs, underpayment for work of equal value, or limitations on access to credit, property, or similar resources for disadvantaged groups.[335]

The affirmative action measures I grapple with in this thesis are firmly concerned with redistributing jobs, positions and other material resources to historically disadvantaged groups. These forms of distribution can be instrumental in alleviating economic disadvantage. The Constitutional Court's first affirmative action case, *Van Heerden,* concerned a distribution of a material benefit – pensions. While the broadness of the beneficiary class in that case was rightly contested,[336] the majority of the class were persons historically excluded from being able to accumulate this resource. Under the EEA, the idea

[333] Fredman, 'Substantive Equality Revisited' (n 16) 729; Albertyn, 'Contested Equality' (n 16) 567.

[334] Albertyn, 'Contested Equality' (n 16) 467.

[335] Fredman, 'Substantive Equality Revisited' (n 16) 729.

[336] Some of the beneficiaries in this case were white persons. For Moseneke J, it was sufficient that an overwhelming majority of the class belonged to the disadvantaged racial groups. However, Mokgoro J required a tighter fit between the purpose of the measure and the beneficiary class. Thus, for her, while the impugned measure did not amount to unfair discrimination, it did not fall within the scope of s 9(2) of the Constitution – see,*Van Heerden* (n 1) [40] (Moseneke J) and [89]-[94] (Mokgoro J).

that affirmative action includes ensuring representation, at all occupational levels of the workplace of disadvantaged persons, is a tool for redistributing resources to this group. Thus, the struggles in the *Barnard* and *Correctional Services* cases, both relating to affirmative action in the employment context, are struggles for the redistribution of work – the scarcity of which, because of underlying inequality in South Africa, falls heaviest on historically disadvantaged groups.

As discussed earlier in the chapter, the concern with redressing economic disadvantage is evident in the Constitutional Court's equality jurisprudence, even though it has sometimes been eclipsed or subsumed into dignity. The concern with redressing economic disadvantage can also be seen in the Equality Act. Section 34 of the Equality Act, under the 'Directive Principles' section of this statute, provides that, in light of 'overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of…socio-economic status' special consideration must be given to the inclusion of socio-economic status as a prohibited ground of discrimination. Section 1 of the Equality Act defines socio-economic status as including 'a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications'.

In *Social Justice Coalition*, the Western Cape High Court drew from the s 34 Directive Principle to recognise poverty as a ground on which discrimination is prohibited under the Equality Act.[337] The High Court was persuaded that poverty, 'was a systemic problem, the result of our history and economic system that result in people living in poverty and rendering them vulnerable and marginalised'.[338] Thus, it had the impact of perpetuating systemic disadvantage and undermining human dignity.[339] Overall, this dimension of

[337] *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC).

[338] ibid [63].

[339] ibid [61].

substantive equality highlights material deprivation and the maldistribution of resources as a form of disadvantage that substantive equality seeks to redress.

3.1.2. Recognition: redressing stigma, prejudice and stereotyping

The second dimension is focussed on countering prejudice, stigma, stereotyping, humiliation and violence based on status such as race, gender, disability, sexual orientation – recognition harms. This dimension is rooted in the idea that certain groups experience social inequality which 'result in patterns of inclusion and exclusion in which the identity, culture, values and behaviours of a particular group are stigmatised, marginalised and denigrated, while another group is affirmed and privileged'.[340]

This second dimension requires a recognition that all persons, based on their humanity, 'should not be humiliated or degraded through racism, sexism, violence, or other status-based prejudice'.[341] It thus captures the Constitutional Court's prevailing dignity-based understanding of equality.[342] However, it escapes its limitations by focussing on relationships, social hierarchies and power rather than an individualistic conception of dignity. 'Rather than regarding each person as an isolated individual to whom dignity is attached, it regards individuals as constructed in many ways by society and social norms'.[343] Thus, it goes beyond the 'liberal concern with the individual effects of social prejudice to a relational concern with how groups are systematically stigmatised, denigrated, exploited, and subject to violence and abuse'.[344]

---

[340] Albertyn, 'Substantive Equality and Transformation' (n 16) 255.

[341] Fredman, 'Substantive Equality Revisited' (n 16) 730.

[342] Albertyn, 'Contested Equality' (n 16) 466; Fredman, 'Substantive Equality Revisited' (n 16) 730; *Discrimination Law* (n 16) 28.

[343] Fredman, 'Substantive Equality Revisited' (n 16) 731.

[344] Albertyn, 'Contested Equality' (n 16) 467.

In the affirmative action context, this dimension highlights, as will be seen in more detail in Chapter Six, that affirmative action measures, beyond redistributing resources, can have an impact in redressing the barriers that stigma, prejudice and stereotyping place on disadvantaged groups in accessing resources such as employment opportunities. Moreover, as I will argue in Chapter Seven, in the context of the permissibility of quotas, this dimension's concern with social relationships and groups experience of disadvantage, within and through social relations, offers a more substantive framework within which to consider arguments that affirmative action measures cause and/or entrench the stigma experienced by its beneficiaries. It also offers a basis to explore and rebut the argument that the use of affirmative action violates the dignity of non-beneficiary classes, especially those who belong to privileged groups. Further, as will be explored in Chapter Six, the focus on recognition harm can help us justify affirmative action measures beyond their redistributive benefit – highlighting their value in fostering deeper bonds and social relationships between historically disadvantaged and advantaged groups as well as in creating role models for historically disadvantaged groups in a manner that could undermine any internalised stigma and prejudice rooted in the experience of misrecognition.

3.1.3. Participation and Voice

The third dimension, participation and voice, recognises that one of the injuries to equality is rooted in the exclusion and marginalisation of groups from social, economic, political and other decision-making structures and processes. The participation dimension recognises that individuals are social beings, so that their marginalisation from social life can thus be dehumanising.[345] Accordingly, it asks whether everyone has an 'equal say in political, social and economic institutions, regardless of wealth, property, class, power and privilege'.[346] The

[345] Fredman, *Discrimination Law* (n 16) 32; 'Substantive Equality Revisited' (n 16) 731; Albertyn and Fredman (n 16) 439.

[346]Albertyn, 'Contested Equality' (n 16) 467.

participation dimension requires interventions that 'compensate for the absence of political voice and to open up the channels for greater participation in the future'.[347] This is similar to Botha's idea of democracy as one of the values underpinning the right to equality (the other being dignity and equality).[348] For Botha, the democracy dimension to the right to equality emphasises the interests of people to fully participate in public life.[349] Participation extends to requiring 'consultative and participatory processes in which those affected can voice their concerns and to participate in search of accommodation of conflicting rights and interests'.[350] Similarly, at the core of Fraser's conception of justice is the idea of parity of participation. She defines this as 'social arrangements that permit all (adult) members of society to interact with one another as peers'.[351]

In addition to economic and political participation, the participation dimension should also encompass a concern with community and social relationships. In their multi-dimensional theory of equality of condition, Baker et al. argue that love, care and solidarity should be a part of our concern with equality. The authors argue that being deprived of the opportunity to develop supportive affective relations, to recognise and feel some sense of affiliation and concern for others can limit human development.[352] Fredman captures this concern in the participation dimension, arguing that people are essentially social, 'To be fully

[347] Fredman, 'Substantive Equality Revisited' (n 16) 731.

[348] Botha (n 16) 10–16.

[349] ibid 13.

[350] ibid 15.

[351] Fraser and Honneth (n 64) 36; see also Hugh Collins, 'Discrimination, Equality and Social Inclusion' [2003] Mod. L. Rev. 16.

[352] Baker, Lynch and Cantillon (n 16) 37.

human thus includes the ability to participate in equal terms in community and in society more generally'.[353]

The participation dimension can help us explore how affirmative action can work as a tool to redress the historical marginalisation and exclusion of disadvantaged groups. The redistribution of resources such as jobs enables greater participation in the labour market and thus, the economy and the political life of a society. Further, affirmative action measures can undermine the social isolation and exclusion experienced by historically disadvantaged groups by making it possible for them to participate, as equals, in both the public and private spheres of life. As will be explored in Chapter Six the EEA's focus on increasing the representation of Black people, women and people with disabilities at all occupational levels in the workplace is its strongest when seen from the perspective of the importance of participation and representation. More than anything, it can help us locate how affirmative action measures can – in redistributing resources, help disrupt the erosion of social relationships within disadvantaged communities – by opening up opportunities for persons or redistributing material resources, affirmative action measures can help strengthen relations of care, love and solidarity.

3.1.4. Affirming difference and structural change

The fourth dimension is concerned with affirming difference and contributing to effecting structural change.[354] This dimension of substantive equality exposes the harm that arises from the repression rather than the recognition of difference.[355] This is a recognition that difference is a positive attribute that society should seek to protect by removing the

[353] Fredman, 'Substantive Equality Revisited' (n 16) 732; Collins (n 351) 24.

[354] Albertyn and Fredman (n 16) 437; Fredman, 'Substantive Equality Revisited' (n 16) 733.

[355] Albertyn, 'Substantive Equality and Transformation' (n 16) 260.

disadvantage that attaches thereto.[356] The rejection of difference entrenches the position/identity of those at the centre, the historically privileged and this functions to justify the oppression of those who bear the markers of difference. Recognising this, in the *National Coalition* case, the Constitutional Court held that 'The desire for equality is not a hope for the elimination of all differences'.[357] In *Fourie,* it held that equality does not require the 'levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference…it affirms that difference should not be the basis for exclusion, marginalisation and stigma'.[358]

In some contexts, this dimension will require the disruption of dominant norms and cultures in order to fight against the cost of inequality being the assimilation of those who belong to groups marked as different and thus inferior or those who are excluded because of an inability to, or, their refusal to assimilate. In other contexts, valuing difference will require reasonable accommodation to cater for the needs of persons with disabilities or to accommodate different cultures.[359] In *Pillay,* the Constitutional Court summarised the importance of accommodation, holding that:

> At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.[360]

---

[356] Fredman, 'Substantive Equality Revisited' (n 16) 733.

[357] *National Coalition* (n 199) [28].

[358] *Fourie* (n 285) [60].

[359] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) [75].

[360] ibid [73].

Fredman uses the example of working hours and how they are often patterned as if childcare takes place outside of the labour market.[361] Because of the gendered division of childcare, women who want to participate in the labour market are required to conform to this structuring of working hours, excluding some women from work if they cannot afford paid childcare or if they want to or have to provide childcare themselves.[362] Structural change would require a restructuring of working hours, providing for flexible or part-time work, made available to all parents and guardians who have childcare responsibilities.[363]

Under the EEA and the Equality Act, the concern with structural change and difference can be seen in the express provision for reasonable accommodation. Under the EEA, affirmative action measures *must* include 'making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce'.[364] Under the Equality Act, one of the factors taken into account in determining whether discrimination is unfair is whether reasonable steps have been taken to address disadvantage or accommodate diversity.[365] Further, one of the orders which the Equality Courts are empowered to make is directing a respondent to make reasonable accommodation for a group or class of persons.[366]

Another area where affirmative action measures under the EEA enable some structural change is in its approach to merit. The idea of merit is that a person is entitled to

[361] Fredman, *Discrimination Law* (n 16) 30.

[362] ibid.

[363] ibid.

[364] EEA, s 15(2)(c).

[365] Equality Act, s 14(3)(i).

[366] ibid s 21(2)(i). Chapter 4 of the Equality Act provides for special equality courts whose task is to adjudicate cases under the Equality Act.

a mode of treatment or a specific good because of a quality they possess.[367] For example, in the employment context, a person is said to have the requisite merit for appointment or promotion if they have the skill, educational background and experience relevant to performing the job. As Young summarises, 'The merit principle holds that positions should be awarded to the most qualified individuals...those who have the greatest aptitude and skill for performing the tasks those positions require'.[368] In the abstract, the merit principle protects the right to equality in the formal sense, that persons should be treated based on their individual merit and not based on 'arbitrary' criteria such as race or gender.

The problem with the merit principle is that it assumes neutrality in the criteria for merit. Merit is not neutral – it will often reflect and reproduce existing relations of privilege, hierarchy and subordination.[369] Further, even if we can agree on neutral criteria, if we do not acknowledge how different forms of disadvantage serve as a barrier for some groups to acquire the necessary skills, qualifications or other benchmarks, merit will entrench existing patterns of inequality. This is because those likely to meet our 'objective' criteria will often come from the privileged groups.

In the South African context, bearing in mind the colonial and apartheid history of exploitation, marginalisation and exclusion of members of the designated groups from getting an education, skills development and training, many members of the designated groups enter the labour market with fewer educational qualifications, skills and less training and experience than white males.[370] The application of the neutral merit principle in this

---

[367] Richard Fallon, 'To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination' [1990] BU L Rev 815, 822; See also, Christopher McCrudden, 'Merit Principles' [1998] OJLS.

[368] Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) 200.

[369] ibid 205.

[370] *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 6 BLLR 539 LC [5].

context would amount to rewarding the historically privileged classes while perpetuating disadvantage. This is why, as discussed earlier in the chapter, the formal equality of opportunity approach to substantive equality does not fit the South African context.

As discussed in Chapter One, in recognition of the problem with the ideal of merit, affirmative action measures under the EEA allow for the preferential treatment of the beneficiary classes if they are *suitably qualified,* as opposed to equally qualified.[371] In addition, affirmative action under the EEA must include measures to 'retain and develop' as well as implement training measures for the beneficiary classes under this statute.[372] This provision shifts the obligation to provide skills, development opportunities and training onto the employer. Furthermore, s 20(5) of the EEA prohibits designated employers from discriminating against persons solely because they do not have relevant experience.

As Cameron et al. JJ held in *Barnard*, the suitably qualified criterion in the EEA recognises that historically disadvantaged persons may not 'brandish the traditional signs of successful candidates'. Thus, an extra effort should be made to find and support them.[373] My argument is that the structural change dimension requires us to question the 'traditional signs' of merit in order to ensure that merit is not used to entrench existing patterns of disadvantage.[374] The approach under the EEA, subverting the merit principle while protecting against inefficiency by requiring 'suitable qualification' and creating obligations to train and develop disadvantaged groups, is an example of pursuing structural change.

With that said, as I noted in the previous chapter, one of the limitations of affirmative action is that they tend to include the 'different' within dominant structures without really

---

[371] EEA s 20(3)-(4).

[372] ibid s 15(2)(d)(ii).

[373] *Barnard CC* (n 13) [110].

[374] *SARIPA CC* (n 13) [78] (Madlanga J dissenting).

questioning these structures. Taking reasonable accommodation of difference is one way in which they can contribute to structural change, so too is taking a more contextual approach to merit and qualification, however, within the broader framework of disrupting dominant norms, they are not very strong. This dimension highlights this weakness.

3.1.5. Enhancing Freedom

The last dimension is a positive conception of freedom. This dimension captures the idea that equality should enhance the exercise of freedom. The value of freedom has not been given much attention in the Constitutional Court's equality jurisprudence. In other contexts, it has defined it in the narrow sense of non-intervention.[375] An example is Ackermann J's finding in the *Ferreira* case.[376] In this case, Ackerman J found that freedom was the 'right of individuals not to have "obstacles to possible choices and activities" placed in their way'.[377] This limited conception of freedom is problematic in the context of substantive equality broadly and affirmative action specifically because state interventions to 'promote the achievement of equality' could be seen as a limitation on freedom.[378]

In the Constitutional Court's unfair discrimination cases, a negative conception of freedom and choice, devoid of an analysis of context, has led to findings that entrench gender inequality. In *Jordan*, the Constitutional Court upheld the criminalisation of sex work partly on the basis that sex workers, in 'choosing' this form of work, 'knowingly attract the stigma associated with prostitution'.[379] In *Volks,* the Constitutional Court refused to extend benefits to surviving partners in a permanent life partnership because they had chosen not to enter

[375] See *Ferreira* (n 306) [50]; *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) [53].

[376] *Ferreira* (n 306).

[377] ibid [54].

[378] Fredman, *Human Rights Transformed* (n 82) 11.

[379] *Jordan* (n 224) [17].

into a marriage.[380] As noted in the dissenting opinions in both cases, this focus on choice ignored the social and economic constraints that restrict women's choices to work[381] and to choose to marry.[382]

Based on the potential conflict between freedom and equality, Fredman does not include freedom as a separate dimension. Instead, she argues that the freedom related concerns of agency and choice should be understood in the context of the different dimensions of substantive equality. For example, in relation to the structural change dimension, she notes how 'agency can be enhanced, through changing structures to widen the range of feasible options'.[383] Taking a different approach, in her theory of transformative substantive equality, Albertyn includes freedom as a distinct concern for a substantive approach to equality.[384] While different in form, the different approaches see a role for freedom in the equality analysis. Further, they both reject the classic liberal conception of freedom as non-intervention and argue for a more substantive value of freedom.

Albertyn argues for a substantive conception of freedom as 'agency and self-determination, which requires both negative and positive actions and which might manifest differently for different groups within and across different domains (e.g. the workplace, health care, education).'[385] Fredman roots her conception of Freedom in Sen and

---

[380] *Volks* (n 224) [92]-[93].

[381] In their dissenting opinion, O'Regan and Sachs JJ found that the prohibition was a form of indirect discrimination against women which entrenched stigma and prejudice, ibid [65].

[382] In his dissenting opinion, Sachs J rejected the decontextualized analysis of choice and held that 'the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other', *Jordan* (n 224) [225].

[383] Fredman, 'Substantive Equality Revisited' (n 16) 738.

[384] Albertyn, 'Contested Equality' (n 16) 467–468.

[385] ibid 467.

Nussbaum's capabilities approach.[386] According to the capabilities approach, freedom consists in being able to do and be what one has reason to value.[387] This requires more than just non-intervention; as 'what people can positively achieve is influenced by economic opportunities, political liberties, social powers and the enabling conditions of good health and basic education'.[388] The things that a person values being or doing are that person's functionings,[389] 'functionings are, in a way, the opposite of disadvantage…being disadvantaged in a particular way is primarily a matter of not being able to achieve a functioning'.[390]

The capability approach's conception of freedom shows a concern with real social and economic context, on people's ability to exercise real choice and define for themselves what is the good life, 'to choose from possible livings'.[391] It thus requires measures to be taken to promote opportunities and substantial freedoms which people may or may not exercise.[392] Another, more substantive conception of freedom is Young's theory of justice as freedom from domination and oppression. According to Young, self-determination is the ability 'to participate in determining one's action and the condition of one's action; its contrary is domination'.[393] To be in a state of freedom is to be able to 'follow one's own pursuits in one's own way' as this is often restricted by direct interference by other agents

[386] Fredman, 'Substantive Equality Revisited' (n 16) 738.

[387] Amartya Sen, *Development as Freedom* (OUP 2001) 18.

[388] ibid.

[389] ibid 75; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Havard University Press 2011) 25.

[390] Wolff Jonathan and de-Shalit Avner, *Disadvantage* (OUP 2007) 38.

[391] Amartya Sen, *Inequality Reexamined* (HUP 1992) 40.

[392] Nussbaum (n 389) (Nussbaum argues that negative liberty is an incoherent idea: all liberties are positive and negative) .

[393] Iris Marion Young, *Inclusion and Democracy* (OUP 2002) 32.

and by institutional relations, 'including those that award differential power to some agents to constrain the choices and actions of others'.[394] Under this approach, the role of the state and its institutions is to promote and preserve non-domination.[395]

Sachs J's separate judgement in *Ferreira* captured aspects of the more substantive notions of freedom described above. For Sachs J, it was incorrect to equate freedom with autonomy or the right to be left alone. This was not in line 'with the reality of life in a modern, industrialised society'.[396] Recognising the limitations of the negative conception of freedom and the embeddedness of people in institutions and in complex social relations of interdependency – Sachs J argued that the state could intervene to enable people to 'develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security'.[397] Under this conception of freedom, the role of the state is to help create the conditions in which people can make real choices.[398]

Any concern with inequality in South Africa should include a concern with freedom – we come from a past in which the colonial and apartheid state limited the freedom of the Black majority. Laws were used to eliminate or severely restrict the freedom of persons in relation to 'where one could reside or work or own property; what work one could do; who one could marry; how one could express or organise oneself politically or where one could be buried'.[399] Because of the 'denial of the freedom to choose or develop one's own identity'

[394] Young, *Inclusion and Democracy* (n 393) 32.

[395] ibid.

[396] *Ferreira* (n 306) [250].

[397] ibid [251].

[398] ibid.

[399] ibid [51] (footnotes omitted).

the 'denial of the freedom to be fully human', it makes sense that freedom is a 'profound constitutional commitment'.[400]

In the affirmative action context, the most valuable aspect of the concern with a positive conception of freedom is the need to recognise disadvantaged groups as more than just disadvantaged. A concern with freedom requires us to see that 'need and deprivation does not exhaust' who the disadvantaged are 'and who they can become under a more just, radical egalitarian and democratic social order'.[401] Recognising this aspect of *being*, this dimension requires affirmative action measures to create and enhance conditions where disadvantaged persons can exercise a range of options and be in control of their destiny.

3.2. The relationship between the different dimensions

In some cases, the different dimensions of substantive equality will come into conflict with each other.[402] As seen in the Constitutional Court's dignity-based approach, a too-narrow focus on redressing recognition harms could limit redressing economic disadvantage. More problematic, a narrow focus on the freedom dimension could serve as a barrier for affirmative action if this dimension is seen as protecting the autonomy and freedom of persons to choose their own work or exercise valuable options even at the expense of entrenching other forms of disadvantage. As will be seen in Chapter Seven, an aspect of freedom and dignity underlies the emerging argument that quotas are not permissible s 9(2) measures because they violate the right to choose one's work.[403]

The point of the multi-dimensional approach is that none of the dimensions should be favoured at the expense of the others in the equality analysis. If they pull in opposite

---

[400] *Ferreira* (n 306) [52].

[401] Joel M Modiri, 'Law's Poverty' (2015) 18 P.E.R 224, 242.

[402] Albertyn and Fredman (n 16) 439. See also, Fredman, 'Substantive Equality Revisited' (n 16) 736.

[403] *SARIPA HC* (n 25) [215]; Kohn and Cachalia (n 20) 177.

directions, a synthesis or compromise must be found instead of focussing on only one dimension.[404] As will be explored in the next Chapter, the point is to maximise the different dimensions to the fullest extent possible. However, if one dimension is ignored in the analysis, a breach of substantive equality might be missed,[405] or an opportunity to redress inequality might be obscured. Seeing the dimensions separately gives a more coherent framework to analyse and work through the tensions that arise in affirmative action cases.[406] At the same time, the goal should be to maximise each of these to the fullest extent possible.

However, the concern with group-based disadvantage must care not to essentialise group identity as this could entrench intra-group inequality and obscure the complex, intersectional ways in which disadvantage manifests. Thus, the multi-dimensional conceptions of substantive equality is conscious of the intersectional and relative nature of disadvantage. As will be discussed in more detail in Chapter Six, substantive equality's concern with redressing group-based disadvantage necessarily requires an intersectional approach to the relationship between advantage and disadvantage, power and hierarchy within and across different groups.[407]

Intersectionality is an important aspect of substantive equality because it unmasks the complex manner in which disadvantage manifests. It is rooted in anti-racist and anti-sexist black feminist activism between the 1960s and 1970s in the United States and from the work of critical race and feminist theorists, the most cited being Kimberle Crenshaw.[408]

---

[404] Fredman, 'Substantive Equality Revisited' (n 16) 728.

[405] Albertyn and Fredman (n 16) 439.

[406] Fredman, 'Reimagining Power Relations' (n 16) 736.

[407] Albertyn and Goldblatt (n 15) 253; Albertyn, 'Contested Equality' (n 16) 463; Catherine Albertyn, 'Gendered Transformation In South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 Stell LR 591, 606.

[408] See Collins Patricia Hill and Bilge Sirma, *Intersectionality* (Polity Press 2016). The authors offer a brief history of intersectionality as a tool for critical inquiry and praxis. See also, Ange-Marie Hancock, *Intersectionality: An Intellectual History* (OUP 2016); *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment*

Crenshaw's foundational article 'Demarginalizing the Intersection of Race and Sex' brought the term intersectionality within the anti-discrimination law framework.[409] Crenshaw argued that the single-axis framework of analysis in anti-discrimination law, which failed to recognise the experiences of Black women because they experienced discrimination from multiple dimensions on account of both their race and gender, erased the experiences of Black women and perpetuated their disadvantage. In requiring that Black women choose between their racial and gender experiences to lodge claims or represent any of the groups, their experiences were erased from the conceptualisation, identification and remedying of antidiscrimination law claims.[410]

Because of the specific history of colonial and apartheid oppression in South Africa and the deeply patriarchal nature of South African society, race, gender and other identity characteristics intersect in varying ways to create complex systemic and institutionalised relations of power, privilege and disadvantage. Some members of the group suffer disadvantage from multiple grounds, such as Black women because of their race and gender; others are privileged because of one or more identity characteristics while disadvantaged because of others, for example - white women who are advantaged because of their race and disadvantaged because of their gender.[411] The intersection of these different identity characteristics in manifesting disadvantage occurs in the context of another complex

(Second, Routledge 2000); Jennifer C Nash, *Black Feminism Reimagined: After Intersectionality* (DUP 2019) (for a critical account of the meaning[s]/use[s] and institutionalisation of intersectionality)s.

[409] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi. Legal F. 139.

[410] ibid 140.

[411] *Barnard CC* (n 13) [153]-[155].

intersection and overlap between the different dimensions - they too overlap and are mutually reinforcing.[412]

For example, equality interventions focussed on economic redistribution could also have benefits for the other dimensions. As alluded to earlier, employing a disadvantaged person could have an impact on redressing entrenched ideas about the capacities and capabilities of misrecognised groups, increasing the esteem of the group. This could also increase the participation of persons – in the political and economic arena but also in their social relations – being able to provide financial care and support for family and friends. Because of the overlapping and the mutually reinforcing nature of the dimensions, they should not be seen in isolation from each other,[413] or as a part of a lexical hierarchy.[414] The overlap and reinforcing nature of the different dimensions is the core value of this approach.

4. Conclusion

Chapters Two and Three sought to define and explore the meaning of transformative constitutionalism and substantive equality – as I argued in Chapter One, this thesis advances the idea that these should guide the development of a transformative approach to affirmative action. In Chapter Two, I explored the meaning of transformative constitutionalism – emphasising its concern with redressing past injustice and achieving the goals of substantive equality. I argued that the commitment to transformative constitutionalism required a specific approach to interpretation and the judicial review of affirmative action – one oriented towards realising the goal of substantive equality. In this chapter, I showed that

[412] This is in contrast with a reading that would see the dimensions as separate or as embedded in a hierachy that does not centre anti-disadvantage - as has been suggested by Catharine MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' [2016] ICON 739.

[413] Albertyn and Fredman (n 16) 439.

[414] Fredman, 'Reimagining Power Relations' (n 16) 131.

while the courts have committed to a substantive approach to equality – its meaning remains contested. Rather than the prevailing dignity-based approach to the right to equality and thus substantive equality, I argued in favour of a multi-dimensional approach to substantive equality as a framework for the development of a transformative approach to affirmative action.

Over the limitations of an approach which centres dignity – the different dimensions enable a deeper analysis of affirmative action measures. Against the background of a commitment to transformation, they provide a framework within which the judicial review of affirmative action measures should occur, (Chapter Four); they justify the argument for the recognition of a duty to take s 9(2) measures and that the courts can order affirmative action as a remedy (Chapter Five); they provide a guide to understanding the different purposes that affirmative action can and should pursue and the criteria for demarcating the beneficiaries of these measures (Chapter Six); they create room and scope for the recognition of a range of tools available to achieve the purposes, including the use of quotas (Chapter Seven). Lastly, they can serve as a guide to setting a benchmark of the 'sunset' of affirmative action in South Africa (Chapter Eight).

PART II: JUDICIAL REVIEW, THE RIGHTS OF BENEFICIARIES AND THE COURT'S REMEDIAL POWER

CHAPTER FOUR: THE STANDARD OF REVIEW: RE-READING THE *VAN HEERDEN* TEST AS PROPORTIONALITY

Introduction

As I briefly discussed in Chapter Three, in *Van Heerden*, the Constitutional Court set a more deferent standard of review to s 9(2) measures than that applicable to unfair discrimination claims, the *Van Heerden* test. The *Van Heerden* test requires that an affirmative action measure should target the disadvantaged; it must be designed to protect or advance them, and it must promote the overall achievement of equality.[415] While the relative deference of the test affirms the need to err on the side of preserving measures under s 9(2), the test is considerably vague and has not been developed or consistently applied by the lower courts,[416] and by the Constitutional Court.[417] In the academic literature, there is disagreement about whether the test requires mere rationality or something more than rationality.[418]

Further, following its decision in *Van Heerden*, the Constitutional Court has not been able to articulate a coherent approach to the judicial review of affirmative action under the EEA and Equality Act or explain their relationship with the conceptual framework in *Van Heerden*. In four separate but concurring opinions in *Barnard*, the judges gave three substantially different approaches – bare minimum rationality, fairness derived from the provisions in the EEA, and a proportionality assessment derived from the s 36(1) limitations clause in the Constitution – the latter being in addition to the *Van Heerden* test. In the second

---

[415] *Van Heerden* (n 1) [44].

[416] See the different approaches in the lower court judgements in Barnard, *Barnard LC* (n 44); *Barnard LAC* (n 44); *Barnard SCA* (n 44).

[417] See the different opinions in *Barnard CC* (n 13).

[418] Pretorius, 'A Model for South African Affirmative Action' (n 17); 'Fairness in Transformation' (n 17); 'Accountability' (n 60); McGregor, 'Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures' (n 17) (who argue and critique the approach as mere proportionality review); De Vos (n 60); Albertyn, 'Adjudicating AA' (n 16); 'Getting It Right' (n 60); McConnachie (n 17); Kohn and Cachalia (n 20) (who argue that it is a proportionality review).

case under the EEA, *Correctional Services*, Zondo J narrowly focussed on the provisions in the EEA and did not place these within the broader constitutional context. While the Constitutional Court has yet to decide an affirmative action case under the Equality Act, an Equality Court decision, *Du Preez* suggests a lack of clarity on the appropriate standard in the context of the Equality Act as well.[419]

Finding and justifying the appropriate standard of review is important for the development of a transformative approach to affirmative action. This is because, while the courts are only one of the sites of struggle for achieving the goals of substantive equality,[420] they provide 'a forum for citizens to make claims for inclusion in social and economic life, and for the state to defend its positive and redistributive measures'.[421] Accordingly, they have a lot of power and 'can ultimately determine the lines of social recognition, inclusion and exclusion, political participation, the obligations of government and the ambit of positive measures and redistribution'.[422]

In this chapter, I argue in favour of a standard of judicial review that best fits the commitment to transformative constitutionalism and achieving the goals of substantive equality. This is an approach which centres the interests of the beneficiaries of an affirmative action measure without perpetuating the disadvantage of other disadvantaged persons or groups. In light of the multiple competing rights and interests which arise in affirmative action cases, I agree with the prevailing argument in the literature[423] and argue that the *Van*

---

[419] *Du Preez* (n 22).

[420] Albertyn, 'Contested Equality' (n 16) 454.

[421] ibid.

[422] ibid.

[423] Albertyn, 'Adjudicating AA' (n 16); McConnachie (n 17); Kohn and Cachalia (n 20); De Vos (n 60).

Heerden test should be read as a proportionality assessment tailored to the context of affirmative action.[424]

The proportionality doctrine is a legal tool, a methodological construction used to resolve the tensions which arise when different rights and interests conflict with each other.[425] It is a context sensitive standard of review and thus fits the commitment to substantive equality and gives room for taking the multiple values and rights that underlie the equality right and which arise in affirmative action cases into account.[426] Proportionality will allow the courts to bring conflicting rights and interests into proper balance with each other and more important, with the lemotif of our constitutional democracy, a commitment to transformation.[427] In allowing an inquiry into the purpose as well as the impact that a measure has on those affected, both beneficiaries and non-beneficiaries – proportionality analysis will enable the courts to give voice to the intended beneficiaries of affirmative action while not losing sight of the rights of those adversely affected by these measures.

To make this argument, I have divided the chapter into five sections. In the first section, I argue that in finding the appropriate standard and intensity of review, the courts must be driven by a proper balance between their commitment to transformative adjudication (purposive, generous and contextual approach to interpretation and judicial review), the separation of powers principles (in particular, democratic legitimacy and institutional competence) as well as the commitment to a culture of justification. In the second section, I consider the approach taken in *Van Heerden* and argue that while the

---

[424] Albertyn, 'Adjudicating AA' (n 16); McConnachie (n 17).

[425] Aharon Barak, *Constitutional Rights and Their Limitations* (CUP 2012) 131; George Barrie, 'The Application of the Doctrine of Proportionality in South African Courts' [2013] SAPL 40, 40.

[426] Vicki Jackson, 'Proportionality and Equality' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 171.

[427] Vicki Jackson, 'Constitutional Law in an Age of Proportionality' [2015] The Yale Law Journal 3094 (For the argument that the proportionality doctrine is aligned with the commitment to justice).

Constitutional Court's approach, a more deferent standard of review than that applicable under s 9(3) unfair discrimination claims, aligns with a commitment to substantive equality and transformation, the different parts of the test are vague, a vagueness that has led to the prevailing lack of clarity about what the *Van Heerden* test requires.

In the third section, in line with the academic commentary on the Constitutional Court's affirmative action jurisprudence,[428] I argue that the best reading of the *Van Heerden* test is as a proportionality assessment that fits the context of affirmative action. Adding to this literature, the section will show how the proportionality assessment should be properly adapted to the affirmative action context. First, I argue that the *Van Heerden* test allows for a balancing of the competing interests which arise in affirmative action cases but gives more weight to the interests of the intended beneficiaries of affirmative action. Second, this proportionality assessment excludes a requirement of necessity. It is a 'softer' approach to proportionality, focussing on proper purpose, rational connection and the impact that a measure has on those adversely affected – not necessity.[429] Third, rather than the centring of dignity, as in the Constitutional Court's unfair discrimination analysis, the assessment is in the context of the broader conception of substantive equality explored in Chapter Three. Thus, the purpose of proportionality in the affirmative action context is to maximise the different dimensions of substantive equality for the intended beneficiaries.

In the fourth section, I explore the approach taken in *Barnard* and *Correctional Services*. The section illustrates how none of the judgments in these cases were able to articulate a coherent approach to the judicial review of affirmative action under the EEA and explain the relationship between the EEA, s 9(2) and the conceptual framework in *Van Heerden*. It also analyses the Equality Court decision in *Du Preez*. As with the cases under the EEA, it

---

[428] Albertyn, 'Adjudicating AA' (n 16); McConnachie (n 17); Kohn and Cachalia (n 20); De Vos (n 60).

[429] This approach to proportionality is derived from Barak (n 425) 132.

argues that there too is a lack of clarity and coherence about the appropriate approach under the Equality Act. In the final section of the chapter, I argue that the best approach to the judicial review of affirmative action measures under the EEA and Equality Act is one in which s 9 of the Constitution and the conceptual framework in *Van Heerden* are the root of the inquiry, with the text of the legislation and their specific purpose serving to give meaning and content thereto.

1. Principles to Guide the Judicial Review of Affirmative Action

Standards of review exist on a spectrum, from low levels of scrutiny such as rationality review to more intermediate levels of scrutiny, such as reasonableness and proportionality review. In South Africa, rationality review is the minimum standard of review of all exercises of public power.[430] It is also the standard of review in terms of s 9(1) of the Constitution.[431] Reasonableness applies in the socio-economic rights context[432] while the general proportionality analysis is used to test the limitations of all the rights in the Bill of Rights.[433]

These different standards can be applied with varying intensity depending on the circumstances.[434] Varying intensity of review concerns the strictness with which a court is

---

[430] See *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC). For commentary on this standard see, Alistair Price, 'Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt.' (2010) 127 SALJ 580; Michael Bishop, 'Rationality Is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 SAPL 312; Lauren Kohn, 'The Burgeoning Constitutional Requirement of Rationality & the Separation of Powers: Has Rationality Review Gone Too Far?' [2013] SALJ 810.

[431] *Prinsloo* (n 33) [36].

[432] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (10) BCLR 1033; *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

[433] South African Constitution s 36(1).

[434] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge L.J. 174; McConnachie (n 17). See Kohn (n 430); Price (n 430); Bishop (n 430) (on the varying intensity of rationality review in the Constitutional Court's judgements).

willing to assess the validity of a law or policy.[435] The higher the intensity of review, the less deferent the court; the lower, the more deferent.[436] Variability allows the court to vary the intensity in relation to the kind of evidence required, its willingness to take judicial notice of certain factors or even in shifting the burden of evidence or proof in cases were one party is likely to have the required information necessary to prove the claim by the other party.[437]

In the affirmative action context, the core issue has to do with how tight the fit between the means, the specific affirmative action measures and the ends, achieving the goal of equality, should be. As will be seen later in the chapter, there is a wide spectrum of approaches. On the one hand, we have the infamous strict scrutiny approach applied by the US Supreme Court in the judicial review of raced based affirmative action.[438] On the other, we have the Supreme Court of Canada's more lax focus on the ameliorative purpose of an affirmative action measure.[439] In this section of the chapter, I argue that the correct standard and intensity of review in the South African context should reflect an appropriate balance between the commitment to substantive equality and transformation, separation of powers principles as well as the commitment to a culture of justification. I turn to explore these below.

1.1. A Commitment to Substantive Equality and Transformation

The first important principle to finding the correct standard and intensity of review is the importance of affirmative action towards the goals of substantive equality and transformation. Seen in the light of the courts' commitment to transformative adjudication

---

[435] Rivers (n 434) 175.

[436] ibid 191.

[437] McConnachie (n 17) 168; Rivers (n 434).

[438] *Adarand Constructors, Inc v Pena* 515 US 200 (1995); *University of California Regents v Bakke* 438 US 265 (1978); *Grutter v Bollinger* (2003) 539 US 306; *Gratz v Bollinger* (2003) 539 US 244; *Fisher v University of Texas at Austin* (2016) 136 S Ct 2198.

[439] *Kapp* (n 39); *Cunningham* (n 39).

- a purposive, generous and contextual approach to interpretation and judicial review – the standard and intensity of review of affirmative action measures must be one that bends towards meeting the Constitution's transformative ends.

The importance of the goals pursued through affirmative action will tilt the scale in favour of affirming the constitutionality of most affirmative action measures – thus, a more deferent standard of review. The idea that this principle captures is that the standard must, as a point of departure be deferent to give room and flexibility in the design and implementation of these measures. As the Constitutional Court and the Supreme Court of Canada have acknowledged, crafting measures to redress complex and interlinked forms of disadvantage is a difficult task.[440] Thus, there must be room for innovation and experimentation. Some affirmative action measures may ultimately prove to be unsuccessful. The state and other duty bearers should have leeway to learn from such failures and revise the measures.[441]

The focus on the goals of transformation and realising substantive equality also means that the standard and intensity must be flexible enough to cater for multiple rights and interests that arise in affirmative action cases – this is because a measure which first appears to further the Constitution's transformative ends, could in its impact on other rights and interests thwart this by entrenching or creating new patterns of disadvantage.

1.2. Separation of Powers

The second important principle is the courts' approach to the separation of powers doctrine. Affirmative action measures have an impact on many rights and interests and can be underlined by larger resource allocation policy and law – this necessarily requires the courts to examine their relationship with other branches of government in determining the best

---

[440] *Kapp* (n 39) [47]; *Van Heerden* (n 1) [41]–[42].

[441] *Kapp* (n 39) [47].

way to realise the Constitution's transformative mission. When exercising its judicial review powers, the Constitutional Court has recognised the need to respect other branches of government, per the separation of powers principle.[442]

In Chapter Two, I argued that the Constitutional Court is carving a uniquely South African approach to its understanding of its relationship with the different branches of government - an approach which does not 'imply a rigid or static conception of strictly demarcated functional roles' – an approach anchored on the idea that all branches of government share the commitment to fulfilling the 'Constitution's vision of justice, dignity and equality'.[443] I argued that this was a purposive approach to the separation of powers principle, one oriented towards eliminating inequality.[444] Thus, while the executive, legislature and judiciary are separate institutions, they serve the same goal and ought to support and hold each other accountable towards realising this goal. However, even with this broader understanding of the separation of powers, it's important to consider how the specific constraints of democratic legitimacy and institutional competence should guide the courts approach to exercising their judicial review powers.

The first consideration, democratic legitimacy, requires the judiciary to 'recognise that there are some matters on which unelected judges should be cautious about second-guessing the decisions of representative bodies'.[445] This captures the idea of there being a tension between democracy and judicial review, the 'counter majoritarian dilemma'.[446]

---

[442] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 [156]; *Mazibuko* (n 432) [60]; S Seedorf and S Sibanda, 'Separation of Powers' in S Woolman and others (eds), *Constitutional Law of South Africa* (Second, OS 2012) ch 12.3.

[443] *Mwelase* (n 188) [46].

[444] Hodgson (n 184).

[445] McConnachie (n 17) 194; For an analysis of the political equality argument against judicial review see Jeff King, *Judging Social Rights* (CUP 2012) ch 6.

[446] Liebenberg (n 72) 63.

According to Waldron, the right to participate in the democratic process is the most fundamental right, the 'right of rights'.[447] Accordingly, he argues that the courts do not have the authority to decide on what rights the individual right-bearers have; it is for these right bearers themselves to decide what the rights require.[448]

Waldron's perspective on judicial review is quite limited. As Fredman has argued, the courts play an important role in the strengthening of democracy – they can enhance democratic accountability, participation and equality.[449] Courts can act as a forum allowing for bounded deliberation, one in which the interests of minorities or other less powerful groups have a platform to participate in democratic processes, enhancing rather than detracting from democracy.[450] They can serve as a 'forum for deliberation over the meaning and implications of the normative commitments in a Constitution'.[451]

Further, Waldron-like objections to judicial review do not have much weight in the South African context. The rights in the Bill of Rights are justiciable – the Constitution clearly states that they are.[452] This is the case even in the context of socio-economic rights.[453] As I explored in Chapter Two, the design of the current Constitution and the nature of legitimacy of judicial review in South Africa is an important aspect of transformative

---

[447] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 233.

[448] Waldron (n 447).

[449] See Fredman, *Human Rights Transformed* (n 82) 103–113; King (n 445). Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 103–122; Sandra Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); Liebenberg (n 72) 65; Van Huyssteen (n 65).

[450] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 91–95.

[451] Liebenberg (n 72) 33–34.

[452] South African Constitution ss 7, 8.

[453] *Soobramoney* (n 170); *Grootboom* (n 432). See in general, Liebenberg (n 72).

constitutionalism. Moreover, it reflects the specific choice, as will be discussed below, that was made to move away from a culture of authority to one of justification.

The second consideration is institutional competence. It relates to the expertise and capacity of the court to deal with complex social and economic issues, specifically those with polycentric implications.[454] Institutional competence requires the courts to recognise the limits of their expertise and 'to be careful not to second-guess decisions reached by more competent bodies equipped with greater capacity, experience, and information'.[455] As King summarises, institutional competence refers to what courts are competent at and what they are bad at doing.[456]

As affirmative action measures concern the redistribution of material resources, their design and implementation can have complex implications for the State as well as for private parties who have an obligation to implement these measures. In addition, as will be seen in the discussion of the cases, the implementation of affirmative action measures is performed by different kinds of decision-makers, exercising their day to day functions and having to balance their obligation to implement these measures and promote the achievement of equality with other considerations. For example, in the public employment context, service delivery and the efficiency of the administration have given rise to questions of expertise and the measure of deference that should be given to decision-makers when implementing affirmative action measures against the background of these other interests.[457] Further, some affirmative action measures are subject to rigorous participatory and accountability measures

---

[454] King (n 445) ch 7; Fredman, *Comparative Human Rights Law* (n 450) 95; Lon Fuller, 'The Forms and Limits of Adjudication' 92 Harv. L. Rev. 353.

[455] McConnachie, 'Intensity of Review' (n 17) 194; see also Patrick Lenta, 'Judicial Restraint and Overreach' [2004] SAJHR 544, 546 and; King (n 445) ch 7 (polycentricity) and 8 (expertise).

[456] King (n 445) ch 5.

[457] See the different approaches in *Barnard CC* (n 13) [64] (Moseneke ACJ),[109]-[110] (Cameron et al. JJ) and [184]-[189] (Van der Westhuizen J).

which could signal the need to exercise a measure of deference. For example, in the EEA context, the implementation of these measures is the responsibility of the employer, but the design and content of employment equity plans is determined in accordance with a participatory process between the employer and her workforce. Section 16 of the EEA requires employers to consult with their employees or representative trade unions in drafting the employment equity plan.[458] Thus, the content of these plans relate to the actual needs of a specific workplace as analysed and accepted by the employer and affected persons. On the one hand, interference in affirmative action measures concluded in accordance with real participation from those affected by these measures could subvert these processes. On the other, when there has been a failure to take or implement affirmative action measures, the courts can play an important role in ensuring that these processes are followed.

At the same time however, institutional competence should not be assumed. That an issue falls within the expertise of a branch of government and/or that a decision maker is particularly skilled and has expertise in an area should not detract from the responsibility on the courts to interrogate the basis for and the design and implementation of affirmative action measures. In those cases where the issues raised are complex and the court lacks expertise or capacity there are ways in which the court can support itself.[459] In the affirmative action context, the intervention of amicus has been particularly important in this regard. For example, the Police and Prisons Civil Rights Union intervened as amicus in both the *Barnard* and *Correctional Services* cases.

With these considerations in mind, it is important to stress that courts play an important role in protecting rights. Accordingly, while it is important to acknowledge separation of powers considerations in respect of the competence of other branches of

---

[458] EEA ss 17-18.

[459] Liebenberg (n 72) 74.

government, and decision-makers with the relevant expertise, the mere fact that a case gives rise to complex issues or requires specialised knowledge should not be used to absolve the court of its responsibility to enforce rights.[460] As Klare argues, 'Separation of powers principles should be valued not for their own sake but for what they contribute to achieving more fundamental values given by the Constitution, namely, democracy, human dignity, equality, freedom, and accountable, responsive and open government'.[461] Thus, while it is correct to say that the court should not 'attribute to itself superior wisdom in relation to matters entrusted to other branches of government' and it should 'give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field',[462] rather than act as a 'rubber-stamp' of decisions made,[463] a commitment to transformative adjudication requires this to be driven by the values in the Constitution.

1.3. A Culture of Justification

A third principle that should guide the courts in finding the correct standard and intensity of review is the commitment to a culture of justification. The commitment to a culture of justification and accountability requires that judges provide sufficient reasons for their judgements and that they require reasons for decisions made by the other branches of government.[464] A decision maker is required to 'explain and justify to the court, and therefore

---

[460] For a discussion of how courts can overcome polycentric issues, see Fredman, *Comparative Human Rights Law* (n 450) 96–97; Liebenberg (n 72) 73–74.

[461] Klare, 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach' (n 184) 446; See also Liebenberg (n 72) 67; Van Huyssteen (n 65); Hodgson (n 184).

[462] *Bato Star* (n 66) [48].

[463] ibid.

[464] Pieterse (n 96) 164; see in general, Seedorf and Sibanda (n 442). For an analysis of the idea of a culture of justification, see, Mureinik E, 'A Bridge to Where? Introducing the Interim Bill of Rights' [1994] SAJHR 31. In this article, Mureinik argued that South African Constitution was a bridge away from a culture of authority under Apartheid, to a culture of justication, defining the latter as 'a culture in which every exercise of power is

to the litigants and the public more generally, the grounds of its decisions and the reason for the selection of particular means'.[465] In accordance with this commitment, 'Where justifications advanced do not reverberate with the tenets of constitutional transformation, they should not pass constitutional muster'.[466]

The provision of reasons supports an approach to the separation of powers that eschews the clear demarcation of roles between the different arms of government and is centred on the possibility of collaboration between the judiciary, the executive and the legislature in eradicating inequality. Moreover, the provision of reasons can, to some extent, be relied on to overcome the objection of democratic illegitimacy and institutional incompetence.[467] In relation to institutional incompetence, 'The more comprehensive and thorough the evidence and argument placed before the courts by the parties in litigation, the more confident a court will feel about making a responsible decision'.[468]

To summarise this section, the importance of affirmative action measures, considerations of democratic legitimacy and institutional competence as well as the commitment to a culture of justification are important to deciding on the appropriate standard and intensity of review for affirmative action. In most cases, because of the importance of affirmative action measures, the point of departure should be the exercise of deference. However, those cases where there exercise of deference does not accord with the commitment to transformation and substantive equality, more scrutiny is required. We thus need a standard of review that is contextual, flexible and gives room to grapple with the

---

expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the forece of its command' 32.

[465] Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 449) 118.

[466] Pieterse (n 96) 165.

[467] Seedorf and Sibanda (n 442); Barak (n 425) 459.

[468] Liebenberg (n 72) 74.

different values and rights that are implicated in affirmative action cases. Standing on the analysis in this section, the next section of the chapter zooms in on the Constitutional Court's actual approach to the judicial review of affirmative action measures under s 9 of the Constitution, starting with its landmark decision in *Van Heerden*.

2. The *Van Heerden* Approach

The *Van Heerden* case concerned the constitutionality of a pension scheme which allocated higher employer contributions for first time parliamentarians in the first democratically elected government. The majority of the new members of parliament were Black persons who were previously ineligible to serve in parliament.[469] The claimant in the case was a white male, who had been a member of the pre-1994 'apartheid-era' parliament. He brought a claim arguing that the pension scheme unfairly discriminated against the old parliamentarians on various grounds including race.[470] The State defended the pension scheme as an affirmative action measure under s 9(2) of the Constitution.

In deciding the appropriate approach to the judicial review of affirmative action, the Constitutional Court had two options. First, it could follow the route taken in the High Court decision in the case and review the case as a form of unfair discrimination, placing the onus on the State to establish that it was fair, as required by s 9(5) of the Constitution.[471] In the alternative, it could carve a new path for the review of affirmative action measures – it chose the latter. Charting an alternative approach, Moseneke J relied on the commitment to substantive equality to reject the US Supreme Court's strict scrutiny test to the review of

---

[469] *Van Heerden* (n 1) [4]-[11].

[470] ibid [11].

[471] ibid.

affirmative action measures based on race.[472] He also rejected the *Harksen* standard of review in s 9(3) unfair discrimination cases.[473]

Instead, Moseneke J's judgement opted for a lower standard of review to ensure that the courts would not 'second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.[474] Accordingly, for Moseneke J, the point of departure in affirmative action cases was a measure of deference, more deference than that applicable in the context of s 9(3) unfair discrimination claims. Instead, he set a test internal to s 9(2) of the Constitution.

The *Van Heerden* test is a threefold enquiry which requires affirmative action measures to (i) target persons or categories of persons who have been disadvantaged by unfair discrimination; (ii) be designed to protect or advance such persons or categories of persons, and (iii) promote the achievement of equality.[475] As briefly explored in Chapter Three, if a purported affirmative action measure falls within the scope of this test, it will not be subject to the *Harksen* analysis applicable to unfair discrimination claims.[476] Measures which fall within the requirements of s 9(2) are also not presumptively unfair, even when based on a listed ground in s 9(3).[477] However, if a measure fails the s 9(2) analysis, it can still be saved as a form of fair discrimination in terms of the *Harksen* analysis under s 9(3).[478]

---

[472] See *Bakke* (n 438); *Adarand* (n 438).

[473] *Harksen* (n 261).

[474] *Van Heerden* (n 1) [33].

[475] Ibid [37].

[476] ibid [33].

[477] Section 9(5) of the equality clause provides that discrimination based on one of the listed grounds in s 9(3) is presumptively unfair.

[478] For example, in *Van Heerden* (n 1), the affirmative action measure passed Mokgoro and Ngcobo JJ's s 9(3) inquiry. In *Fundza Lushaka* (n 265), the measure passed Makgoka J's s 9(3) analysis too.

Accordingly, if the internal criteria are met, s 9(2) acts as a complete defence against an unfair discrimination claim.[479]

In affirming that affirmative action measures are subject to judicial review but distancing itself from the strict scrutiny approach taken by the US Supreme Court and the s 9(3) *Harksen* analysis, the conceptual framework in *Van Heerden* sought to strike an appropriate balance between the need to protect the rights in the Constitution, affirming the importance of affirmative action measures and, as I discussed earlier, the difficulties which arise in crafting affirmative action.

Unfortunately, the different legs of the test are vague. This has led to disagreement in the commentary. According to Pretorius, the *Van Heerden* test merely set a rationality standard.[480] Others have argued that the *Van Heerden* test can, based on how it was applied in *Van Heerden,* and should, in line with the commitment to substantive equality, be read as encompassing a deferent approach to proportionality.[481] As will become clear in the section that follows, I agree with the latter – the *Van Heerden* test should be read as setting a deferent standard of proportionality.

3. A Transformative Approach to *Van Heerden*

In this section of the chapter, I advance the best approach to the *Van Heerden* test. I argue that the best reading of the test is that it is a species of proportionality suited to the context of affirmative action. This reading is based on how Moseneke J went about applying the test in the case, as well as seeking to optimise the commitment to substantive equality, a

---

[479] Albertyn and Goldblatt (n 209) ch 35.4(a)(ii); Pierre De Vos and Warren Freedman (eds), *South African Constitutional Law in Context* (OUP 2014) 434.

[480] Pretorius, 'A Model for South African Affirmative Action' (n 17).

[481] Kohn and Cachalia (n 20) 161 (calling it 'proportionality simpliciter'); McConnachie (n 17); Albertyn, 'Adjudicating AA' (n 16); De Vos (n 60).

purposive approach to separation of powers, as well as the commitment to a culture of justification discussed earlier in this chapter. To make this argument, the section will start by justifying the appropriateness and basis of the shift from the *Harksen* test, a standard applicable to unfair discrimination claims. The section will also show why rationality is too low a standard and argue against the assertion that the *Van Heerden* test set a rationality standard.[482]

3.1. Not so high as *Harksen* or Strict Scrutiny

As noted earlier, a point of departure in the judicial review of affirmative action is a measure of deference. This point was made clear in *Van Heerden,* Moseneke J holding that the courts should not 'second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.[483] The exercise of deference in affirmative action cases aligns with a transformative approach to affirmative action because it requires the courts to err on the side of preserving affirmative action measures. This commitment explains the shift from *Harksen*.

The *Harksen* test is a two-stage evaluation of unfair discrimination.[484] In the first stage, the court must determine if a differentiation amounts to discrimination.[485] Having established that a measure is discriminatory, the second leg of the inquiry requires the court to determine whether the discrimination is unfair.[486] Discrimination on a specified ground in s 9(3) is presumed to be unfair under s 9(5). If it is not on a specified ground, the complainant

---

[482] Pretorius, 'Accountability' (n 60); 'Fairness in Transformation' (n 17); 'A Model for South African Affirmative Action' (n 17).

[483] *Van Heerden* (n 1) [33].

[484] ibid.

[485] *Harksen* (n 261) [45].

[486] ibid [51].

bears the onus to prove the unfairness of the discrimination. This is a value judgement which focusses on the impact of the discrimination on the complainant and his or her group, in particular, their right to dignity.[487] As discussed in Chapter Three, the *Harksen* test is too high a threshold to allow for the requisite deference in affirmative action cases. In addition, its focus on dignity harm, as well as its centring of the impact that the measure has on the complainant, would tilt the scale in the opposite direction of what is appropriate in the affirmative action context.

However, there is an overlap between the *Harksen* test and measures which could fall within s 9(2) of the Constitution. In the analysis of the impact that a measure has on the complainant in s 9(3) claims, a range of factors are taken into account, including the nature of the provision or power and the purpose sought to be achieved by it. That a measure serves the purposes of furthering the achievement of equality has 'a significant bearing on the question of whether complainants have, in fact suffered the impairment in question'.[488] Thus, affirmative action measures can pass the *Harksen* test. This has led Pretorius to argue that the *Harksen* test should apply to s 9(2) measures.[489]

Criticising the decision in *Van Heerden*, Pretorius argues that the *Van Heerden* test, in excluding the inquiry applicable to unfair discrimination claims under *Harksen,* is too deferent and has the potential 'to harm core constitutional functions and values'. In principle, he argues that the separate test 'could significantly undermine the ability of the Constitution to function as an instrument for the integration and accommodation of competing rights and interests within the context of s 9(2) disputes'.[490] Moreover, he argues that the standard

---

[487] ibid; *Hugo* (n 288) [41]-[43]; *National Coalition* (n 199) [19].

[488] *Harksen* (n 261) [51].

[489] Pretorius, 'Fairness in Transformation' (n 17) 539.

[490] ibid 537. See also, Pretorius, 'A Model for South African Affirmative Action' (n 17).

of review is contrary to the commitment to a culture of justification and public accountability.[491]

Pretorius' argument is based on a narrow reading of the *Van Heerden* case. Moseneke J's majority judgment in *Van Heerden* gave three strong, value-based reasons to reject the application of the *Harksen* test, reasons that align with the commitment to substantive equality, a purposive separation of powers and the commitment to a culture of justification. First, he held that subjecting affirmative action measures to the s 9(3) inquiry would mean that the provisions in the equality right are internally inconsistent or that s 9(2) was 'a mere interpretative aid or even surplusage'.[492] As Mokgoro J wrote in support, such an approach would mean that:

> The whole structure of our equality clause and the important aim of substantive equality would be undermined by an approach which requires the state to show that measures which aim at advancing the substantive notion of equality and fostering a society which no longer resembles that of the South Africa of old are fair. It is an invariable consequence of enacting measures that advance certain groups that other groups will be disadvantaged in that regard, albeit that this would not be the intention of such measures.[493]

The quote above encapsulates the need for more deference than in the context of s 9(3) unfair discrimination cases – a deference rooted in the acknowledgement of the important purpose served by s 9(2) measures. It also accepts that measures which seek to undo decades of privilege may cause harm to other groups, a cost that cannot render a measure unconstitutional unless it constitutes 'an abuse of power' or if it imposes a 'substantial and undue harm' on those adversely affected.[494] Thus, as Sachs J held in his concurring opinion, in the context of South Africa's 'specific historical and constitutional context' the reviewing court must harmonise the 'fairness inherent in remedial measures with the fairness expressly

---

[491] Pretorius, 'Accountability' (n 60).

[492] *Van Heerden* (n 1) [33].

[493] ibid [77].

[494] ibid [44].

required of the state when it adopts measures that discriminate between different sections of the population'.[495]

The second reason for rejecting the *Harksen* approach has to do with the presumption of unfairness. The presumption of unfairness in s 9(5) of the equality right would catch most affirmative action measures as they are likely to be based on a listed ground. In this regard, Moseneke J argued that:

> I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.[496]

The quote above encapsulates two basis for the inappropriateness of the presumption. First, as McConachie has argued, it creates the 'expressive harm' that affirmative action measures are unfair.[497] The expressive harm would come from placing the interests of the complainants in affirmative action cases at the core of the analysis and its important purpose secondary, 'suggesting that the benefits of an affirmative action measure for historically disadvantaged groups are only of secondary concern'.[498] In *Kapp*, the Canadian Supreme Court noted a similar problem with treating affirmative action measures under s 15(2) as a form of discrimination under s 15(1) of the Canadian Charter, noting the 'symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1)'.[499] Second, the quote captures a respect for separation of powers in an endeavour to

---

[495] *Van Heerden* (n 1) [136]. See also, Albertyn and Goldblatt (n 209) ch 35.4(e).

[496] *Van Heerden* (n 1) [33].

[497] McConnachie, 'Intensity of Review' (n 17) 173.

[498] ibid 172.

[499] *Kapp* (n 39) [40].

preserve measures which seek to achieve the goals of substantive equality – a purposive approach to separation of powers. This is perhaps in light of the recognition that the presumption of unfairness can be difficult to rebut, especially when the impact that s 9(2) measures have is not easy to pin down.[500]

The third reason for rejecting the *Harksen* test is related to the different focus envisaged in the review of s 9(2) measures. Mokgoro J made it clear that the *Harksen* test's centring of dignity was not appropriate for affirmative action measures as it would focus unduly on the impact the measure had on the complainant.[501] For Mokgoro J, s 9(2) was 'forward looking' and required the review of these measures to be looked at from the perspective of the purpose of promoting the achievement of equality and 'on the group advanced and the mechanism used to advance it'.[502] In contrast, s 9(3) focussed on the complainant and the impact of the measure on her and her group.[503]

Applying the *Harksen* test to s 9(2) measures would create a substantive barrier for these measures to pass constitutional muster. While it is not the same as the *Harksen* test, the experiences with strict scrutiny in the US serves as an example of the dangers of too high a standard for affirmative action. The strict scrutiny analysis requires that a race-based affirmative action measure must *serve a* compelling state interest and be narrowly tailored

---

[500] *Van Heerden* (n 1) [41].

[501] *Van Heerden* (n 1) [80].

[502] ibid [78].

[503] ibid [79].

towards achieving that interest.[504] Measures taken by universities,[505] ordered by courts,[506] designed by local governments,[507] have failed this high standard of review.

There are several ways in which the US Supreme Court's strict scrutiny standard has created a substantial barrier for race-based affirmative action. The first is in the limited interests considered to be compelling. In the landmark *Bakke* case, the university's medical school used race as one of the criteria in its admissions process to secure 16 of its 100 places for minority students. To defend against a claim that the admissions policy violated the Equal Protection clause in the Fourteenth Amendment,[508] the university advanced four possible 'compelling interests' for the admissions policy - increasing the representation of 'disfavoured minorities' in medical schools and the medical profession; redressing the effects of societal discrimination; increasing the number of doctors who would practise in underserved minority communities; and 'obtaining the educational benefits that flow from an ethnically diverse student body'.[509] Powell J rejected the first three bases. Currently, the only compelling interests are the educational benefits of diversity in higher education, and redressing proven past discrimination.

Second, the strict scrutiny test is focussed on the impact that the measure will have on the excluded groups rather than the intended beneficiary classes. For example, to ensure the protection of non-beneficiaries rights, Powell J defined the interest of diversity in higher education in a narrow and individualist manner. According to Powell J, race or ethnic

---

[504] *Bakke* (n 438); *Adarand* (n 438).

[505] *Bakke* (n 438); *Gratz* (n 438).

[506] *Sheet Metal Workers v EEOC* 478 US 42 (1986).

[507] *Parents Involved in Community Schools v Seattle School* 551 US 701 (2007).

[508] *Bakke* (n 438) 270.

[509] ibid 306.

diversity had to be 'only one element in a range of factors' to pass constitutional muster.[510] Moreover, he held that for a measure to be narrowly tailored, it must not amount to a quota, requiring affirmative action measures to be flexible and focus on the individual attributes of each person.[511] This requirement has meant that university admissions use of race or other ethnic criteria can only be used as a 'plus' to other merit criteria to ensure 'flexibility' and that every applicant is treated as an 'individual in the admissions process'.[512]

Third, the strict scrutiny approach includes a strict necessity requirement. While the US Supreme Court has held that it will exercise deference in relation to diversity being a compelling state interest in higher education admissions,[513] it has also held that 'no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals'.[514] The university has the burden to show that "'race-neutral alternatives" that are both "available" and "workable" "do not suffice.'"[515] In light of the difficulty in predicting the outcomes of affirmative action measures, the strict approach to the necessity requirement is a substantial barrier in the design of these measures.

The US Supreme Court's approach is an example of how judicial intervention can substantively limit the use of affirmative action to redress inequality. As Siegal has argued, the US Supreme Court has constructed a Fourteenth Amendment jurisprudence which is more sympathetic to the claims of majorities adversely affected by affirmative action measures as opposed to the interests of historically disadvantaged racial minorities.[516] In *Van*

---

[510] ibid 314.

[511] ibid 317.

[512] ibid 318–319; *Grutter* (n 438) 334.

[513] *Grutter* (n 438) 328; *Fisher University of Texas at Austin* (2013) 133 S Ct 2411 2419.

[514] *Fisher (2013)* (n 513) 2420.

[515] *Fisher (2013)* (n 513).

[516] Reva B Siegal, 'Equality Divided' [2013] Harv. L. Rev. 1.

Heerden, the Constitutional Court rightly set a lower threshold than this. However, as I will show below, the standard is not so low as rationality review.

3.2. Not so low as rationality

Rationality review requires the courts to consider whether there is a rational link between the purpose sought to be achieved (the ends) and the measure or tool used to achieve it (the means). As discussed in Chapter Three, this threshold is applicable under s 9(1) of the Constitution,[517] and is the standard applied in the judicial review of all executive power.[518] Rationality review is too deferent for affirmative action measures – it would not enable an inquiry into the impact that a measure has on those affected and the balancing of the multiple, complex and interconnected rights and values in affirmative action cases. The Canadian experience serves as an example of the limitations of such a low threshold in the affirmative action context.

In *Kapp*, the Canadian Supreme Court held that affirmative action measures under s 15(2) of the Canadian Charter were insulated from the unfair discrimination proportionality analysis applicable to s 15(1) discrimination claims. This approach resembles that taken in *Van Heerden*, insulating s 9(2) measures from the s 9(3) unfair discrimination analysis. According to the court in *Kapp,* all that needs to be shown is that the measure serves an ameliorative or remedial purpose and that it targets a disadvantaged group identified by the enumerated or analogous grounds in s 15(1) of the Canadian Charter, a focus on purpose rather than impact.[519] This deferent approach is criticised for the risk that it poses to

---

[517] *Prinsloo* (n 33) [25]–[26].

[518] For an analysis of rationality review of executive power in South Africa see Kohn (n 430); Bishop (n 430); Price (n 430).

[519] *Kapp* (n 39) [41].

protecting the interests of other disadvantaged groups.[520] While the focus on purpose gives a lot of room in the design and implementation of affirmative action, allowing for innovation, flexibility and creativity, failing to consider the impact that the measure has could perpetuate rather than redress disadvantage, especially in cases where the complainant is a person or group that is disadvantaged. One example is the *Cunningham* case.[521]

The claimants in the case were members of the Peavine Métis aboriginal community in Alberta who registered under the Indian Act in order to obtain health benefits. In doing so, they fell afoul of the Métis Settlements Act (MSA). The MSA provided that voluntary registration under the Indian Act precluded membership in a Métis settlement, another Aboriginal community recognised under the Canadian Charter.[522] The claimants argued that the measure infringed their equality rights under s 15(1) of the Charter. Defending the MSA, it was argued that the legislation was an ameliorative measure under s 15(2), one designed to enhance and preserve the identity, culture and self-governance of a constitutionally recognized group.[523] Rather than inquire into the impact of excluding a historically disadvantaged group, Métis peoples, from benefiting from recognition under the MSA, the Canadian Supreme Court held that:

> Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization.[524]

---

[520] See Jenna McGill, 'Section 15(2), Ameliorative Programs and Proportionality Review' [2013] The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 521; Jonnette Watson Hamilton and Jennifer Koshan, 'Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp' [2009] Alta. L. Rev. 927; Pretorius, 'A Model for South African Affirmative Action' (n 17).

[521] *Cunningham* (n 39).

[522] ibid [22].

[523] ibid [3].

[524] ibid [53].

While it is true that the very nature of affirmative action requires the advancement of one group over another, it does not follow that the courts should not inquire into the reasons underlying why one group is excluded over another, especially when the excluded group is itself disadvantaged. In failing to distinguish between the position of the claimants and the nature of the claim in *Kapp* from the claim in this case, the court exposed a flaw in the level of deference applied in *Kapp* and its transferability to different contexts while pursuing the goal of substantive equality. In *Kapp*, the claimants were a relatively privileged class of non-aboriginal commercial fishers, in this case, a disadvantaged group is excluded from benefiting from a measure that they would otherwise benefit from. A substantive approach to equality would call for less deference in the latter case, in particular, the impact of the measure on the excluded group should be taken into account.

As noted above, Pretorius, drawing from the similarities between the *Kapp* analysis and the *Van Heerden* test, has read the latter as encompassing mere rationality. Pretorius' critique is a too narrow focus on the second leg of the *Van Heerden* test and its similarities with the approach in Canada.[525] Pretorius also fails to engage with how Moseneke J went about applying the test in *Van Heerden* - an approach which included an analysis of the policy as a whole and the impact it would have on the excluded group, balancing the importance of the measure and its impact. For Pretorius, that Moseneke J undertook an analysis of the impact of the measure and its purpose is a 'contradiction' rather than an indication of a more than just rationality assessment.[526] As Albertyn argues, this is an 'impoverished interpretation' of *Van Heerden*.[527]

---

[525] See Pretorius, 'A Model for South African Affirmative Action' (n 17). Here Pretorius compares the approach in *Van Heerden* (n 2) with the approach in the *Kapp* (n 39). While he notes that the third leg of the test could bring in a 'backdoor' analysis of impact 'a watered down fairness' analysis, he insists that this is not sufficient.

[526] Pretorius, 'A Model for South African Affirmative Action' (n 17) 418–419.

[527] Albertyn, 'Adjudicating AA' (n 16) 729.

Contrary to the argument made by Pretorius, the *Van Heerden* test requires the courts to enquire into the reasons underlying the s 9(2) measure and its impact on the beneficiaries and those adversely affected thereby. In *Van Heerden* for example, Moseneke J held that the scheme had to be reviewed as a whole, looking at the 'history of transition from the old to the new 1994 Parliament; the duration, nature and purpose of the scheme; the position of the complainant and the impact of the disfavour on the respondent and his class'.[528] The rigour with which Moseneke J conducted his analysis in *Van Heerden* is similar to that by both Mokgoro and Ngcobo JJ whose analysis was under the s 9(3) unfair discrimination test. The primary reason that the measure passed in the different judgements was the relative disadvantage of the beneficiary class when compared to the position of the excluded group. Moseneke J found that the complainants were not a vulnerable or marginalised class, they would continue to be more privileged than the beneficiary class in the case.[529] Similarly, Mokgoro J found that because the financial position of the claimant's group was still better off than new Parliamentarians, the measure created no disadvantages and could not be said to amount to unfair discrimination.[530]

In my view, to align with the commitment to transformation and substantive equality, the best reading of the *Van Heerden* test is that it encompasses a proportionality assessment that requires the courts to balance the purpose of an affirmative action measure, the rights and interests of the intended beneficiaries, the complainant and other competing interests. I turn to this below.

---

[528] *Van Heerden* (n 1) [45].

[529] ibid [53]-[54].

[530] ibid [101] (Mokgoro J), [128]-[130] (Ngcobo J).

3.3. *Van Heerden* as a species of proportionality

Thus far in the chapter, I have shown why the appropriate standard of review is one that while relatively more deferent than the standard applicable to unfair discrimination claims, is not so deferent as to abdicate the courts responsibility to pursue the goals of transformation and substantive equality. In this regard, I agree with Albertyn,[531] McConachie,[532] as well as Kohn and Cachalia[533] that this standard is a form of proportionality. Proportionality analysis allows for the contextual inquiry necessary in affirmative action cases. The inquiry into the purpose as well as the impact that a measure has on those affected, both beneficiaries and non-beneficiaries will enable the courts to give voice to the intended beneficiaries of affirmative action while not losing sight of the rights of those adversely affected by these measures. Contributing to the scholarship on proportionality and affirmative action, this section of the chapter maps a unique approach to proportionality - one adapted to fit the context of affirmative action in three important ways.

First, reflecting the difficulties that arise in the design and implementation of affirmative action measures, it does not require proof of necessity.[534] The exclusion of necessity takes the approach to proportionality advanced in this chapter outside the 'traditional' understanding of proportionality, an approach which includes a necessity requirement. It also falls outside the ambit of the Constitution's s 36(1) rights limitations clause, a proportionality standard that, while distinct from 'traditional' proportionality assessment is, for reasons discussed below, also inappropriate for the judicial review of

---

[531] Albertyn, 'Adjudicating AA' (n 16).

[532] McConnachie, 'Intensity of Review' (n 17).

[533] Kohn and Cachalia (n 20).

[534] This is in contrast with the approach in McConnachie, 'Intensity of Review' (n 17) 189–190.

affirmative action measures. Second, the balancing of competing interests gives more weight to the important purpose of affirmative action and the need to fulfil the rights to equality and dignity of the intended beneficiaries.[535] Third, rather than a focus on dignity harm, the approach incorporates the multi-dimensional conception of substantive equality to guide its proportionality inquiry.[536] In the language of proportionality, the *Van Heerden* test should, to the best extent possible, seek to optimise the goals of redistribution, redressing stigma, prejudice and stereotyping, enable participation, creating conditions for freedom and enabling structural change – on both sides of the scale.

3.3.1. The nature of proportionality analysis

Proportionality 'is a tool of practical reasoning that is applied whenever we deliberate about the correct course of action in the face of competing interests and scarce resources'.[537] In the affirmative action context, proportionality can be used to resolve the tension between the important purpose served by affirmative action and the rights of those adversely affected thereby. In contrast with rationality review, proportionality 'can generate insights into the nature and structure of inequality that might otherwise elude judges' when resolving the conflict that arises in equality cases.[538] While there is no single approach to proportionality analysis, it usually entails four distinct stages.[539] In exploring these different stages, we can

---

[535] Albertyn, 'Adjudicating AA' (n 16) 731.

[536] This is similar to the argument made by Albertyn, 'Adjudicating AA' (n 16) and contrary to, Kohn and Cachalia (n 20) 176, whose approach centres dignity-based harm.

[537] McConnachie, 'Intensity of Review' (n 17) 188.

[538] Jackson, 'Proportionality and Equality' (n 426) 171.

[539] Jackson, 'In an age of Proportionality' (n 427) (A detailed analysis of proportionality in the context of arguing for this standard im the US); Barak (n 425) (A detailed comparative analysis of proportionality); Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' [2007] The University of Toronto Law Journal 383 (An analysis of proportionality in Germany and Canada); Paul Craig, 'Proportionality, Rationality and Review' [2010] NZ Law Review 265 (Proportionality under EU law).

get an insight into whether and the extent to which the *Van Heerden* test encompasses a proportionality standard.

The first stage of the inquiry is an analysis of the proper purpose. This leg examines whether the law or action serves a legitimate purpose (legitimacy or proper purpose).[540] This a value laden component[541] - reflecting that only those purposes which can be justified in a constitutional democracy, a 'free and democratic' society in the language of the Canadian Charter,[542] 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' in the language of the s 36(1) limitations clause in the Constitution. The second leg requires there to be a rational connection between the purpose and the means. This is to determine the suitability of the means to achieve the purpose (suitability).[543] It prohibits measures which are arbitrary and irrational. The question here is whether the means chosen are sufficiently capable of advancing the purpose.[544] Even if rational however, the third leg requires an analysis of whether the measure is the least restrictive means to achieve the legitimate purpose, (necessity).[545] If there are other 'hypothetical alternatives' that would be less harmful to the right while equally advancing the purpose, necessity states that the alternatives should have been taken.[546] The last leg of the proportionality inquiry is an assessment of whether, on balance, the attainment of the

---

[540] For a detailed analysis of this leg see, Barak (n 425) ch 9.

[541] ibid 245.

[542] See, *R v Oakes* [1986] 1 SCR 103 [69]-[70].

[543] Barak (n 425) ch 10.

[544] ibid 305.

[545] ibid 11.

[546] ibid 317.

purpose outweighs the cost - the greater the degree of infringement of a right, the greater the justification that must be given therefore (balancing or proportionality *stricto sensu*).[547]

In South Africa, proportionality is used in the justification phase when a right in the Bill of Rights has been limited. The limitations of rights analysis has two stages – infringement and justification. In the first stage, the court must determine 'whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights'.[548] This leg focusses on the substantive content of the right, it entails 'examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)'.[549] If the measure does not infringe the right, the challenge is dismissed.[550] If it does, the second question is whether this infringement is justifiable – requiring a proportionality assessment under s 36(1) of the Constitution.[551]

Section 36(1) provides that a right in the Bill of Rights may be limited by a law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. To determine this, a range of factors have to be taken into account, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose.

---

[547] ibid 12.

[548] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 [18].

[549] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 [26].

[550] ibid.

[551] *Sandu 1999* (n 548) [18].

In contrast with the sequential four stage proportionality test, the South African courts have opted for a more flexible approach. First, in *Manamela*, the Constitutional Court held that the different factors to be taken into account under s 36(1) where not an exhaustive list, they were factors to be considered 'in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society'.[552] Second, when applying s 36(1), the different legs of the proportionality inquiry are not treated as separate pre-conditions, instead the court has to 'arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'.[553] Third, while the Interim Constitution's limitations clause, s 33(1), included a 'necessity' requirement, this was subsequently excluded.[554]

Similar to the Constitution's s 36(1) limitation clause, s 33(1) of the Interim Constitution stated that the rights in the Bill of Rights could be limited by a law of general application, provided that such limitation was reasonable and justifiable in an open and democratic society based on freedom and equality.[555] However, it also required that such limitations could not negate the essential content of the right[556] and, in relation to some rights in the Bill of Rights, s 33(1) required proof of necessity.[557]

In a review of the ss 33(1) and 36(1)'s drafting history, Woolman and Botha note that it remains unclear why reference to 'necessary' was excluded. They suggest that it either

---

[552] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 [32].

[553] ibid.

[554] S Woolman & H Botha, 'Limitations' in S Woolman and others (eds), *Constitutional Law of South Africa* (Second, OS 2012) ch 34.

[555] Interim Constitution s 33(1)(a).

[556] ibid s 33(1)(b).

[557] ibid s 33(1)(b)(bb).

signalled the desire to relax the limitation test or the belief that the term was redundant.[558] Nevertheless, the authors note that the prevailing 'less restrictive means' requirement in s 36(1), captures the 'idea that rights should be limited no more than is necessary, and that a limitation will therefore be held to be unjustifiable if it could be achieved by less restrictive means'.[559] Thus, at least in theory, the less restrictive means standard is more deferent than the necessity requirement described above. Further, because the s 36(1) limitations analysis requires a 'global balancing' of the different factors, the less restrictive means test is just one of the different considerations taken into account. Thus, that there is less restrictive means to achieve a purpose does not necessarily mean that the means taken will be found to be disproportionate.[560]

In the equality context, the proportionality analysis plays a role under the s 9(3) *Harksen* test. A measure that unfairly discriminates against persons, failing the two stages in *Harksen,* can in theory be saved as a justifiable form of unfair discrimination.[561] However, the Constitutional Court has never passed an unfairly discriminatory measure under s 36(1) of the Constitution. In the s 9(2) context, 'proportionality' was expressly mentioned in Sachs J's concurring opinion in *Van Heerden.* Sachs J held that measures which seek to 'destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain' are not a form of unfair discrimination.[562] Similarly, he expressed the need for a measure of deference in affirmative action cases, noting that 'Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the

[558] ibid 12.

[559] ibid 87.

[560] ibid 91.

[561] *Harksen* (n 261) [52].

[562] *Van Heerden* (n 1) [152].

measure could have been proceeded with in a better or less onerous way'.[563] For Sachs J, what is prohibited are those measures which are 'manifestly overbalanced' and 'disproportionate'.[564] This arguably gestures towards a proportionality analysis that, as Albertyn has argued, is 'heavily weighted in favour of opening opportunities for the disadvantaged'.[565]

As will be discussed later in the chapter, in *Barnard,* Van der Westhuizen J's concurring opinion drew from Sachs J and suggested a proportionality assessment to the review of the *implementation* of affirmative action measures under the EEA. Van der Westhuizen J's approach was derived from s 36(1) of the Constitution.[566] The problem with applying the s 36(1) limitations clause to affirmative action is that in some cases we will not be dealing with a law of general application, but a decision made pursuant thereto.[567] In such cases, s 36(1) would not apply – leaving a gap in the law. As discussed in the section that follows, even if a case was dealing with a law of general application, if applied strictly, the 'less restrictive means' requirement in s 36(1) could place too high a burden on the State - going against the need for deference in affirmative action cases. Further, the s 36(1) analysis, broad as it is, does not sufficiently centre the importance of affirmative action, leaving room that this would be given the same weight as the other factors taken into account in the analysis.

---

[563] ibid.

[564] ibid.

[565] ibid.

[566] *Barnard CC* (n 13) [162].

[567] ibid [162].

3.3.2. Adopting proportionality to the affirmative action context

Fortunately, proportionality assessment need not adhere to a formulaic inquiry. It is a 'legal construction,' a 'methodological tool'[568] that can be altered to fit the needs of a specific case. As Barak notes, some jurisdictions use a 'softer approach to proportionality', requiring a focus on 'proper purpose, rational connection, and a proper relation between the fulfilment of the purpose and the damage to the constitutional right', as opposed to the requirement of strict necessity and causation.[569] Based on the analysis of *Van Heerden*, this softer approach is what Moseneke J envisaged. In the sections below, I overlay the *Van Heerden* test onto traditional proportionality analysis and illustrate how the *Van Heerden* test should be understood. As will be apparent, the different legs are interrelated. In addition, as discussed above, the *Van Heerden* test excludes necessity.

3.3.2.1. Legitimate Purpose

The first and second legs of the *Van Heerden* test encompass the legitimate purpose and rationality requirement. The first requirement is that the measure must target a disadvantaged group.[570] This requires 'a comparison between affected classes, the beneficiary class and the excluded class.[571] In Chapter Six, I discuss the classification of beneficiaries of affirmative action under this leg. In particular, I will consider whether Moseneke J's argument that not all beneficiaries need to belong to disadvantaged groups. According to Moseneke J, a measure can pass this threshold if an 'overwhelming majority' of the beneficiary class is disadvantaged. Thus, in *Van Heerden*, that there were white members of Parliament, persons who 'were not unfairly discriminated against under the apartheid regime, but who benefited

---

[568] Barak (n 425) 131.

[569] ibid 132.

[570] *Van Heerden* (n 1) [38].

[571] ibid [39].

from the differential pension contribution scheme' did not affect the validity of the impugned pensions scheme.[572] For now, it suffices to say that in the identification of the beneficiary group, this leg of the inquiry is linked to the purpose of the affirmative action measure.

3.3.2.2. Rationality

The second leg of the *Van Heerden* test requires that the measure must be designed to protect and advance disadvantage groups or persons. According to Moseneke J, this requires proof that the measure is 'reasonably capable of attaining the desired outcome'; they must not be 'arbitrary, capricious or display naked preference'.[573] The requirement that the measure must be designed to advance and protect a disadvantaged group or persons shows that there must be proper purpose (advancing and protecting disadvantaged groups) and there must be a rational link between the means, the impugned affirmative action measure, and the purpose.[574]

That this leg of the inquiry requires a rationality assessment can be seen in Moseneke J's assessment in *Van Heerden*. In applying this test, Moseneke J held that the evidence before the Court was proof of:

> [A] clear *connection between the membership differentiation the scheme makes and the relative need of each class for increased pension benefits*…It reflects a *clear and rational consideration* of the need of the members of the Fund and serves the purpose of advancing persons disadvantaged by unfair discrimination.[575]

From the quote above, there are two foundational requirements implicit in this leg of the inquiry. First, the purposes pursued by an affirmative action measure must be genuine, serving the purpose in s 9(2) of the Constitution. As Sachs J notes in his concurring opinion,

---

[572] ibid [40].

[573] ibid [41].

[574] Kohn and Cachalia (n 20) 165; De Vos (n 60) 89.

[575] *Van Heerden* (n 1) [52] (my emphasis).

'a measure taken for improper or corrupt motives…even if done under the guise of advancing the disadvantaged' would fail under both ss 9(2) and 9(3).[576] Second, there must be a measure or policy in place from which the design can be discerned. Affirmative action decisions cannot be 'haphazard', 'random' or 'ad hoc'.[577] In *Gordon,* the Supreme Court of Appeal held that, in the absence of an actual plan or policy, a decision to appoint a person from a disadvantaged group over another candidate was a form of unfair discrimination and could not be defended as an affirmative action measure.[578]

The requirement of a link between the means and ends can also be seen in the *Fundza Lushaka* case. The policy in that case gave bursaries to students from rural areas and who were interested in teaching in an African language. The evidence given in support of the policy as a s 9(2) measure was that it was designed to increase the number of teachers who could offer instruction in an African language for the benefit of foundation phase students. The question which arose was whether the scheme could be said to be designed to advance and protect the recipients of the bursary.[579] Makgoka J held that, 'Although one of the outcomes of the selection criteria may well be the upliftment of rural communities who speak African languages the selection criteria are not designed to achieve this purpose'.[580] This was because, taking a formal approach to who the 'beneficiary class' was, the court held that it was the bursary recipients– not the foundation phase students. Thus, there was a mismatch between the purpose of the policy and its beneficiary class. This approach seems rather strict

---

[576] ibid [149]. See also, *Kapp* (n 39) [54] - the Canadian Supreme Court similarly held that a law that has 'no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments…are not permitted to protect discriminatory programs on colourable pretexts'.

[577] *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA) [24].

[578] ibid.

[579] Albertyn, 'Getting It Right' (n 60) 410.

[580] *Fundza Lushaka* (n 265) [42].

when considering *Van Heerden's* overall tilt towards preserving affirmative action measures. A better approach would be one like the approach taken by the Canadian Supreme Court. In *Kapp*, the court held that an affirmative action measure need not serve a single purpose, 'It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme'.[581]

Affirmative action measures can and will often be a part of or sit alongside complex schemes that seek to advance the achievement of substantive equality, including through the realisation of the full and equal enjoyment of other socio-economic rights in the Constitution.[582] In *Fundza Lushaka*, this was the right to education. While the claimant argued that the bursary scheme violated her right to further education,[583] Makgoka J dismissed this claim on the basis that the purpose of the scheme was to further the right to basic education, s 29(1)(a)[584] and the right to receive an education in the language of one's choice, s 29(2).[585] Dismissing the argument that the bursary scheme was an unjustified limitation on the right to further education, she held that both of these provisions, ss 29(1)(a) and 29(2) of the Constitution 'require the state to take positive measures to ensure that learners have access

---

[581] *Kapp* (n 39) [51].

[582] See, *Barnard CC* (n 13) [33] Moseneke J held that affirmative action measures are only one aspect of realising the commitment to substantive equality. The realisation of socio-economic rights, is perhaps the most important part of achieving this goal. See also, *Khosa* (n 280) [49] (on the right to social assistance and equality); Liebenberg (n 72) 206–214; Albertyn, 'Getting It Right' (n 60) 412; Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 SAJHR 335; Pierre De Vos, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' [2001] SAJHR 258, 265.

[583] Section 29(1) (b) of the South African Constitution provides that everyone has a right to further education 'which the state, through reasonable measures, must make progressively available and accessible.

[584] Section 29(1)(a) of the South African Constitution provides for the right to basic education.

[585] Section 29(2) of the South African Constitution provides that 'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account - (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.'

to sufficient and well-qualified teachers who are able to teach them in their language of choice'.[586] This approach recognises the relationship between s 9(2) and other socio-economic rights. While it was clear that the 'overall goal' of the policy was an increase in the number of teachers so as to advance the right to basic education,[587] it need not have led to the conclusion that the measure was not *designed* to protect and advance the bursary recipients under s 9(2).[588]

The difficulty in *Fundza Lushaka* was that the evidence on paper could not establish that the State had contemplated the benefit to the bursary recipients. The 'common theme' in the evidence examined by Makgoka J pertained to the need to increase the number of teachers who could teach an indigenous language at the foundation phase.[589] Even so, that the measure was designed in a manner that would redistribute resources to this group is implicit in the design of the policy. An approach that centres the interests of the beneficiary classes and the goal of achieving substantive equality would have taken this broader view of 'designed'. This is particularly so if we recognise that affirmative action measures coexist and interact with other provisions in the Constitution, as Makgoka J clearly did.

3.3.2.3. Necessity

The most difficult aspect of reading the *Van Heerden* test as requiring a proportionality assessment is the necessity requirement. In *Van Heerden*, discussing the second leg of the inquiry, Moseneke J rejected the requirement of necessity. This is evident in his statement that:

> Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means

---

[586] *Fundza Lushaka* (n 265)[35].

[587] ibid [44].

[588] ibid [45].

[589] ibid [43].

> should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end.[590]

To the extent that necessity means 'that no other alternative must be available that can equally realise the purpose and be less invasive of the right in question',[591] it is too high a threshold for affirmative action. A strict necessity requirement would allow very few affirmative action measures to pass muster. As judges would be required to consider all possible alternatives to realise the objective and be less restrictive to the rights and interests of those adversely affected by these measures, a strict approach to necessity would go against the need for deference in affirmative action cases. It would in effect turn the courts into back seat drivers, dreaming of all possible alternatives to impugned affirmative action measures.

McConnachie argues that Moseneke J's statement should be read as merely stating that the presence of alternative ways should not be determinative of whether an affirmative action measure is proportionate, it should merely be one of the factors taken into account.[592] McConachie's approach is rooted in the fact that, as discussed above, South Africa takes a distinct, arguably more deferent approach to proportionality and does not include a strict necessity requirement. Instead, it has opted for an inquiry into whether there are less restrictive means to achieve the purpose, an inquiry that is only one of the factors taken into account in the global balancing. Even so, the danger with the 'less restrictive means' requirement is that less restrictive means can often be envisaged, but 'such means may impose significant administrative burdens on the state, have other substantial cost implications, undermine the state's symbolic objectives or reverse a hierarchy of needs

---

[590] *Van Heerden* (n 1) [42].

[591] David Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 43.

[592] McConnachie (n 17) 190.

worked out through the political process'.[593] While the presence of less restrictive means under s 36(1) would not be determinative, in the affirmative action context, the search for less restrictive means could detract from the importance of affirmative action measures and the deference that should be shown in the design, interpretation and implementation of these measures. I thus disagree with McConachie's inclusion of necessity, even as a part of the Court's flexible, global judgement approach to proportionality .

3.3.2.4. Balancing

The last leg of the *Van Heerden* test requires that the measure promote the achievement of equality.[594] It is an examination of 'the effects of the measure in the context of our broader society'.[595] This leg of the inquiry thus fits the proportionality '*stricto sensu*' leg – encompassing an inquiry into the effect or impact that an affirmative action measure has had on those affected.[596] According to Barak, the foundation of the proportionality *stricto sensu* test is the requirement of proper relation between the benefit gained by the limiting law and the harm caused by it. 'The limitation on a constitutional right is not proportional *stricto sensu* if the harm caused to the right by the law exceeds the benefit gained by it'.[597]

While there are different rights and interests which arise in affirmative action cases, the weight placed on these should depend on the context of the case, the determining factors being the importance of the benefits gained as against the harm caused.[598] The social importance of a measure is derived 'from different political and economic ideologies, from

---

[593] Woolman and Botha (n 554) 89.

[594] *Van Heerden* (n 1) [44].

[595] ibid.

[596] Barak (n 425) 342.

[597] ibid 343.

[598] ibid 349.

the unique history of each country, from the structure of the political system, and from different social values'.[599] In the affirmative action context, these measures derive their social importance from the commitment to transformation (Chapter Two), and a commitment to substantive equality (Chapter Three). Thus, the importance of affirmative action to achieve these goals should weigh in favour of preserving these as proportional.

In *Van Heerden*, the balancing of competing interests was relatively easy – the complainant belonged to a class that was more privileged than the majority of the beneficiary class. Thus, using the multiple dimensions – the increase in pension benefits for the beneficiary class redressed maldistribution of resources, which arguably worked to enable participation by creating conditions in which the new parliamentarians could serve and represent historically disadvantaged groups. On the other side, as Moseneke J acknowledged, the majority of the old parliamentarians remained better off.[600] Thus, the purpose served by these measures outweighed the harm to the adversely affected non-beneficiaries.

However, in cases where the complainant also belongs to a disadvantaged group, the balancing may require more weight to be placed on the interests of the adversely affected person or group.[601] For example, in cases where a disadvantaged group is excluded as a beneficiary without adequate reason, or where a group that s 9(2) intends to advance would have been adversely affected by the implementation of the affirmative action measure, without adequate reason for the classification – the inquiry should weigh against the constitutionality of the affirmative action measure or the decisions made pursuant thereto. As will be discussed in Chapter Seven, the impugned affirmative action measure in *SARIPA*

---

[599] ibid.

[600] *Van Heerden* (n 1) [43].

[601] Albertyn, 'Adjudicating AA' (n 16) 730.

rightly failed this leg of the test. The impugned policy in that case, without adequate reason, excluded a similarly disadvantage group from the beneficiary class.[602]

Aligning with the South African courts overall approach to proportionality, this test need not be applied as a sequential checklist – instead, the court should consider all the different legs of the inquiry and reach an overall judgement of proportionality. While some have argued that the sequential structure of proportionality provides clarity in what is otherwise an abstract process,[603] the global approach will allow the courts to have more leeway in giving weight to the importance of the purpose served by affirmative action and incorporating the different dimensions of substantive equality. At the core of the courts analysis should be an understanding of its role, within the separation of powers, as seeking to ensure that measures which genuinely seek to and are capable of achieving the goals of substantive equality and transformation are not thwarted.

Further, rather than a focus on dignity, as has been the case in the court's unfair discrimination analysis so far, the court should apply the different dimensions of substantive equality. As discussed in Chapter Three, a too narrow focus on dignity in the affirmative action context could obscure other important values.[604] Later in the chapter, using the examples of the EEA and the Equality Act cases, I will illustrate how this approach could work in practice. For now, it suffices to say that the mutually reinforcing dimensions should be used as a framework to ensure that the multiple forms of disadvantage are being taken into account in the design and implementation of affirmative action measures. Accordingly, the courts can inquire into whether an affirmative action measure advances a disadvantaged group in relation to the redistribution of resources, as well as whether it alleviates or

---

[602] *SARIPA CC* (n 13) [42].

[603] Barak (n 425) 132.

[604] Albertyn, 'Adjudicating AA' (n 16) 725–726.

entrenches stigma and prejudice, whether it allows for participation, whether it enhances the freedom of the beneficiary classes in the sense that they are able to exercise valuable options; and whether it has the potential to create real structural change.[605]

Thus far, I have argued that the best reading of the *Van Heerden* test is as a proportionality standard suited to the context of affirmative action. This is for affirmative action measures under s 9(2) of the Constitution. A question that follows is whether and the extent to which this approach should apply to the judicial review of affirmative action under the EEA and Equality Act. I turn to this in the sections below.

4. The Approach Under the EEA and Equality Act

This section of the chapter explores the relationship between the equality provisions in the EEA, Equality Act, s 9 of the Constitution and the approach taken in *Van Heerden*. As I discussed in Chapter Three, s 6(2)(a) of the EEA expressly provides that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the EEA, these purposes include taking affirmative action to achieve equitable representation of the designated groups in the workplace.[606] Similarly, s 14(1) of the Equality Act expressly provides that 'It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons'. The question which arises is whether affirmative action measures under the EEA and the Equality Act are insulated from the unfair discrimination analysis – as is the case for s 9(2) affirmative action measures.

Answering the question above is important because the unfair discrimination analysis under these statutes is similar to the *Harksen* test. Section 11 of the EEA provides that if

---

[605] See Fredman, 'Reimagining Power Relations' (n 16); Albertyn, 'Contested Equality' (n 16).

[606] EEA s 2(b).

discrimination is on one of the listed grounds in s 6(1) of the EEA, the onus is on the employer to prove, on a balance of probabilities, that the discrimination did not take place as alleged; or is rational and not unfair or is otherwise justifiable. If the discrimination is not on a ground listed in s 6(1), the onus is on the complainant. While some commentators have argued that the analysis of fairness under ss 6(1) and 11 of the EEA is distinct from the s 9(3) fairness inquiry,[607] in practice, the courts have applied a similar approach to ss 6(1) and 11 of the EEA.[608]

Similarly, the standard of review for unfair discrimination cases under the Equality Act is derived from the *Harksen* test. Section 13 of the Equality Act provides that once a complainant has made out a *prima facie* case of discrimination, the onus is on the respondent to prove either that the discrimination did not take place or that it was not on one of the prohibited grounds.[609] If the discrimination took place on one of the prohibited grounds, it is presumed to be unfair.[610] Further, s 14 provides for criteria that should be taken into account in determining whether discrimination under the Equality Act is unfair.[611] These criteria include and expand on the factors taken into account under the *Harksen* test.[612]

Taking the *Harksen*-like approach under the Equality Statutes would create a hierarchy in which affirmative action measures under the statutes are subject to a higher level of scrutiny than those under s 9(2) of the Constitution. This approach would be problematic

---

[607] Darcy Du Toit, 'The Prohibition of Unfair Discrimination:Applying s 3(d) of the Employment Equity Act 55 of 1998' in Ockert Dupper and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009) 150–152.

[608] Du Toit (n 605); *Barnard SCA* (n 44) [55].

[609] Equality Act s 13(1).

[610] ibid 13(2).

[611] ibid 14(2).

[612] See *Harksen* (n 261) [51].

because the Equality Statutes were enacted to give effect to the s 9 equality right,[613] and must be interpreted in light of the Constitution.[614] Accordingly, the *same* or at least a *similar* standard of judicial review to measures under s 9(2) of the Constitution should apply to the Equality Statutes. Unfortunately, following *Van Heerden,* the lower courts have subjected affirmative action measures under the EEA to the stricter ss 6(1) and 11 analysis.[615] Under the Equality Act, the Equality Court's decision in *Du Preez* suggests a similar approach - applying the unfair discrimination analysis to affirmative action.[616]

Overall, the tensions which play out in the context of the s 9 right to equality in the Constitution are present in the statutes. In the next section of the chapter, I critically explore the approach taken by the courts in seeking to find a resolution under the statutes – starting with the Court's approach in *Barnard*. The analysis reveals two substantive problems with the courts' jurisprudence. First, the courts have not been able to articulate a common approach to the judicial review of affirmative action under the EEA. Second, the approaches the courts have applied fall short of the standard set in *Van Heerden* in a manner that would undermine the development of a transformative approach to affirmative action.

4.1. The approach Under the EEA

4.1.1. The *Barnard* Case

The *Barnard* case concerned a challenge by a white woman who had twice applied for a promotion within the SAPS. In both instances, Ms Barnard was not promoted despite being

---

[613] EEA Preamble; Equality Act s 2 and preamble (Objectives).

[614] EEA s 3(1)(a); Equality Act s 3(1)(a).

[615] See *Barnard SCA* (n 44); *Barnard LC* (n 44); Alan Rycroft, 'Transfromative Failure:The Adjudication of Affirmative Action Appointment Disputes' in Dupper Ockert and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009).

[616] See, *Du Preez* (n 22) [26].

the interviewing panel's recommended candidate.[617] In the first interview, the only Black person to make the shortlist, an African man, Captain Shibambu, scored 17.5 per cent less than Ms Barnard.[618] Thus, despite the disproportionate representation of white women for the position for which Ms Barnard applied, and the under-representation of African women and men, the interviewing panel recommended her appointment - taking the view that Captain Shibambu could not be appointed without compromising service delivery.[619] After the second interview, the difference between her score and the next Black candidates, two African males, Captain Mogadima and Captain Ledwaba was 7.33 and 11.33 per cent respectively. The panel recommended that one of the three, with Ms Barnard as first preference, be appointed. While the Divisional Commissioner accepted the interviewing panel's recommendation, the National Commissioner of Police (the Commissioner) declined her appointment as it would not advance representivity. He did not appoint the second or third male candidates either, withdrawing the post for being 'non-critical' to service delivery.[620]

Having failed in the internal grievance procedures and in the Commission for Conciliation Mediation and Arbitration,[621] she brought a claim to the Labour Court. The core of Ms Barnard's argument was that the failure to appoint her was a form of unfair discrimination in terms of s 6(1) of the EEA and that it had an adverse impact on service

---

[617] *Barnard CC* (n 13) [8]-[14].

[618] *Barnard SCA* (n 44) [25]-[26]; *Barnard CC* (n 13)[9].

[619] *Barnard CC* (n 13) [9].

[620] ibid [14]-[15].

[621] ibid [16]-[17].

delivery.[622] The SAPS argued that the decision was not unfair discrimination; it was a valid implementation of an affirmative action measure.[623]

Illustrative of the prevailing lack of clarity and coherence, the three lower court decisions took different approaches to the standard of review. The Labour Court and Supreme Court of Appeal decided the case under the ss 6(1) and 11 unfair discrimination framework in the EEA. This approach brought in some of the hurdles of an unfair discrimination analysis under s 9(3) of the Constitution. First, the courts placed the onus on the SAPS to establish that the discrimination in the case was fair.[624] With this high threshold, it is not surprising that Ms Barnard's claim passed in both courts.

In the Labour Court, Pretorius AJ found that the SAPS had unfairly discriminated against Ms Barnard because it had failed to show that Ms Barnard's rights to equality, dignity, personal work history, and circumstances had been taken into account in the decision not to appoint her.[625] In the Supreme Court of Appeal, Navsa ADP relied on several factors to find that the discrimination was unfair, mostly focussed on Barnard's personal qualities - that Ms Barnard was also a member of a designated group;[626] that the national commissioner had failed to take into account the reasons behind her recommendation (she scored higher than all the other applicants, she had a unique blend of passion and enthusiasm for service delivery; a high level of commitment towards the SAPS, her eagerness towards enhanced

[622] ibid [18].

[623] ibid [20].

[624] *Barnard LC* (n 44) [26]; *Barnard SCA* (n 44) [50].

[625] *Barnard LC* (n 44) [36], [38], [43.5].

[626] *Barnard SCA* (n 44) [59].

service delivery);[627] and the impact that the refusal to appoint her a second time would have.[628]

On the other side of the spectrum is the approach taken by Mlambo J in the Labour Appeal Court. While he did not apply the *Van Heerden* test, in contrast with the approach taken by the Labour Court and Supreme Court of Appeal, Mlambo J located his analysis in the conceptual framework in *Van Heerden* and s 9(2) of the Constitution.[629] He thus began his inquiry from the perspective that the right to equality must be understood within its context, in this case, that s 6(2) of the EEA permits affirmative action measures to promote the achievement of equality.[630] Responding to the centrality of the complainant's rights to equality and dignity in the Labour Court judgement, Mlambo J held that it was incorrect to render the implementation of an affirmative action measure subject to an individual's right to equality and dignity, such an approach would defeat the purpose of affirmative action.[631] Moreover, he argued that such an approach would entrench the status quo and perpetuate the disadvantage of historically disadvantage groups.[632] The shift away from the other courts' fairness assessment allowed Mlambo J to focus on the important purpose served by affirmative action – partially reflecting the approach under s 9(2) of the Constitution.

For Mlambo J, the question which had to be determined was 'whether there is a rational connection between the transformational goal of promoting the achievement of

---

[627] ibid [62].

[628] ibid [77].

[629] *Barnard LAC* (n 44) [1], [2], [26]-[32].

[630] *Barnard LAC* (n 44)[24].

[631] ibid [26].

[632] ibid [30], [38].

equality…and the means used to achieve that goal on the other hand'.[633] This approach is more deferent than the Labour Court and Supreme Court of Appeal's approach. The deference allowed him to reject the argument that the failure to appoint Ms Barnard would have an adverse impact on service delivery. In this regard he held that, 'it was not open to a court to "second guess" a decision that not filling a post will or will not compromise service delivery'.[634] He thus accepted that the overrepresentation of white women at the salary level for which Ms Barnard applied was sufficient reason to refuse her appointment, it did not amount to unfair discrimination.[635]

While Mlambo J's approach is laudable in rooting the inquiry in s 9(2) of the Constitution and has echoes of the findings in *Van Heerden*, it still didn't provide clarity on the relationship between s 9(2), *Van Heerden* and the EEA. Overall, none of the judgments in the lower courts were able to carve a clear and coherent path for the review of affirmative action under the EEA. It was hoped that the Constitutional Court would bring a measure of clarity in this case. Unfortunately, in a 114-page judgment with four different but concurring opinions, the judges failed to articulate a common standard of review which aligned with the approach in *Van Heerden* or at least provides convincing reasons explaining the departure from that approach. Ultimately, what united the judges was the extent of the overrepresentation of white women and the fact that, by the time the case was before the Court, Ms Barnard's career had advanced. The persisting lack of coherence and clarity is evident in the different standards of review; how the judges dealt with the role of dignity and other competing rights and interests; the onus of proof, the requirement of evidence and the

[633] ibid [44].

[634] ibid [46].

[635] ibid [47].

regard given to the Commissioner's expertise in making decisions on appointments and promotions. I explore these in more detail below.

4.1.1.1. Conflicting Standards of Review

In relation to the appropriate standard of review, the judgments range between a relatively deferent rationality analysis; the application of the *Van Heerden* test and proportionality derived from s 36(1) of the Constitution; and a fairness standard derived from the EEA and the constitutional value of fairness. In his majority opinion, Moseneke ACJ affirmed the application of the *Van Heerden* test for the review of the content of affirmative action measures under s 6(2) of the EEA.[636] On this basis, he rejected the Supreme Court of Appeal's application of the s 11/*Harksen* analysis,[637] establishing that affirmative action measures under s 6(2) of the EEA cannot be presumed to be unfair.[638] As is the case under s 9(2) of the Constitution, they had to comply with the *Van Heerden* test.[639] However, he added a second analysis, finding that decisions made pursuant to an otherwise constitutionally compliant affirmative action measure had to be *implemented* lawfully, '…it may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose'.[640]

Moseneke ACJ suggested a different standard for the review of the *implementation* of affirmative action measures. While not setting a definitive standard, he held that the bare minimum requirement is rationality: 'a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate

---

[636] *Van Heerden* (n 1) [36]-[37].

[637] *Barnard SCA* (n 44) [55].

[638] *Barnard CC* (n 13) [51]-[53].

[639] ibid [36]-[37].

[640] ibid [38].

purpose and nothing else'.[641] This finding is confusing as it is not clear why a different standard of review should apply to the implementation of an otherwise lawful affirmative action measure. In particular, as argued earlier in the chapter, mere rationality review is not sufficient to cater for the complex rights and interest that arise in affirmative action cases. These tensions are present when we are dealing with the constitutionality of an affirmative action measure as well as cases where we are grappling with decisions made in the implementation of an affirmative action measure.

In his opinion, Jafta J supported the findings in Moseneke ACJ's majority judgment. In particular, he held that the *Harksen* test was not applicable to the judicial review of affirmative action measures under the EEA because these were sanctioned by s 9(2) of the Constitution and s 6(2)(a) of the EEA expressly provided that affirmative action measures consistent with the purposes of the EEA were not a form of unfair discrimination.[642] How this approach would work in progress was not explored in much detail as both judges dismissed the claim arguing that Ms Barnard had changed her cause of action from an unfair discrimination claim in the lower courts to the review of the Commissioner's decision not to appoint her.[643]

In their Judgement, Cameron et al JJ agreed with the separation between the standard applicable to the review of affirmative action measures and their implementation.[644] Similar to Moseneke ACJ, they did not provide a reason for this bifurcation. However, in contrast with Moseneke ACJ, the judges rejected the rationality standard. Instead, they argued for an

---

[641] ibid [39].

[642] *Barnard CC* (n 13)[208].

[643] ibid 54-60 (Moseneke ACJ), [209]-[213] (Jafta J).

[644] The judges characterise their inquiry as including an analysis of 'the appropriate standard that should apply when a litigant challenges the *implementation* of a constitutionally compliant restitutionary measure in a particular case.' ibid [75].

approach that was less deferential than rationality review, one which allowed for 'heightened scrutiny' - fairness.[645] For Cameron et al JJ, rationality was the bare minimum,[646] but the EEA contemplated something more than rationality – a standard that would enable the reviewing court to properly interrogate whether the decision-maker balanced the interests of the multiple beneficiary groups of affirmative action and their interests against those adversely impacted by the affirmative action measures.[647]

Similar to the Labour Court and Supreme Court of Appeal judgments in this case, the problem with the fairness standard is that it contradicts the approach taken in *Van Heerden* as well as the provision in s 6(2)(a) of the EEA. Aware of the contradiction, Cameron et al. JJ argued that their fairness analysis was not the same as the s 9(3) *Harksen* test, acknowledging that there were 'problems' with an unfair discrimination claim under the Constitution.[648] Instead, the judges held that:

> Assessing the fairness of the *individual implementation* of affirmative action measures is different to deciding whether those measures amount to unfair discrimination. The latter enquiry is at the general level of determining whether the formulation and content of a restitutionary measure are constitutionally compliant. The former enquiry examines whether a specific implementation of a measure that is constitutionally compliant *in its general form* is nevertheless in conflict with the provisions of the Act.[649]

The argument in the quote above does not set out how this standard of fairness is distinct from the *Harksen* analysis or what the difference is between the individual implementation and the design/content of these measures is. Further, the judges failed to reconcile s 6(2)(a) of the EEA with the application of this fairness standard. In fact, while the judges argued that their fairness standard was derived from the provisions in the EEA, they failed to

---

[645] ibid [95]-[98].

[646] ibid [94].

[647] ibid [96].

[648] *Barnard CC* (n 13) [97].

[649] ibid [101] (my emphasis).

mention s 6(2)(a). Ignoring s 6(2)(a) allowed the judges to avoid dealing with the contradiction between their suggested approach and the reasons for rejecting the *Harksen* fairness inquiry in *Van Heerden*.[650]

In contrast with the other judgments, Van der Westhuizen J was the only judge to apply the *Van Heerden* test. He held that the Court had to determine 'whether the policy and its implementation meet the standard set in *Van Heerden* including, whether they promote equality'.[651] However, this did not end there: his approach also required the reviewing court to determine 'whether the implementation impacts on any other constitutional rights, in particular, the right to human dignity'.[652] Van der Westhuizen J rooted his additional inquiry in a proportionality assessment derived from the s 36(1) limitations clause in the Constitution. He thus envisaged a balancing of the competing interests which arise in affirmative action cases, but outside of and in addition to the *Van Heerden* test. As argued earlier in the chapter, the s 36(1) analysis is not appropriate for the review of affirmative action, even the review of the implementation of an otherwise valid affirmative action measure.

4.1.1.2. The role of dignity

Another area of tension is the different approaches to the role that dignity should play in the analysis. As argued earlier in the chapter, an important aspect of the approach in *Van Heerden* is that the review of affirmative action measures under s 9(2) of the Constitution requires a reviewing court to focus on the important purpose of affirmative action.[653] As Sachs J held in that case, 'the balance when determining whether a measure promotes equality is fair will

---

[650] See *Van Heerden* (n 1) [33].

[651] *Barnard CC* (n 13) [133].

[652] ibid.

[653] *Van Heerden* (n 1) [44] (Moseneke J), [78] (Mokgoro J).

be heavily weighted in favour of opening up opportunities for the disadvantaged'.[654] Another important principle is that the reviewing court must consider the impact of these measures on adversely affected persons, dignity is one of the rights taken into account in this regard. However, Cameron et al JJ and Van der Westhuizen J unduly focussed on the individualised, narrow conception of dignity discussed in Chapter Three. For Moseneke ACJ, the impact of the measure was important insofar as it was an indication of a breach of the prohibition against quotas and the creation of absolute barriers to the promotion and appointment of persons under the EEA.

In his majority opinion, Moseneke ACJ held that affirmative action measures should not 'unduly invade the human dignity of those affected by them',[655] a concern he articulated in *Van Heerden* as well.[656] However, dignity did not play an important role in his proposed analysis. While he dismissed the claim, his 'benevolent' analysis of the merits of the case reveal that rather than a focus on the complainant's dignity and personal characteristics, Moseneke ACJ considered the impact of the measure through the lens of the provisions in the EEA – specifically the prohibition of quotas. One of the arguments made on the papers was that the decision not to appoint Ms Barnard was based on impermissible quotas or 'race norming' or 'social engineering'.[657]

As mentioned in Chapter One, EEA prohibits the use of quotas but permits the use of numerical targets.[658] While not definite, Moseneke ACJ's majority held that the difference

---

[654] *Barnard CC* (n 13) [152].

[655] ibid [32].

[656] *Van Heerden* (n 1) [44].

[657] Dirk Groenewald, 'Answering Affidavit, *Barnard CC*' [27].

[658] EEA s 15(3).

between quotas and numerical targets was the flexibility of the latter.[659] For Moseneke ACJ, the EEA required flexibility and inclusiveness in the implementation of affirmative action measures – quotas were 'job reservations' which did not enable this flexibility.[660] In this case, Moseneke ACJ was convinced that the numerical targets were not applied so rigidly to amount to quotas. That there was already an overrepresentation of white women showed that racial targets had not been pursued 'at the expense of other relevant considerations'. If they had, the overrepresentation of white women would not have come about.[661] In addition, that Ms Barnard had subsequently been promoted was an indication that the plan had not been implemented as an absolute bar on her promotion.[662] In Chapter Seven, I will explore the relationship between dignity and the arguments for the impermissibility of quotas. For now, the point is that, rather than a broad inquiry into whether the measure had impaired her dignity *per se*, Moseneke ACJ rooted his impact analysis in the provisions in the EEA. He located the *kinds of impact* that are prohibited in the prohibition of quotas and absolute barriers for promotion and appointments.

In contrast, Cameron et al. JJ's fairness approach focussed on Ms Barnard's dignity. For example, the judges argued that a reviewing court had to find a standard that would help determine whether 'a remedial measure has adequately balanced substantive equality with the dignity of the person negatively affected by the measure'.[663] Similarly, the judges noted that, deference should be given 'where decisions are made in a way that balances the mandate

---

[659] *Barnard CC* (n 13) [42], [54].

[660] ibid.

[661] ibid [67].

[662] ibid [68].

[663] *Barnard CC* (n 13) [94].

to achieve representivity with a full appreciation of the individual'.[664] This approach pits the individual right to dignity of those adversely affected by affirmative action against substantive equality.

Similarly, while Van der Westhuizen J argued for a more collective conception of dignity, this did not come out in his analysis. Ultimately, he applied the narrow individualistic ideal of dignity, summarising the inquiry as whether Ms Barnard was treated 'as a mere means to achieve an end,' whether the decision to refuse to appoint her had reduced her to 'a member of an underclass to the extent that her place in society and in the Constitution is denigrated', and whether the decision constituted 'an impermissible barrier to an individual's ability to "develop [her] humanity [and] 'humanness' to the full extent of its potential"'.[665]

While all the judges affirmed the need to take the impact of the measures on those adversely affected into account, none of the judgments were able to chart an appropriate role for dignity in the inquiry. Cameron et al and Van der Westhuizen JJ veered towards centring an individualistic conception of dignity. In his majority, Moseneke ACJ located the inquiry into the impact of the measure in the provisions in the EEA, this made it so that he could not appreciate the questions related to the intersection between power and privilege related to Ms Barnard's race and gender. Nowhere does Moseneke ACJ consider whether her gender could have made a difference to whether the decision to appoint her was indeed rational and reasonable. Considering the history of the SAPS as a male dominated field and the reality of patriarchal oppression and gender inequality in South Africa – failing to consider the gendered aspects of this case missed an opportunity to acknowledge the complexity of disadvantage. In another context, this failure could lead to an outcome that perpetuates group disadvantage.

---

[664] ibid [118].

[665] ibid [180].

4.1.1.3. Onus of proof and evidentiary burden

Another area where the tension between the different levels of scrutiny can be seen is in the analysis of the evidence and the requirement that the decision maker provide reasons for his decision. This brought about different approaches to the degree of justification and the evidentiary burden required in the review of affirmative action measures under the different standards of review. A key issue in the case was whether sufficient evidence had been given to justify the decision for not appointing Ms Barnard. While none of the judges applied a presumption of unfairness, Cameron et al. JJ placed more stress on the provision of reasons than the approach taken by Moseneke ACJ and Van der Westhuizen J.

In his 'benevolent' assessment of the rationality and reasonableness of the claim, Moseneke ACJ gave us a glimpse of the relative deference of this approach. First, he readily accepted the reasons given for not appointing Ms Barnard - the overrepresentation of white women at the level for which Ms Barnard applied and that the position was not critical for service delivery.[666] In relation to service delivery, he was deferent to the Commissioner's assessment, finding that 'There is no valid cause to reject the National Commissioner's operational assessment that service delivery would not have suffered from not appointing Ms Barnard'.[667] Accordingly, he found that the claim would have failed in any case as the Commissioner had exercised his discretion rationally and reasonably.[668]

While Cameron et al JJ argued that the 'heightened scrutiny' did not require a reviewing court to 'second-guess the reasoned choices of other branches of government',[669] the judges were less deferent to the reasons given by the Commissioner. According to the

---

[666] *Barnard CC* (n 13) [62].

[667] ibid [64].

[668] ibid [70].

[669] ibid [96].

judges, the fairness standard required a decision-maker to have 'carefully evaluated relevant constitutional and statutory imperatives before making a decision that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by section 9(3) of the Constitution'.[670] Similar to the Labour Court and Supreme Court of Appeal decisions which applied the ss 6(1) and 11, *Harksen*-like enquiries, the judges did not accept the reasons given for not appointing Ms Barnard. For Cameron et al JJ, there was a paucity of reasons in the case, making the Commissioner's decision 'opaque' as it was not clear whether all relevant factors had been taken into account in deciding not to appoint Ms Barnard.[671] In particular, the judges held that it was not clear whether the Commissioner considered how Ms Barnard's gender would have enhanced the representation of women in relation to the gender pay gap;[672] and whether and how he balanced the concerns of service delivery and representation.[673] Contrasted with Moseneke ACJ's approach, the fairness inquiry placed higher a burden on the decision maker in this case.

Similar to Moseneke ACJ's majority decision, Van der Westhuizen J exercised some deference in relation to the impact that the measure would have on service delivery. Noting the importance that the achievement of representation did not compromise service delivery, he cautioned that:

> [C]ourts should be wary of making evaluations about service delivery – in the context of affirmative measures – from a distance. Without proper evidence or specialist institutional knowledge, it may be difficult for a court to draw conclusions about the precise impact a policy, an appointment, or even a vacancy will have on service delivery.[674]

---

[670] ibid.

[671] ibid [107].

[672] *Barnard CC* (n 13) [115].

[673] ibid [109], [111].

[674] ibid [189].

In addition, while he stressed the provision of reasons, as Cameron et al. JJ, the threshold for scrutinizing the reasons under Van der Westhuizen J's approach is lower. While they may have been 'formulated more comprehensively, accurately and lucidly', he held that the Commissioner gave Ms Barnard enough information to understand why she was not appointed and exercise her rights accordingly'.[675] Essentially, while the provision of reasons in Cameron et al. JJ's judgment was necessary for evidentiary purposes, to prove whether the implementation was fair, in Van der Westhuizen J's judgment, the provision of reasons was important to ensure that Ms Barnard was aware of her rights.[676] Both these approaches are appropriate – in line with a commitment to a culture of justification, the provision of reasons to explain the basis of decisions and to inform persons of their rights is important. However, it is not clear what more reasons and evidence could have persuaded Cameron et al JJ.

Overall, the *Barnard* case set little precedent for the judicial review of affirmative action under the EEA. A core take away is that the content of affirmative action measures under the EEA can be reviewed in accordance with the *Van Heerden* test. However, Moseneke ACJ introduced a separation between the review of the content of the affirmative action measures and their implementation. This was done without providing reasons for this difference. It is thus not clear how and whether this distinction is workable in practice. This bifurcation could mean that some claimants have less protection based on whether their claim challenges an affirmative action measure itself or its implementation. However, a key failure in the judgments is that no clarity is provided on the relationship between the EEA, s 9(2) and *Van Heerden* in relation to the review of the content and the implementation of affirmative action measures under the EEA.

---

[675] ibid [193].

[676] ibid [193]-[194].

4.1.2. The *Correctional Services* Case

Following the decision in *Barnard*, the Constitutional Court's third affirmative action case was in relation to the Western Cape Department of Correctional Service's (DCS) affirmative action measure under the EEA. The policy comprised of numerical targets that were based on national racial demographics as opposed to both national and regional racial demographics, as required by s 42 of the EEA at the time.[677] The use of national racial demographics in the case ignored the relative difference in the racial demographics in the Western Cape province, specifically for Coloured persons. While making up a small percentage of the national population, Coloured people make up a larger portion of the regional racial demographics in the province. In using the national demographics to set the numerical targets, the benchmark targets for Coloured persons was lower than it would be if regional demographics had been taken into account. Another salient feature of the policy was that while appointments had to be made using the numerical targets, the policy empowered the National Commissioner of Correctional Services (Corrections Commissioner) to deviate from the plan and appoint persons from non-beneficiary groups in the context of scarce skills and where there was no suitably qualified candidate from the beneficiary groups.[678]

Represented by the trade union Solidarity, there were ten claimants in the case – one white man and nine Coloured men and women.[679] They had applied for positions and, save for one person; they were all recommended for appointment by the interviewing panel but

---

[677] *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) [5]. Prior to its amendment, s 42(1)(a) of the EEA provided that in determining compliance with the obligations in the EEA, the extent of the representation of suitable qualified people from the different beneficiary groups in relation to both national and regional demographics must be taken into account. This provision was amended and now provides that this 'may' be taken into account, (Employment Equity Amendment Act 47 of 2013). The case was decided under the old provision as the plan was drafted prior to the amendment.

[678] *Correctional Services CC* (n 677) [7].

[679] ibid [2].

were not appointed. The Coloured men were not appointed because there was an overrepresentation of coloured men at the occupational level for which they applied.[680] The Coloured women were not appointed because of an overrepresentation of women.[681] Solidarity brought a claim on various grounds. First, it argued that the policy breached the provisions in the EEA because it did not use the regional and provincial demographics to set the numerical targets.[682] Second, it argued that the implementation of the plan amounted to unfair discrimination on the grounds of race, sex and/or gender in its individual application to the claimants in this case.[683]

In the Labour Court, Rabkin-Naicker J took an approach which drew from the constitutional standard established in *Van Heerden* and the provisions in the EEA. She relied on the conceptual framework in *Van Heerden* as an interpretive tool to respond to submissions made about the provisions in the EEA. Referring to *Van Heerden*, she held that 'affirmative action measures in conformity with the purposes of the EEA are those that meet the requirements of substantive equality'.[684] However, she concluded that s 42 clearly required that both national and regional demographics be taken into account when setting numerical targets.[685] Based on the failure to comply with s 42, she found that the plan breached the EEA, accordingly, the decision not to appoint the Coloured men and women

---

[680] ibid [6].

[681] ibid.

[682] ibid [18].

[683] ibid.

[684] *Correctional Services LC* (n 236) [29]-[30].

[685] ibid [45].

amounted to unfair discrimination.[686] Rather than grant individual relief, she ordered the DCS to draft a new policy that took regional and national demographics into account.[687]

Solidarity appealed the decision not to grant individual relief and the DCS appealed the decision that the policy violated the EEA.[688] In the Labour Appeal Court, Waglay JP and Davis JA took Rabkin-Naicker's review of the case based on the EEA but through the prism of the Constitutional framework a step further. Relying on Albertyn's analysis of the conceptual framework in *Van Heerden*,[689] the Labour Appeal Court judges approached the case from the prism of s 9(2) and the commitment to substantive equality.[690] Accordingly, they began with an assessment of whether the employment equity plan in this case complied with the conceptual framework in *Van Heerden.*

One of the arguments made by Solidarity was that the numerical targets in the case were impermissible quotas. According to Solidarity, for a deviation to convert impermissible quotas to permissible numerical targets, it had to be 'based on the assessment of the individual condition of an applicant'.[691] Having embedded the analysis of the EEA in the broader constitutional framework in *Van Heerden*, the judges located this as a conflict between an individualistic conception of equality and the commitment to substantive equality.[692] According to the judges, if substantive equality was to be achieved, the court had to determine the correct balance to 'be struck between an individual claiming a post as

---

[686] ibid [46].

[687] ibid [56].

[688] *Solidarity and Others v Department of Correctional Services and Others* [2015] ZALAC 6 [7].

[689] Albertyn, 'Adjudicating AA' (n 16) 730–731; *Correctional Services LAC* (n 688) [24]-[25].

[690] *Correctional Services CC* (n 677) [25]-[26].

[691] *Correctional Services LAC* (n 688)[46].

[692] ibid [48].

opposed to the need to recognize the group as the central concept with which Apartheid worked to undermine the dignity of millions of South Africans which remains central to the journey to be taken to move society away from this sorry past'.[693] Relying on *Van Heerden,* the judges affirmed that in affirmative action cases, there was a shift from a focus on the individual rights and interests of persons or groups adversely affected by affirmative action in the context of the EEA,[694] and thus rejected the argument that the numerical targets were impermissible quotas for failing to take the individual characteristics of candidates into account.

The judges then applied the *Van Heerden* test but suited it to the context of the EEA by using its provisions to inform each leg of the inquiry. In the first leg, they agreed that the policy targeted disadvantaged groups under the EEA. In the second leg of the analysis, the judges relied on s 15 of the EEA which defines affirmative action and used this as a benchmark. The judges held that the second leg of the *Van Heerden* test was an analysis of whether the policy was reasonably capable of ensuring 'that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce',[695] permitting preferential treatment but prohibiting quotas.[696] Based on the finding that the deviations need not relate to an analysis of individual interests and characteristics, the judges held that the plan was reasonably capable of achieving the desired outcome.[697]

---

[693] ibid.

[694] ibid [49]-[50].

[695] EEA s 15(1).

[696] ibid s 15(3).

[697] *Correctional Services LAC* (n 688)[51].

In the last leg of the *Van Heerden* analysis, whether the measure would promote the achievement of equality, the judges held that this required the reviewing court to take the interests of those adversely affected by affirmative action and broader society into account.[698] However, they affirmed the principle in *Van Heerden* that the assessment must be 'heavily weighted in favour of opening up opportunities for the disadvantaged'.[699] In conclusion, the judges held that the policy passed the test under s 9(2) of the Constitution and the provisions in the EEA.[700] In the end however, the policy failed because the DCS had not taken regional demographics into account in setting numerical targets.[701]

On appeal to the Constitutional Court, Zondo J's majority did not follow the track of any of the lower court judgments. Instead, he decided the case within the confines of the EEA, focussing on whether the numerical targets were impermissible quotas under the EEA and the effect of the non-compliance with a provision in the EEA. In relation to whether the numerical targets were impermissible quotas, Zondo J affirmed Moseneke ACJ's obiter remarks in *Barnard* that one of the distinctions between quotas and numerical targets was that quotas were rigid whereas numerical targets were flexible.[702] Thus, to succeed with their argument, Solidarity had to show that the numerical targets were applied rigidly.

Solidarity argued that the plan was rigid for three reasons. First, the only person who could make deviations was the Corrections Commissioner; second, the plan provided sanctions for managers who failed to comply with its provisions; third, deviations were not

---

[698] ibid.

[699] *Van Heerden* (n 1) [152].

[700] *Correctional Services LAC* (n 688) [53].

[701] ibid [63].

[702] *Correctional Services CC* (n 677) [51].

possible on the instance of individual applicants.[703] Rejecting these arguments, Zondo J held that the numerical targets were sufficiently flexible to not constitute quotas.[704] While this finding is the same as that reached by Waglay JP and Davis JA in the Labour Appeal Court, in failing to engage the conceptual framework in *Van Heerden*, his analysis of the nature of quotas did not grapple with the tension between protecting the individual's right to equality and dignity and redressing group based disadvantage. As noted earlier, in Chapter Seven, I return to this question and illustrate why, under a transformative approach to affirmative action, an absolute prohibition of quotas does not fit.

In relation to the non-compliance with s 42 of the EEA, Zondo J held that the DCS's failure to consider the regional demographics invalidated the numerical targets.[705] Because the numerical targets were incorrect, he held that there was no valid basis to refuse the appointment of the Coloured men and women.[706] Accordingly, the DCS could not prove that the discrimination was rational and fair under ss 6(1) and 11 of the EEA, 'Since the Department's understanding that Coloured people and women were overrepresented in the relevant occupational levels had no lawful basis, the Department has failed to show that the discrimination was rational and not unfair or was otherwise justifiable'.[707] Essentially, Zondo J held that the non-compliance with a provision in the EEA in the design of an employment equity plan rendered the plan and decisions made pursuant thereto invalid and constitute unfair discrimination.

---

[703] ibid [52].

[704] ibid [50]-[64].

[705] ibid [74].

[706] *Correctional Services CC* (n 677) [80].

[707] ibid [79]-[82].

As with the decision in *Barnard*, the *Correctional Services* case did not clarify the relationship between the EEA and the constitutional standard. Instead, Zondo J made reference to the constitutional standard but his analysis focussed on the provisions in the EEA. The lower court decisions in this case took a better approach, attempting to bring the constitutional standard and the EEA together. In the approach suggested below, I draw from the lower courts approach as it promises a better foundation for a transformative approach to affirmative action under the EEA. Before this, the section that follows explores the decision in *Du Preez*, a case decided under the Equality Act, and, similar to the cases under the EEA did not provide clarity on the relationship between the *Van Heerden* test and the standard of review of affirmative action under the Equality Act.

4.2. The approach under the Equality Act

As already noted, the Constitutional Court has yet to consider an affirmative action measure under the provisions in the Equality Act. In a 2006 Equality Court decision however, the court took an approach which does not align with s 9(2) of the Constitution and the framework established in *Van Heerden.*[708] In fact, Pretorius AJ referred to s 9(2) of the Constitution, the EEA, and the Constitutional Court's unfair discrimination jurisprudence but made no mention of the *Van Heerden* case – a judgment handed down over a year before the *Du Preez* case was heard.[709]

The case concerned the validity of shortlisting criteria for vacant posts in the Eastern Cape magistrates courts. The minimum qualifications for the two open positions were an LLB degree and at least seven years' work experience in law.[710] The shortlisting criteria

---

[708] The EEA was not applicable because Magistrates officers are not state employees - they are judicial officers independent of the public service.

[709] The *Van Heerden* case was decided on 29 July 2004 and *Du Preez* was heard on December 8, 2005.

[710] *Du Preez* (n 22) [2].

allocated points to applicants for criteria which included relevant work experience, degree qualifications as well as race and gender.[711] These allocations were related to the extent of underrepresentation of each group in the different provinces and districts.[712] The applicant in the case, a white male, was not shortlisted for the position and he brought a claim arguing that the failure to shortlist him unfairly discriminated against him on the grounds of his race and gender.[713] To make his argument, he showed evidence of two Black females with less work experience and educational qualifications than him who had been shortlisted on account of the points scored based on their race and gender.[714]

The State defended the case by arguing that the shortlisting criteria were in accordance with s 174(2) of the Constitution. To ensure that the race and gender composition of the judiciary broadly reflects the population, s 174(2) requires race and gender to be considered when judicial officers are appointed.[715] In setting out the applicable law to the case, the court recognised the relation between s 14(1) of the Equality Act and s 9(2) of the Constitution. Thus, it held that 'The approval of affirmative action measures in the Constitution thus translates into a declarator in the Act to the effect that such measures are not unfair discrimination….this means that s 14(1) must, if possible, be so interpreted as to dovetail with s 9(2)'.[716] Based on this analysis, one would think that the court would follow the approach in *Van Heerden,* insulating affirmative action measures from an unfair discrimination analysis. Unfortunately, the court found that despite s 14(1) of the Equality

---

[711] ibid [5].

[712] ibid [33].

[713] ibid [8].

[714] ibid [7]-[8].

[715] *Du Preez* (n 22) [9].

[716] ibid [17].

Act, 'reverse discrimination' was 'justiciable in terms of s 6'.[717] Thus, it subjected the plan to an unfair discrimination analysis in terms of ss 6(1) and 13 of the Equality Act as well as the *Harksen* test.[718] In applying this test, the court held that:

> The shortlisting criteria adopted by the committee imposed a disadvantage on the complainant in the selection process and, effectively, withheld from him the benefit of being considered for the posts of regional court magistrate, Port Elizabeth. This disadvantage was based on race and gender. Clearly, therefore, the shortlisting criteria applied by the committee amounted to discrimination by the respondents against the complainant.[719]

Ultimately, the court held that the shortlisting criteria had unfairly discriminated against the applicant as it had created an insurmountable barrier for his appointment.[720] It held that the criteria for shortlisting were too narrow in their focus on race and gender and did not give enough regard to his individual experience.[721] This case is an indication of the lack of clarity about the relationship between the Equality Act, s 9 of the Constitution and *Van Heerden*. As in the context of the EEA, the court in the case failed to find a standard that would adequately capture and help resolve the tension between the prohibition of unfair discrimination and the statement that affirmative action measures are not a form of unfair discrimination. Drawing from my proposed approach under s 9(2) of the Constitution, the section that follows attempts to remedy this.

5. Applying *Van Heerden* to the Statutes

The analysis of the cases under the EEA and Equality Act reveal the continued struggle to find an appropriate standard of review under these statutes. My argument is that the principle of constitutional supremacy and s 39(2) of the Constitution requires the standard under

---

[717] ibid [18].

[718] ibid [21]-[24].

[719] ibid [27].

[720] ibid [41].

[721] ibid [36]-[37].

these statutes to comply with the approach under s 9 of the Constitution. This is because of the principle that while legislation can provide more protection than the rights in the Bill of Rights, it cannot provide less.[722] Thus, an interpretation of the provisions in the EEA and Equality Act that provides less protection to the beneficiaries of affirmative action than under s 9(2) should not pass constitutional muster. Subjecting affirmative action measures under the EEA and Equality Act to *Harksen*-like unfair discrimination analysis would provide less protection to the beneficiaries of affirmative action than under s 9(2) of the Constitution. Thus, the constitutional standard should at least be the baseline approach to the review of affirmative action under the EEA and Equality Act. Further, contrary to the findings in *Barnard* and *Correctional Services,*[723] the same approach should apply to the judicial review of affirmative action measures and their implementation.[724]

5.1. Applied to the EEA

The suggested approach requires the Constitutional court to confirm the following. First, in the EEA context, affirmative action measures which comply with the purposes of the EEA are not a form of unfair discrimination. Accordingly, they should not be subject to the *Harksen*-like s 6(1) and s 11 inquiry. The same should apply to s 14(1) of the Equality Act. Contrary to the finding in *Du Preez,* affirmative action measures brought under the Equality Act are justiciable but not in terms of ss 6(1) and 13 of the Equality Act. This means that the presumption of unfairness applicable to unfair discrimination claims under the Equality Act should not be applicable. The unfair discrimination analysis should only come in when a measure or its implementation fails the standard under s 6(2) of the EEA, or the s 14(1) of the Equality Act. Second, the Court should confirm that, under both statutes, rather than

---

[722] See Lourens (n 155) ch 32.3; *Pillay* (n 359) [43].

[723] *Barnard CC* (n 13) [37], [51]; *Correctional Services CC* (n 677) [47]-[49].

[724] McConnachie, 'Intensity of Review' (n 17) 186.

attempt to carve a separate standard, as Cameron et al JJ did for the EEA in *Barnard,* the courts should apply the *Van Heerden* test adopted in light of the provisions in the statutes.

A difficulty which arises however, is how the different 'norm-like' provisions in the EEA should inform the *Van Heerden* test. For example, the prohibition of quotas, the need to achieve equitable representation in different occupational levels in the workplace, the scope and meaning of the term 'suitably qualified'. Should they be treated as preconditions for the constitutionality of EEP's? McConnachie argues that the provisions should be treated as 'binding constraints that are independent' of the *Van Heerden* test.[725] This approach is appropriate to the extent that the provisions in the EEA are interpreted in a manner that complies with the commitment to substantive equality and enables transformative outcomes in real cases. Accordingly, in the application of the *Van Heerden* test, the different provisions must be given meaning and content within the framework of substantive equality. Below, I outline how the specific provisions in the EEA should be integrated into the *Van Heerden* test as outlined earlier in the chapter.

In the first leg of the *Van Heerden* test, the question whether the measure targets a disadvantaged group should be informed by the EEA's stated beneficiary groups, race, gender and disability. As will be discussed in Chapter Six, these different categories must be understood in the context of a commitment to substantive equality that takes into account relative disadvantage within the different beneficiary classes as well as intersectionality. In the context of the *Barnard* case, the measure would clearly have passed this standard.

In the second leg of the inquiry, in determining whether the measure is designed to protect or advance disadvantaged groups, the purposes stated in the EEA should guide the link between the means and ends. This can start with s 6(2)(a) of the EEA which provides that affirmative action measures which are consistent with the purposes of the EEA are not

---

[725] McConnachie, 'Intensity of Review' (n 17) 187.

unfair discrimination. Thus, the first step is to look at the purposes of the EEA. Section 2 of the EEA provides that the purpose of the EEA is to achieve equity in the workplace by promoting 'equal opportunity' and 'fair treatment' through the elimination of unfair discrimination and by 'implementing affirmative action measures to redress the disadvantage experienced by the beneficiary groups and to ensure that there is equitable representation at all occupational levels in the work place'.

Another important provision would be s 15 of the EEA. Section 15(1) defines affirmative action measures as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. Section 15(2) then provides specific requirements of these measures: they should include: measures to identify and remove employment barriers; furthering diversity in the workplace based on equal dignity and respect of all people; making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; providing for skills development and training. In *Barnard,* it was clear that the measure sought to achieve equitable representation at all occupation levels of the workplace. White women, while also belonging to a disadvantaged group, were overrepresented at this level – thus, it would have thwarted the goals of the EEA to appoint Ms Barnard. Thus, the decision to appoint Ms Barnard would pass as a rational means to achieve the purpose of the EEA.

Further, the different purposes pursued should be analysed in accordance with the different dimensions of substantive equality. In this regard, affirmative action measures in the workplace are likely to meet the requirement of redistributing material resources in their allocation of jobs and positions to persons belonging to disadvantaged groups. In addition, the focus on increasing the representation of the designated groups and the insistence that this is at all occupational levels in the workplace, is aligned with the participation dimension.

In relation to dignity, stereotyping, prejudice and violence, the court should inquire into whether the purpose of the measure does not entrench stereotypes or violate the dignity of the intended beneficiary class. For example, an affirmative action measure which seeks to increase the representation of women in the workplace but is designed or implemented in a manner that channels women to roles considered suitable for women because of their gender would be suspect for perpetuating gender stereotypes. In relation to enhancing freedom and self-determination, an affirmative action measure which provides for training and development, opportunities for the beneficiaries of these measures to increase their skill and open up valuable options for their career choices would be aligned with this dimension as well as the first dimension in redistributing skills and knowledge.

The courts should consider the provisions which create boundaries for the kinds of tools used to achieve the stated purposes. For example, s 15(3) allows for preferential treatment and the use of numerical goals but prohibits the use of quotas. In addition, s 15(4) provides that an employer is not required to create an absolute barrier for the appointment or continued employment or advancement of people who are not from designated groups. These two requirements played a prominent role in the inquiry in *Barnard* and are likely to do so in future cases.[726] In Chapter Seven, I argue that an absolute prohibition of quotas under s 9(2) of the Constitution, the Equality Act, and the EEA does not comply with the commitment to achieving the goals of substantive equality. For now, the argument is that, in applying the *Van Heerden* test, the Court should interpret and apply these provisions in light of the commitment to substantive equality.

In the last leg of the assessment, the court should consider the impact that the measure will have on those adversely affected thereby and broader society. In this regard, since the EEA is concerned with the dignity of all persons in the workplace as well as

[726] *Barnard CC* (n 13) [54] (Moseneke ACJ), [91], [119] (Cameron et al. JJ).

efficiency in the workplace, these factors should be taken into account. However, as argued above, these should not be treated as rule-like norms. They should be interpreted and given meaning and content which align with the commitment to substantive equality and the context of each case. A measure which allows for the appointment of persons who are not suitably qualified, bearing in mind the broad definition of suitably qualified in the EEA, could have an adverse impact on service delivery and entrench the disadvantage of those who rely on public services. In *Barnard,* Van der Westhuizen J looked at the responsibilities of the SAPS and the rights of persons who rely on these services. Thus, he held that the Court had to 'balance the public's rights to security of the person, the constitutional demand for an effective police force and a functional public service against the promotion of full equality'.[727]

In *Barnard,* the issue was whether the decision not to appoint Ms Barnard would hamper service delivery – in this regard, I agree with Moseneke ACJ's approach, absent clear evidence that the failure to appoint her would have hampered service delivery, the courts should exercise deference to the decision-maker. This is an important aspect of tilting the scale in favour of validating an affirmative action measure and its implementation. Moreover, it affirms that suitable qualification, as opposed to individual merit is sufficient. An approach which would require a protection of efficiency by going for the most qualified or more meritorious candidate would entrench existing patterns of inequality and contradict the commitment to substantive equality.

As noted earlier, in the balancing, the scales must be tipped in favour of the validity of the measure. This will be easy when the adversely affected person belongs to a non-beneficiary group. Under the EEA, this would consist of cis white males who do not have a disability. It is more complex when the adversely affected person or group belongs to one

[727] ibid [184].

of the designated groups under the EEA. In *Barnard* it was a white woman, in *Correctional Services* it was nine Coloured men and women. In these cases, the court should take the relative disadvantage between the affected classes into account. As will be shown in more detail in Chapter Six, the multiple dimensions of substantive equality enable a contextual analysis of relative disadvantage between and within groups. In *Barnard* for example, Van der Westhuizen J considered the intersection between Ms Barnard's privilege as a white person and disadvantage as a women.[728] In cases where an affirmative action measure has an adverse impact on an equally or more disadvantaged group, the court should require adequate reasons therefor.

5.2. Applied to the Equality Act

Under the Equality Act, had the Equality Court in *Du Preez* followed the conceptual approach in *Van Heerden*, it could have made the following findings to align the approach under the statute with the constitutional standard. First, that s 14(1) of the Equality Act insulates affirmative action measures from the unfair discrimination analysis in ss 6(1), 13 and 14(2) of the Equality Act. Second, that the review of affirmative action measures under the Equality Act is subject to the *Van Heerden* test.[729]

Applying the *Van Heerden* test, the court would have reached a different finding. As a point of departure, there would be no presumption of unfairness. The onus to prove that the measure did not meet the threshold in s 14(1) would be on the claimant in the case.[730] The first leg of the *Van Heerden* test requires the measure to target a disadvantaged group.[731] In this case, the measure would likely have passed as it targeted a group disadvantaged by

[728] *Barnard CC* (n 13) [153]-[154].

[729] See, Albertyn, 'Getting It Right' (n 60) 414.

[730] *Van Heerden* (n 1) [33].

[731] ibid [38]-[40].

unfair discrimination, the beneficiaries in the case were classified by race and gender, benefitting Black persons as well as women – historically disadvantaged groups which were underrepresented in the regional magistrates courts.[732] This also aligned with s 174(2) of the Constitution.

In the second leg of the inquiry, the court has to determine whether there is a rational connection between the means and ends.[733] The policy in *Du Preez* sought to achieve a judiciary that was broadly representative of the racial and gender demographics in South Africa.[734] The policy would have passed this second leg of the inquiry. It is clear that the shortlisting criteria led to an increase in persons belonging to historically disadvantaged groups, specifically Black women, being shortlisted for the positions. Moreover, the shortlisted candidates had to at least meet the bare minimum criterion for the position, having the requisite LLB degree and the required work experience. Accordingly, the measure is not arbitrary or irrational in relation to the stated purpose and it does advance and protect historically disadvantaged groups. To the extent that by design, the policy would allocate more points based on race and gender for Black women could be justified on the basis that Black women were the least represented group in this context. It will be recalled that the allocations differed from one region to the next based on the racial and gender composition of the benches in the different regions.[735] In addition, the court could justify the prioritisation of this group based on the intersection of race and gender which compounds the disadvantage experienced by Black women in the workplace - explaining the

---

[732] *Du Preez* (n 22) [33] (the allocation of points in this case was related to the level of underrepresentation of different groups in the magistrates courts).

[733] *Van Heerden* (n 1) [41]-[43].

[734] *Du Preez* (n 22) [9].

[735] *Du Preez* (n 22) [33].

underrepresentation of this group as well as the relative disadvantage experienced by this group within the larger beneficiary class.

In the last leg of the inquiry, the court would have to consider the impact of the measure on the complainant, and broader society – requiring the court to balance these against the important purpose served by the measure and the interests of the intended beneficiary groups. In relation to the impact on the claimant, the court would have to take his right to dignity into account. However, as a white male, the claimant does not belong to a historically disadvantaged group and, while the shortlisting criteria may limit his earning capacity – it cannot be said to entrench economic or other forms of disadvantage. Regardless of his individual circumstances, an approach focussed on redressing disadvantage would weigh against a finding in his favour. In relation to the impact on broader society, the court could consider the importance of having a representative judiciary for the administration of justice.

In addition, the public has an interests in an efficient judiciary, thus the court could look at questions of efficiency and service delivery. As already mentioned, absent any evidence to the contrary, the court would likely accept that the minimum criteria set for the appointment was sufficient to ensure an efficient judiciary – protecting against the appointment of unqualified candidates who could hamper service delivery and efficiency. A weighing of these factors, placing more emphasis on the important purpose served by the measure and the interests of the beneficiary groups is likely to have upheld the shortlisting criteria as a valid affirmative action measure under s 14(1) of the Equality Act. There is no reason why this approach should not be applied under the Equality Act.

In this section of the chapter, I have argued that the *Van Heerden* test, as a species of proportionality, should be applied to affirmative action measures under the EEA and Equality Act. This approach should apply in cases dealing with the implementation of affirmative action measures as well as in those challenging the constitutionality of affirmative

action. It is not clear why Moseneke J and Cameron et al JJ thought it necessary to have different standards for the review of the implementation of affirmative action as opposed to the design and content of these measures when the *Van Heerden* test could equally be applied. If the intention is that a lower standard of review should apply to the implementation of affirmative action, explaining Moseneke J's rationality standard, this could be problematic.

Both the content of an affirmative action measure, and its implementation could cause harm to persons in a comparably serious manner. Moving away from the *Van Heerden* test and diluting the protection offered to claimants, who may themselves be disadvantaged, without a clear basis therefore is inappropriate and contrary to the commitment to transformative adjudication. A more convincing reason for a different standard to the review of decision implementing affirmative action is the need for more deference when the instruments under which decisions are made are themselves not being challenged. However, rather than apply a different standard in this context, the better approach would be to apply the *Van Heerden* test, read as proportionality, with more deference than in cases where the affirmative action law or policy is directly under challenge.

6. Conclusion

This chapter has argued that in light of the commitment to substantive equality, a purposive approach to the separation of powers principle and the commitment to a culture of justification, the best approach to the judicial review of affirmative action is as setting a proportionality standard that is suited to the context of affirmative action in three aspects. First, it is relatively more deferent, specifically excluding the requirement of necessity. Second, the approach gives more weight to the important purpose served by affirmative action. Third, it is grounded in seeking to maximise the multiple dimensions of substantive equality. Thereafter, I argued that the conceptual approach in *Van Heerden* (insulating affirmative action from the unfair discrimination analysis') and the reading of *Van Heerden*

advanced in this chapter, should too be the foundation of the approach under the EEA and Equality Act.

CHAPTER FIVE: AFFIRMATIVE ACTION AS SHIELD, SWORD AND REMEDY

'To ensure a full vindication of rights, the courts are obliged to "'forge new tools" and shape innovative remedies'.[736]

Introduction

In the previous chapter, I explored the appropriate standard of review for affirmative action – arguing in favour of a proportionality assessment suited to the context of affirmative action. Having mapped the courts' role, in this chapter, I consider the nature of the claims that can be brought to the courts, in particular, whether there is a duty to take measures to fulfil the right to equality – a duty that gives rise to an equality violation claim. The chapter also explores whether affirmative action is available as a remedy to vindicate the right to equality. In both cases, I argue that a transformative approach to affirmative action instinctively requires an affirmative answer. However, arriving at this answer, as will be seen in the chapter, is a difficult task.

The Constitutional Court has held that s 9(2) measures are a 'substantive and composite part of the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole'.[737] If s 9(2) is an integral and composite part of the right to equality, it will make sense for there to be a duty to take such measures, one that entitles the intended beneficiaries to have a claim in cases where there is a failure to implement these measures or in cases where a piece of legislation, a policy or other measure purporting to be taken under s 9(2) does not promote the achievement of equality. The same can be said under the Equality Act. While it is clear that s 9(2) and arguably s 14(1) of the Equality Act serve as a shield against unfair discrimination claims, allowing persons implementing these measures to defend themselves, thus far, the existence of a claim on the part of the intended

[736] *Fose v Minister of Safety and Security* 1997 (3) SA 786 [69].

[737] *Van Heerden* (n 1) [32].

beneficiaries, a sword, remains unclear. Similarly, in the few cases under the EEA[738] and the academic commentary thereon, there is resistance to recognising an *enforceable* equality claim in cases where there has been a failure to take or implement affirmative action measures in the workplace.[739]

In this chapter, I argue that under a transformative approach to affirmative action, the courts should recognise a positive duty to fulfil the right to equality under s 9 of the Constitution and ss 6 and 14(1) of the Equality Act. Failing which the intended beneficiaries should be able to claim that their right to equality has been violated. In addition, I argue that when exercising their remedial powers, the courts have the power to use affirmative action as a remedy to vindicate the right to equality. In the EEA context, there is already a duty on designated employers to take affirmative action. Unfortunately, the Labour Courts have held that this is not enforceable by the intended beneficiaries.[740] In this chapter, I illustrate how a transformative, generous and purposive interpretation of the EEA provisions supports the recognition of a right to affirmative action under the EEA.

I have divided the chapter into four sections. In the first section, I explore the nature of the State's obligations in s 7(2) of the Constitution. Based on an analysis of the Constitutional Court's s 7(2) jurisprudence, I argue that the State has a positive and negative duty to fulfil the right to equality. While the courts cannot prescribe the exact mechanisms for realising this duty, they can intervene when there has been a failure to take or implement measures to fulfil the right to equality or when measures do not accord with the commitment to transformation and substantive equality. This is because the means taken to realise the s 7(2) obligation must be effective and give practical and meaningful expression to the right

---

[738] *Dudley v City of Cape Town and Another* [2004] 5 BLLR 413 (LC); *Dudley LAC* (n 21).

[739] Coetzer (n 21); Thompson and Van der Walt (n 21); McGregor, 'The Nature of Affirmative Action: A Defence or a Right?' (n 59).

[740] *Dudley LC* (n 738); *Dudley LAC* (n 21).

to equality – not just anything will do. In the second section, I explore the three key provisions in s 9 of the Constitution, ss 9(1), (2) and (3) and I illustrate how a court, against the background of s 7(2), could interpret these provisions in a manner that enables the recognition of a positive duty to promote and fulfil the right to equality, including through affirmative action.

Moving to the Equality Statutes, in the third section, I explore the position under the EEA and Equality Act. Under the EEA, there is an obligation on all employers to take steps to promote equality of opportunity and eliminate unfair discrimination.[741] Further, designated employers have a specific duty to take affirmative action. While the Labour Courts have held that these provisions do not confer a right to benefit from affirmative action under the EEA, I argue that there is a right to affirmative action under the EEA. In the context of the Equality Act, I argue that the language of this statute deeply supports the recognition of a duty to take affirmative action. Unfortunately, much of this language is in the provisions which are yet to come into force. Nevertheless, I show how a similar line of argument as that made under s 9 of the Constitution could be made under the Equality Act.

In the fourth section, I argue that when exercising their remedial power, courts have within their wide arsenal of 'appropriate' and 'just and equitable remedies' to vindicate the right to equality, the power to order that affirmative action measures be taken. Overall, this chapter seeks to bring the intended beneficiaries of affirmative action into the centre, as bearers of an enforceable right to equality, including through affirmative action.

---

[741] EEA s 5.

1. The Section 7(2) Obligation

Section 7(2) of the Constitution provides that the State has a duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[742] According to Shue, the effective realisation of all rights, both positive and negative, requires a combination of negative and positive duties - the duties to avoid, protect and to aid.[743] Under international law, these duties have been adopted and developed in various forms, the most prominent being the formulation by the ICESCR (the duty to respect, protect and fulfil) and in the landmark judgement of the African Commission of Human and Peoples Rights, *SERAC v Nigeria* (the duty to respect, protect, promote and fulfil).[744] Briefly, the duty to respect requires the State to refrain from interfering with the enjoyment of rights. The duty to protect imposes a duty on the State to prevent private persons from interfering with the enjoyment of rights. The duty to fulfil requires the State to take positive measures to ensure the full realisation of rights. The duty to promote includes an obligation on the State to disseminate information and educate people as to their rights.[745]

Section 7(2), together with s 8(1), which provides that the rights in the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state' and the interpretive provisions in s 39[746] of the Constitution have been relied on to impose

---

[742] For a brief discussion of how this provision came to be included in the Constitution, see Liebenberg (n 72) 82–83 specifically fn 11.

[743] Henry Shue, *Basic Rights* (PUP 1980).

[744] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* AHRLR 60 (ACHPR 2001) [44].

[745] Liebenberg (n 72) 82–87; Fredman, *Comparative Human Rights Law* (n 450) 66–67. See also, De Vos and Freedman (n 479) 697–708.

[746] Sections 39(1) and 2 of the South African Constitution, provide that:
(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

positive and negative obligations on the State towards the realisation of the rights in the Bill of Rights.[747] In this section of the chapter, I explore how the Court has interpreted these provisions to impose positive obligations on the State, developing and giving content to the rights in the Bill of Rights. The analysis is an important foundation for the argument that in order to realise the right to substantive equality, embodied in s 9 of the Constitution, the State has a duty to take positive steps to fulfil the right to equality.

1.1. The meaning and content of the obligations imposed by ss 7(2) and 8(1) of the Constitution

Sections 7(2) and 8(1) of the Constitution impose negative and positive obligations on the State to 'take deliberate, reasonable measures to give effect to all of the fundamental rights' in the Bill of Rights.[748] The obligation in s 7(2) is a 'promissory note',[749] one in which the State promises that it will facilitate the enjoyment of rights in the Bill of Rights.[750] In *Carmichele*, the Constitutional Court specifically held that:

> [T]here is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.[751]

An alleged violation of a right in the Bill of Rights triggers the courts' powers to determine whether the State has met its obligations under s 7(2).[752] However, there is a wide range of

---

[747] See *Carmichele* (n 168); *Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651 (CC); *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC); *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bignham NO and Others, Esau v Esau and Others* 2018 (6) SA 598 (WCC).

[748] *Glenister* (n 747) [105].

[749] *Kaunda and Others v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC*)* [157].

[750] *My Vote Counts (2018)* (n 747) [174].

[751] *Carmichele* (n 168) [44].

[752] *Women's Legal Trust* (n 747) [178].

options available to the State to meet its s 7(2) obligations. Accordingly, the Constitutional Court has held that the courts should exercise a measure of deference when deciding whether the State has met its s 7(2) obligations. For this purpose, the Constitutional Court has established guidelines for determining *how* and *the rate* at which the s 7(2) obligation must be fulfilled. This includes the nature of the right involved; the availability of government resources; whether there are other provisions of the Constitution that spell out how the right must be protected or given effect.[753] In addition, the Constitutional Court has held that steps taken towards meeting the State's s 7(2) obligations must be reasonable and effective.[754]

Section 7(2) has been relied on to impose a range of negative and positive obligations on the State.[755] There are two important principles from the Court's s 7(2) jurisprudence for this chapter. First, a positive duty can be imposed on the State if it enables the effective realisation of a right.[756] In *Glenister*, the Court held that the State need not use the best method possible or the most effective method.[757] All that has to be shown is that the steps taken to realise s 7(2)'s promise are reasonable and effective.[758] Second, the State is obliged 'to do everything reasonably possible to give practical and meaningful expression' to the right.[759]

In this thesis, my argument is that for the effective, practical and meaningful exercise of the right to equality, the State has an obligation to take positive steps to fulfil the right to

---

[753] *Glenister* (n 747) [107].

[754] ibid [189].

[755] *Carmichele* (n 168) [44] (recognising a positive duty on the state to act and prevent harm); *Glenister* (n 747) [84] (recognising a positive duty on the state to take effective measures to fight corruption); *My Vote Counts (2018)* (n 747) (recognising that the right to vote and the right to access information included the right to have access to information related to private funding recieved by political parties - obliging the state to enact legislation to provide for this); *Women's Legal Trust* (n 747) (recognising that the state had a positive obligtaion to enact legislation regulating Muslim marriages).

[756] *Glenister* (n 747) [84].

[757] ibid [111].

[758] ibid [189].

[759] *My Vote Counts (2018)* (n 747) [43].

equality. While the courts must exercise deference on the mechanism used to realise this obligation, in cases where there has been a failure to take or implement steps towards realising the s 7(2) promise in relation to s 9 or where such measures fall foul of the commitment to substantive equality, the Courts can make an order that such measures be taken or implemented, including affirmative action. Before an examination of the different ways in which this argument could be made under ss 9(1), (2) and (3), the next section analyses the position under international law – a position which supports the argument made in this chapter.

1.2. Using international law to give meaning to the s 7(2) obligation

International law can be used to give meaning and content to the obligations imposed by s 7(2). First, s 39(1)(b) of the Constitution places an obligation on the courts to consider international law when interpreting a right in the Bill of Rights. Second, s 233 of the Constitution requires legislation to be interpreted in compliance with international law. While the Constitutional Court has held that international law agreements, even those ratified by Parliament, do not give rise to substantive rights and obligations until they have been domesticated through legislative action,[760] international law has been relied on to give content to the obligations in s 7(2) of the Constitution. According to Ngcobo J, 'obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights'.[761] For the argument in this chapter, the relevant international law agreements are the CERD;[762]

---

[760] *Glenister* (n 747) [91]-[95].

[761] ibid [96].

[762] UN General Assembly, 'International Convention on the Elimination of All Forms of Racial Discrimination' (1965) <https://www.refworld.org/docid/3ae6b3940.html> accessed 4 November 2020.

CEDAW;[763] and the CRPD.[764] All three of these conventions provide for 'special measures' for disadvantaged groups, which include but are not exclusive to affirmative action as defined in this thesis.[765]

The CERD does not expressly state that there is a duty to take special measures. Article 1(4) CERD simply provides that special measures taken to advance racial and ethnic groups or individuals to secure their equal enjoyment or exercise of human rights do not amount to discrimination. However, Article 2(2) provides that:

> State Parties *shall when the circumstances so warrant*, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, *for the purpose of guaranteeing them the full and equal enjoyment* of human rights and fundamental freedoms.[766]

In General Recommendation 32,[767] the UN Committee on the Elimination of Racial Discrimination (CERD Committee) clarifies that the use of the term 'shall' in relation to special measures under the CERD, 'clearly indicates the mandatory nature of the obligation to take such measures', one not weakened by the phrase 'when circumstances so warrant'.[768] Further, the CERD Committee has stated that the 'obligation' to take special measures is distinct from the general positive obligation to secure human rights and fundamental

---

[763] UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination Against Women, United Nations' (1979) <https://www.refworld.org/docid/3ae6b3970.html> accessed 4 November 2020.

[764] UN General Assembly, 'Convention on the Rights of Persons with Disabilities A/RES/61/106' (2007) <https://www.refworld.org/docid/45f973632.html> accessed 4 November 2020.

[765] South Africa has ratified all three of these conventions, see, United Nations Human Rights (Office of the High Commissioner) 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org> accessed 4 November 2020. In UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination' (2009) <https://www.refworld.org/docid/4adc30382.html> accessed 4 November 2020. The CERD Committee recognises that special measures include affirmative action, at para 12.

[766] My emphasis.

[767] UN Committee on the Elimination of Racial Discrimination (n 762).

[768] ibid [30].

freedoms on a non-discriminatory basis.[769] This is a recognition that the special measures contemplated under the CERD entail more than just a prohibition of discrimination in the allocation of resources and could encompass affirmative action obligations 'when the circumstances so warrant'.

Similar to the position under CERD, the CEDAW states that the special measures applicable under CEDAW are mandatory. Article 4(1) of CEDAW provides that the adoption of temporary special measures by state parties towards accelerating *de facto* equality between men and women does not constitute discrimination. In General Recommendation 25, the CEDAW Committee states that the obligation in Article 14(1) is mandatory, 'State parties *are obliged* to adopt and implement temporary special measures…if such measures *can be shown to be necessary and appropriate* in order to accelerate the achievement of overall….substantive equality'.[770]

The same has been said about the special measures for persons with disabilities under the CRPD. Article 5(4) CRPD states that 'Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities' do not amount to discrimination under the Convention. The UN Committee on the Rights of Persons with Disabilities, in General Comment No. 6 on equality and non-discrimination, has clarified that this imposes a mandatory obligation:

> States parties *must identify* areas or subgroups of persons with disabilities — including those who face intersectional discrimination — that require specific measures to accelerate or achieve inclusive equality. States parties are under an obligation to adopt specific measures for such groups.[771]

---

[769] UN Committee on the Elimination of Racial Discrimination (n 762) [14].

[770] UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures' [24] <https://www.refworld.org/docid/453882a7e0.html> accessed 4 November 2020, (my emphasis).

[771] UN Committee on the Rights of Persons with Disabilities, 'General Comment No. 6 (2018) on Equality and Non-Discrimination' para 32 <https://digitallibrary.un.org/record/1626976?ln=en> accessed 13 January 2020.

The analysis above reveals that under international law, when circumstances warrant (CERD), when necessary and appropriate (CEDAW), in order to accelerate or achieve equality (CRPD), there is an obligation to take special measures. However, what is not clear is the trigger for this obligation under international law. Essentially, when will the circumstances so warrant? When will it be necessary and appropriate? Under the CRPD, the quote above makes clear that the state must take active steps to identify disabled persons who require affirmative action measures. Once identified, the state must take these measures to accelerate and achieve equality. Similarly, the CERD Committee has stated that:

> Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.

Thus, the trigger in international law comes when the state has identified existing patterns of inequality. Further, states have an obligation to take steps to make the requisite identification.

So far in the chapter, I have explored the nature of the obligations imposed by s 7(2) of the Constitution, which include the imposition of positive duties on the state towards the realisation of the rights in the Bill of Rights. The State has discretion in this regard. However, the measures taken must be practical, meaningful and effective. Under international law, there is a mandatory positive obligation on state parties to take special measures to realise the right to equality under certain circumstances. Thus, international law instruments have made the leap of prescribing special measures as a specific instrument to realise the right to equality for disadvantaged groups. While the EEA arguably makes a similar leap in its affirmative action obligations, the range of measures that could be taken to fulfil the right to equality under s 9 and the Equality Act is wider. Essentially, it is possible that in realising its ss 7(2) and 9 obligations, the State could take measures other than affirmative action.

However, bearing in mind the threshold of effectiveness and giving practical and meaningful effect to the right to equality, not just anything will do.

Against this background, in the next section of the chapter, I map a positive argument that s 9 of the Constitution imposes a duty on the State to promote the achievement of equality, failing which a claim that the right to equality has been violated can be made. Later, I will show how if successful; the courts have the power to use affirmative action to remedy the equality violation.

2. A Section 9 Positive Duty to Fulfil the Right to Equality

In this section of the chapter, I explore the possible basis for the recognition of a positive duty to implement affirmative action under ss 9(1), (2) and (3) of the Constitution.

2.1. A duty arising from section 9(2)

> 'Equality includes the *full and equal enjoyment of all rights and freedoms*. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination *may be taken*.'

As discussed in the previous section, when determining the nature and scope of the State's s 7(2) obligations, one of the factors taken into account is the nature of the right in question and of other rights giving effect to the right. In our case, s 9(2) of the Constitution expressly provides for taking measures to advance and protect disadvantaged groups. This supports the argument that affirmative action is one of the available tools to meeting the State's s 9 duty to enable the full and equal enjoyment of all rights and freedoms and to promote the achievement of equality. As I explored in Chapter Three, the Court has committed to a substantive rather than formal view of equality. An important aspect of the commitment to substantive equality is the recognition that to achieve equality, unequal treatment to advance disadvantaged groups is not a breach of the equality guarantee. From this, my argument is that the *nature of the right to equality* includes a duty to take s 9(2) measures, in some cases affirmative action, where the failure to do so would render the right to equality nugatory.

For example, in a case where appointment criteria treat persons belonging to disadvantaged groups in the same way as more privileged groups, creating a barrier to access for candidates who belong to disadvantaged groups, and resulting in the marginalisation and exclusion of the disadvantaged, the failure to take steps to promote the achievement of equality and enable the full and enjoyment of rights, under those circumstances, renders substantive equality nugatory. In this case, the courts should find a violation of s 9(2) of the Constitution and order the state to take steps to remedy this. To pass constitutional muster, such steps would have to meet the s 7(2) threshold in the sense that they must enable the practical, meaningful, and effective realisation of s 9(2). However, there is a significant barrier to this reading of s 9(2) - the use of permissive language in the provision.

The use of the term 'may' could be interpreted to mean that s 9(2) does not impose a duty to promote the achievement of equality through measures taken under s 9(2).[772] The term 'may' ordinarily suggest that a provision is permissive – affording discretion on the duty holder and militating against the recognition of a positive duty. This understanding of s 9(2) is supported by the language used by the Constitutional Court in its examination of the provision. In *Van Heerden*, the terms 'authorise' and 'permit' are used in several places to describe the nature of the obligation under s 9(2).[773]

In India, the Indian Supreme Court relied on similar permissive language to refute the argument that there was a duty to take and implement reservations. Article 16(4) of the Indian Constitution provides that, '*Nothing in this article shall prevent the State* from making any provision for the reservation…in favour of any backward class of citizens'. Reading this language, the Indian Supreme Court has held that it is an 'enabling provision'. It does not

[772] See Albertyn and Goldblatt (n 209) ch 35 p 42.

[773] *Van Heerden* (n 1) [28].

confer a 'fundamental right', 'it gives freedom to the state'.[774] In *Mukesh*, the Indian Supreme Court specifically held that there is no right to affirmative action under Article 16(4) of the Indian Constitution[775] and that Article 16(4) was merely an enabling provision.[776] While a similar reading of s 9(2) is possible, it is neither inevitable nor in line with the commitment to substantive equality and transformation. Provisions which first appear to be permissive can be interpreted as imposing a positive duty.

In South Africa, there is precedent for looking past the use of permissive language. In *Women's Legal Centre Trust*,[777] the Western Cape High Court was faced with a 'permissive' provision, s 15(3) of the Constitution. Section 15(3) of the Constitution provides that the recognition of the right to freedom of religion, belief and opinion does not 'prevent' legislation regulating traditional or religious marriages. The use of the term 'prevent' suggests that while permissible, the State has no obligation to pass legislation to regulate traditional or religious marriage. The court held that while the State had the discretion to determine how it fulfils its s 7(2) duty, this must be in line with the Constitution. In this case, it held that in light of the nature of the rights violations, the complexity and importance of marriage, the only reasonable means of fulfilling the section 7(2) duty was to enact legislation.[778] Of significance here, the court held that the permissive nature of s 15(3) of the Constitution did not forbid such a conclusion.[779] While not expressly stated by the court, a principle that can

---

[774] *UP Power Corporation Limited v Rajesh Kumar & Others* (2012) 7 SCC 1 32; *Nagaraj & Others v Union of India & Others* (2006) 8 SCC 212 262–263.

[775] *Mukesh Kumar and Another v State of Uttarakhand and Other, Civil Appeal No 1226 of 2020 (Non-Reportable)* (Indian Supreme Court).

[776] ibid [11].

[777] *Women's Legal Trust* (n 747).

[778] ibid [181].

[779] ibid [184].

be drawn from *Women's Legal Centre Trust* is that in cases where the fulfilment of obligations under s 7(2) requires the imposition of a specific obligation on the State, the permissive language in a provision should not bar the imposition of such an obligation. Accordingly, if the recognition of a duty to take s 9(2) measures would give practical and meaningful effect to the right to equality, the permissive language in s 9(2) should not bar this recognition.

A similar argument has been made in the Indian context.[780] Lahiri argues that constitutional provisions which first appear to be discretionary should be read as encompassing 'a power coupled with a duty', when the failure or refusal to act 'would nullify a portion of the constitutional scheme, however small that portion might be'.[781] From this, he argues that, if the failure to take reservations would render the Indian Supreme Court's commitment to substantive equality nugatory, then the best interpretation of Article 16(4) is that it confers both a power and a duty on the state.[782] The requirements in s 7(2) arguably prescribe a similar principle. If s 9 of the Constitution confers a right to substantive equality, the fact that s 9(2) uses permissive language should not bar the recognition of a duty to take s 9(2) measures if the failure to do so would render the fulfilment of the s 9 right to equality nugatory.

Support for this approach can be found in the Equality Court's decision in *Singh*. In *Singh*, the Equality Court, with reference to s 9(2) of the Constitution, recognised a duty to implement affirmative action in favour of disabled persons. The facts of the case are that Ms Singh, a woman with a visual impairment, applied for an entry level position as a magistrate

---

[780] Karan Lahiri, 'Does Article 16 Impose a "Power Coupled with a Duty" Upon the State? - I' (*Indian Constitutional Law and Philosophy*, 13 March 2015) <https://indconlawphil.wordpress.com/2015/11/13/guest-post-does-article-16-impose-a-power-coupled-with-a-duty-upon-the-state-i/> accessed 9 March 2020.

[781] Karan Lahiri, 'Does Article 16 Impose a "Power Coupled with a Duty" Upon the State? - I' (*Indian Constitutional Law and Philosophy*, 13 March 2015) <https://indconlawphil.wordpress.com/2015/11/13/guest-post-does-article-16-impose-a-power-coupled-with-a-duty-upon-the-state-i/> accessed 9 March 2020.

[782] ibid.

and was not shortlisted for the position.[783] She argued that she was not shortlisted because, as a blind person, she could not meet the criteria of having a valid driver's licence.[784] Accordingly, the shortlisting criteria unfairly discriminated against blind persons on the grounds of their disability as it withheld 'benefits, opportunities or advantages from people with disabilities'.[785] In addition, she argued that there had been a failure to give preference to people with disabilities,[786] and 'redress the legacy of discriminating against people with disabilities'.[787]

The respondent in the case, the Magistrates Commission, argued that there was no obligation to consider disability when making appointments to the judiciary.[788] For this, it relied on s 174(2) of the Constitution.[789] When making appointments to the judiciary, s 174(2) requires the need for the judiciary to be broadly representative of the racial and gender composition of South Africa to be taken into account. It does not mention disability. The Equality Court held that the provision in s 174(2) had to be considered in light of the Constitution as a whole.[790] In this case, s 9(2) of the Constitution, read with the Equality Act, 'clearly' imposed 'a *complementary duty* on the state to take active measures to promote the equality of people with disabilities'.[791]

---

[783] *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC) [8].

[784] *Singh* (n 783) [9], [12].

[785] ibid [9].

[786] *Singh* (n 783) [10].

[787] ibid [14].

[788] ibid [20].

[789] ibid [22].

[790] ibid [24].

[791] ibid [24] (my emphasis).

On the facts, the Equality Court held that when Ms Singh's application was considered, the appointment committee failed to take her disability into account, breaching their 'duty to advance and promote the position of disabled people'.[792] This was also in contravention of their duty, under the CRPD, to promote the employment of people with disabilities.[793] Further cementing the basis for this duty's imposition, the court powerfully noted that 'It is not enough to put a symbol of a wheelchair on the letterhead and to allege that the Magistrate Commissioner is sensitive to the plight of disabled people'.[794] In other words, the court affirmed that measures taken had to give practical and meaningful effect to disabled person's right to equality.

Relying on ss 7(2) and 9(2), the provisions in the Equality Act and the State's obligations under international law, the court in *Singh* saw no insurmountable barrier to imposing a positive obligation to take affirmative action measures in favour of disabled persons. While the court did not fully canvas the imposition of this duty, we can extrapolate and expand on how it reached its finding. First, disabled people are a disadvantaged group and face barriers to entry into the workplace. This is a limitation on their right to equality. Second, there are different ways in which the State can meet its s 7(2) obligations. In this case, the State's recruitment criteria failed to take disability into account, treating disabled persons the same as non-disabled persons, a formal rather than a substantive approach to equality. One way to realise the right to equality in this case was to require disability to be considered. This included removing discriminatory barriers to entry (the licence criteria) and affirmative action. *Singh* recognised a duty to take affirmative action in favour of disabled

[792] ibid [32].

[793] ibid [40].

[794] *Singh* (n 783)[33].

persons because the failure to do so would render the commitment to substantive equality nugatory.

The *Singh* case illustrates how the courts could use s 9(2) as the basis for the recognition of a positive duty to fulfill the right to equality through affirmative action. That said, it bears emphasis that in cases where there has been a failure to take any steps to fulfil the right to equality of disadvantaged groups, arguing for a specific positive obligation, as in *Singh,* will be a difficult task. In addition to the permissive language problem, another difficulty in the s 9(2) argument is in the leap between the recognition of a positive duty to fulfil the right to equality and the argument that there is a duty to specifically take affirmative action. This is because the Court, as discussed above, has rightly held that the State has a wide measure of discretion on how to realise the s 7(2) promise. Even so, when measures have not been taken to fulfill the right to equality, the s 9(2) could be relied on to support the argument that the full and equal enjoyment of all rights and freedoms requires positive steps to be taken.

Alternative basis for the recognition of a duty to take positive steps to fulfill the right to equality lie in ss 9(1) and 9(3) of the Constitution. A transformative interpretation of these other provisions could lead us to the recognition of a duty to take measures to promote the achievement of equality – either as an aspect of the right to equal protection and benefit of the law, s 9(1), or as an aspect of the prohibition of unfair discrimination under s 9(3) of the Constitution. While the s 9(2) argument is strongest in cases where no steps have been taken to fulfill the s 9(2) promise, reliance on ss 9(1) and 9(3) best fit those cases when some steps have been taken to realise the right to equality or another right in the Bill of Rights but, such measures have ignored existing patterns of disadvantage or are underinclusive in their beneficiary classificatin. I turn to this below.

2.2. A duty arising from section 9(1)

The first provision in the s 9 right to equality, s 9(1), protects the right to equality 'before the law' and 'equal protection and benefit of the law'. A transformative interpretation of this provision could include the recognition of a duty to take measures to promote the achievement of equality, including through affirmative action. The suggested approach requires the recognition that 'neutrality' in law will not always confer equal protection or benefit of the law. In some cases, it may create or entrench existing inequality. My argument is that, read with s 7(2), in order to fulfil the 'equal protection and benefit' promise and effectively realise s 9(1) of the Constitution, there is a positive duty to take measures where: (i) the law is neutral to the lines of difference and disadvantage between and within disadvantaged groups to whom the law applies; (ii) the neutrality has the impact of entrenching or creating new patterns of disadvantage; and (iii) taking positive measures in favour of the disadvantaged could give practical and meaningful effect to the promise in s 9(1) - equal protection and benefit of the law.

Unfortunately, as discussed in Chapter Three, in its jurisprudence, the Constitutional Court has given an impoverished meaning to s 9(1). First, it has held that the provision protects against arbitrary and irrational treatment.[795] Second, it has held that the provision guarantees equal treatment by law with reference to the legal process.[796] In essence, thus far, s 9(1) sets a rationality requirement that would pass as Constitutional any measure found to have a 'defensible purpose, together with reasons for its actions that bear some relationship to the stated purpose'.[797] This standard is very deferent to the State – it does not permit an enquiry into the impact that a measure has on disadvantaged groups. Accordingly, it would

[795] *Prinsloo* (n 33) [25].

[796] *S v Ntuli* 1996 (1) SA 1207 [18]; *Prinsloo* (n 33) [22].

[797] Albertyn and Goldblatt (n 209) ch 35, p 22.

be difficult to argue that the fulfilment of s 9(1) imposes a positive duty to take any positive steps towards promoting and fulfilling the right to equality.

However, the prevailing approach to s 9(1) is arguably conceptually flawed – it does not meet the standard of the commitment to substantive equality. As Albertyn and Goldblatt note, 'The idea of equality as rationality refers to a formal notion of equality that sees inequality as a function of laws that irrationally single out groups rather than as emerging from a social and economic context of inequality'.[798] As discussed in Chapter Three, based on a purposive interpretation of the Constitution, one which 'seeks to maximise its coherence and to promote the fundamental values of an "open and democratic society based on freedom and equality"',[799] and the commitment to substantive equality,[800] Albertyn and Kentridge made the argument that s 8(1) of the Interim Constitution which stated that 'Everyone shall have the right to equality before the law and to equal protection of the law' expressed a right to substantive equality.[801] The authors argued that the interpretation of equality before the law, and equal protection of the law must give effect to the values that support it, 'it must take account of the history of inequality and oppression, and the need for reparation and reconstruction'.[802] This argument equally applies to s 9(1) and it better aligns with the commitment to substantive equality and transformation.

What is more, the text of s 9(1) of the Constitution includes 'equal benefit of the law'. In a footnote on their article on the Interim Constitution's s 8(1) provision, which did not provide for 'equal benefit of the law', Albertyn and Kentridge noted that an early draft

---

[798] ibid 35, p27-29.

[799] Albertyn and Kentridge (n 208) 151.

[800] ibid 152–155.

[801] ibid 156.

[802] ibid 159–160.

of the equality right included 'equal benefit of the law'. The authors suggested that the exclusion under s 8(1) was presumably motivated by anxiety that its inclusion would lead to 'unwelcome judicial intervention in state reconstruction and welfare provisions'.[803] Accordingly, its inclusion in the final Constitution is indicative that the provision requires substantive action to realise the right to equality[804] leaving room for intervention when there has been a failure to do so. Unfortunately, the Court has expressly rejected this more substantive reading of s 9(1). In *National Coalition*, the *amicus* in the case, the Centre for Applied Legal Studies, argued that s 9(1)'s inclusion of the term 'and benefit' to 'equal protection' required a different approach to s 9(1) than that under s 8(1) of the Interim Constitution – an approach that would give more weight to the commitment to substantive equality.[805] Rejecting this argument, Ackerman J held that the inclusion of the term 'an benefit' did not result 'in any change of substance in its objectives'.[806]

While expressly rejected by the Court, the substantive reading of s 9(1) advanced here is the approach taken under s 15(1) of the Canadian Charter. Section 15(1) protects the right to equality before and under the law as well as the 'equal protection and equal benefit of the law without discrimination'.[807] In *Andrews*, McIntyre J held that in order to achieve the full ideal of equality:

> [T]he main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the

---

803 Albertyn and Kentridge (n 208) 159 fn 54.

804 Albertyn and Goldblatt (n 15) 267.

805 *National Coalition* (n 199) [15] and [58].

806 ibid [59].

807 For an analysis of the history of this provision and the value of the inclusion of 'equality under the law' and 'equal benefit of the law' to a substantive approach to equality see, Clare L'Heureux-Dube, 'It Takes A Vision: The Constitutionalization of Equality in Canada' [2002] Yale Journal of Law and Feminism 363.

> admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have *a more burdensome or less beneficial impact* on one than another.[808]

The substantive approach taken by the Canadian Supreme Court supports the suggested reading of s 9(1) of the Constitution. Despite having rejected this substantive reading of s 9(1), the approach suggested is also supported by the Constitutional Court's assertion that the provisions in s 9 of the Constitution must be read together. As Moseneke J held in *Van Heerden*, ss 9(1) and 9(2) of the Constitution are complementary and 'integral to the reach of our equality guarantee' contributing towards the 'constitutional goal of achieving equality to ensure full and equal enjoyment of all rights'.[809] If this commitment is taken seriously, the formal, minimalist reading of s 9(1) should not stand.

Returning to the argument in this section of the chapter, the substantive approach to s 9(1), read with s 7(2), enables the recognition of a positive duty to promote and fulfil the right to equality under s 9(1) of the Constitution. Using the example of the *Van Heerden* case, if the impugned policy in that case were not introduced, Black Parliamentarians would have a claim. The claim would be that to the extent that the legal regime under which the pensions were paid did not take their disadvantage into account, it did not confer equal benefit or protection of laws – allowing, to use the language in the Canadian Supreme Court, 'less beneficial impact' on a historically disadvantaged group, perpetuating their disadvantage. Nevertheless, as discussed above, the South African courts are unlikely to shift from the prevailing, narrow approach to s 9(1). Leaving s 9(3) as arguably the strongest basis for the recognition of a duty to fulfill the right to equality, including through affirmative action.

---

[808] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (my emphasis).

[809] *Van Heerden* (n 1) [30].

2.3. A duty arising from section 9(3)

The third argument that could be made is under s 9(3) of the Constitution. Section 9(3) prohibits unfair discrimination. The argument here is that taking steps to promote and fulfil the right to equality, including through affirmative action, is one way in which the State can eliminate unfair discrimination. Thus, the failure to take measures to promote and fulfil the right to equality could amount to unfair discrimination. This argument is distinct from the s 9(3) claims currently brought. In the cases envisaged, the claimants would be arguing from the perspective that there has been a failure to take or implement measures to promote and fulfil the right to equality, or that a measure is 'not enough' or 'not the right thing' to vindicate their right to equality.

In cases where there is no law or policy in place or where a law or policy is silent in the context of prevailing inequality, a s 9(3) indirect unfair discrimination claim could be brought. Here the argument would be that the neutrality in treatment has had a disproportionate impact on a disadvantaged group.[810] In *Singh*, the Equality Court arguably recognised a similar claim. It will be recalled that one of the arguments made by Ms Singh was that the selection criteria was a form of unfair discrimination because it 'directly or indirectly, actively or by omission, withholds benefits, opportunities or advantages from people with disabilities, in that it does not take into account disability criteria for short-listing of candidates'.[811] While the court held that there was no evidence that the reason for not shortlisting her was her disability, it still held that the failure to take her disability into account, when there was 'a duty to advance and promote the position of disabled people,' amounted to unfair discrimination.[812]

---

[810] For an analysis of the Court's understanding of indirect discrimination in South Africa see, *Walker* (n 99) [31]-[32].

[811] *Singh* (n 783) [8.3].

[812] ibid [32].

Recently, a similar line of argument as that advanced in this section of the chapter has emerged in case law related to the South African government's distribution of Covid-19 relief. The cases discussed below show the interrelatedness of the arguments above and the possibility of what I think rests in the adjacent possible.

2.4. A duty to take disadvantage into account for disaster relief

In 2020, a global health pandemic caused by the novel coronavirus, Covid-19 gripped the world. In response to this pandemic, the South African government declared a 'national state of disaster' under the Disaster Management Act, 57 of 2002 (DMA). Under this statute, it published regulations to help manage the pandemic. Because of the devastating impact that the pandemic had on the economy, and the recognition that it would have a disproportionate impact on already disadvantaged groups, the regulations included an increase in social welfare grants and the creation of a temporary unemployment grant.[813] In addition, the government gave financial relief to businesses adversely affected by the pandemic. Some of the State's Covid-19 relief allocated relief by using criteria which included race, gender, disability and youth status.[814] Several organisations challenged these criteria before the courts. In two High Court decisions, the South African courts opened the door to recognise that when taking Covid-19 relief measures, the State must take existing disadvantage into account.[815]

---

[813] For an analysis of these interventions and their impact Haroon Bhorat, Morné Oosthuizen and Ben Stanwix, 'Social Assistance Amidst the Covid-19 Epidemic in South Africa: An Impact Assessment' (Development Policy Research Unit 2020) 202006 <http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP202006.pdf> accessed 10 November 2020.

[814] This includes the Debt Relief Finance Scheme, Business Growth Resilience Facility, Spaza Support Scheme and a Tourism Relief fund. See <https://www.gov.za/covid-19/companies-and-employees/support-business> accessed 10 November 2020.

[815] *Solidarity Obo Members v Minister of Small Business Development and Others; Afriforum v Minister of Tourism and Others* (21314/20; 21399/2020) [2020] ZAGPPHC 133 (30 April 2020), ('*Tourism Fund*'); *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* (21424/2020) [2020] ZAGPPHC 237 (19 June 2020) ('*DA Covid-Relief*'); *Democratic Alliance v President of the Republic of South Africa and Others* (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) ('*DA Covid-Relief Appeal Application*').

In the *Tourism Fund* case, Kollapen J held that when taking economic relief measures to help businesses adversely affected by Covid-19, the State *must* recognise the 'uneven playing field' and the 'fault lines' of 'poverty, race and exclusion that continue to exist in our society'.[816] Having recognised these, he held that the State should then calibrate its response 'to deal with the impact of the crisis as well as the effect of historical disadvantage'.[817] According to Kollapen J, this approach 'is not only permissible at the level of principle, but warranted and necessary'. Kollapen J made these findings in the context of a case in which the trade union Solidarity was challenging Covid-19 pandemic economic relief criteria' lawfulness. The impugned criteria allocated points for Black ownership. Kollapen J found the impugned criteria permissible.

Kollapen J justified the policy's use of these criteria as being in accordance with the 'general transformative trajectory of the Constitution in which the principle of equality finds centre place'.[818] Moreover, he held that 'a race neutral response' in this case would have had the effect of deepening existing patterns of disadvantage.[819] For Kollapen J, 'in a time of a crisis, when people are their most vulnerable, context matters'.[820] Seen from another perspective, it could be argued that had the State failed to take these criteria into account, disadvantaged groups would have a claim that the neutrality of the provision unfairly discriminated against them, breaching their s 9(3) right not to be subject to indirect unfair discrimination or that it violated s 9(1) by failing to confer equal benefit of the law.

---

[816] *Tourism Fund* (n 815) [36].

[817] ibid.

[818] *Tourism Fund* (n 815) [28].

[819] ibid [37].

[820] ibid.

In a second case, *DA Covid -Relief*, the court held that the State *must* take race, gender, youth and disability status into account when distributing Covid-19 relief funds.[821] This case concerned the use of gender, age and disability status in criteria for Covid-19 relief for business. The impugned policies in the case provided that businesses owned by women, young people and people with disabilities would be 'prioritised' when distributing Covid-19 relief.[822] The State justified these criteria on the basis that they were a tool to reach 'vulnerable sectors of society'.[823] The applicant in the case, the Democratic Alliance (DA), sought an interdict against the implementation of the criteria on the basis that there was a lack of clarity on how they would be used to distribute funds.[824] In particular, the DA argued that the term 'priority' was vague and did not provide clarity on the weight that would be given to the impugned criteria when allocating the Covid-19 pandemic relief funds.[825]

The court found in favour of the DA, concluding that the use of the term 'priority' was too vague.[826] However, the DA had made and then abandoned another argument, that when distributing Covid-19 pandemic relief, the State could not use criteria such as race, gender and disability status. The core of the DA's argument was that the DMA did not provide for these criteria to be taken into account.[827] The DA argued that the DMA required resources to be redistributed based on 'need', not for purposes of broader transformation

---

[821] *DA Covid-Relief* (n 815) [55].

[822] ibid [9].

[823] ibid.

[824] *DA Covid-Relief* (n 815) [12]-[15].

[825] ibid [15].

[826] ibid [31].

[827] ibid [32].

and black economic empowerment.[828] While this argument was abandoned, the court decided to a make a finding on this issue because the failure to do so would leave a lack of clarity on the side of the State as to whether it could use these criteria when distributing Covid-19 relief funds.[829]

Rejecting the DA's objection to the use of race, gender, disability and youth, the State argued that the authority to take these criteria into account and promote the advancement of previously disadvantaged groups was in the Constitution, the DMA need not expressly provide this authority. Further, it argued that s 39(2) of the Constitution required the courts to interpret legislation in a manner that promoted the spirit, purport and objects of the Bill of Rights. In this case, the court had to interpret the DMA in a manner that would promote rather than inhibit the right to equality.[830]

While the initial policy only required gender, youth and disability to be taken into account, the court went further, and held that the State *must* take race into account as well.[831] The court based its finding on the interpretive obligation in s 39(2) of the Constitution as well as s 9(2) of the Constitution. It held that the provisions in the DMA had to be interpreted in a manner that took South Africa's history into account, in particular, the 'pattern of disadvantage in which race, class and gender are overlaid'.[832] In relation to s 9(2), the court held that 'The very presence of s 9(2) of the Constitution together with the range of socio economic rights contained in sections 26, 27, 28 and 29 of the Constitution luminously illustrate its commitment to historical redress and the *priority that must be given to*

---

[828] ibid [36].

[829] ibid [33].

[830] *DA Covid-Relief* (n 815) [41].

[831] ibid [55].

[832] ibid [48].

those most in need'.[833] It thus concluded that because of the disproportionate impact of the Covid-19 pandemic on those who are already disadvantaged,[834] prioritising disadvantaged groups is what the Constitution would expect the executive to do.[835]

On application for leave to appeal, specifically on whether the State *must* take these criteria into account, the DA argued that the DMA did not *oblige* the State to take measures to redress historic discrimination unrelated to the Covid-19 pandemic.[836] In addition, the DA argued that s 9(2) of the Constitution was a permissive obligation; it did not impose an obligation to take positive redistributive steps.[837] The court refused to grant leave to appeal. Instead, it held that it was faced with two possible approaches – a literal interpretation of the provisions in the DMA, an approach 'shorn of context and in particular, the social and economic reality of South Africa which courts are obliged to take into account in the context of our transformative constitutional enterprise' and one in terms of its obligation under s 39(2).[838] In that regard, it held that it was obliged, under s 39(2) of the Constitution, to have regard to the spirit, purport and objects of the Bill of Rights. This required the DMA to be interpreted in a manner that obliged the State to prioritise disadvantage groups. Thus, rejecting leave to appeal, the court concluded that:

> The Constitution enjoins fundamental social and economic redress after 300 years of colonial and apartheid rule. There is in our view, therefore no prospect that another court would apply a literal interpretation to the Disaster Act and gloss over the context in which the Act must be interpreted. To do so is to live in a world totally divorced from the racism and sexism that continues to divide our country and where those most in need and most in vulnerable conditions happen to be black.[839]

---

[833] ibid [50] (my emphasis).

[834] ibid [49].

[835] ibid [50].

[836] *DA Covid-Relief Appeal Application* (n 815) [8].

[837] *DA Covid-Relief Appeal Application* (n 815) [9].

[838] ibid [13].

[839] ibid [15].

The cases above illustrate the possibility of recognising that when redistributing resources, the State has a duty to take pre-existing disadvantage into account. My argument is that the corollary to this should be thatthere is a duty to promote and fulfil the right to equality, failing which disadvantaged groups can bring a claim that their right to equality has been violated. While the argument is possible under ss 9(1), 9(2) and 9(3) or a cumulative reading of all three provisions, the strongest argument is that under s 9(3) – the failure to take positive measures in favour of disadvantaged persons could amount to unfair discrimination. As will be shown later in the chapter, in these cases, the courts have the power to order affirmative action as a remedy to vindicate this rights violation. In the next section of this chapter, I explore similar questions in the EEA and Equality Act context.

3. A Duty to Design and Implement Affirmative Action under the EEA

This section of the chapter is concerned with the duty to design and implement affirmative action under the EEA. As will become clear, the questions under the EEA are different to those under s 9 of the Constitution. First, under Chapter Two of the EEA, the 'Prohibition of Unfair Discrimination', the core issue is whether the duty on *every employer* to promote equal opportunity in the workplace includes a duty to implement affirmative action measures. Second, under Chapter Three of the EEA, 'Affirmative Action', the obligation to design and implement affirmative action measures is binding on *all designated employers*. The problem under this chapter is that this duty is not readily enforceable before the courts. Third, there is a bifurcation between Chapters Two and Three of the EEA. This bifurcation bars claimants from relying on Chapter Three provisions in unfair discrimination claims based on a failure to implement affirmative action measures under Chapter Two. In order to untangle these questions and make a positive argument for a duty to implement affirmative action under the EEA, in the next section, I provide a brief overview of the structure and key provisions in the EEA.

3.1. The Bifurcation

Chapter Two of the EEA consists of the unfair discrimination provisions of this statute. Section 5 obliges all employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.' Section 6(1) prohibits unfair discrimination, and s 6(2) provides that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the EEA. These purposes are listed in s 2, which provides that the purposes of the EEA are to achieve equity in the workplace by:

> a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
>
> b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.

Chapter Two of the EEA applies to *all employers* and, under s 10, disputes which arise under this chapter may be brought to the CCMA and the Labour Court. Essentially, claimants have standing to bring Chapter Two rights violations claims. Further, as argued in Chapter Four, similar to s 9(2) of the Constitution, s 6(2) of the EEA is a defence against unfair discrimination claims brought against *all employers*. In this way, affirmative action is a *shield* for employers facing unfair discrimination claims brought by persons adversely affected by an affirmative action measure. The question is whether the provisions in Chapter Two confer a duty on all employers to implement affirmative action - a duty that is actionable as a *sword* in the hands of the beneficiaries of affirmative action under the EEA.

The EEA's affirmative action provisions are in Chapter Three. For purposes of this chapter, the material provisions in Chapter Three are ss 15 and 20. As noted in Chapter One of this thesis, s 15(1) of the EEA defines affirmative action measures as 'measures designed to ensure that suitably qualified people from designated groups have equal employment

opportunities and are equitably represented in all occupational levels in the workforce'. This includes preferential treatment and the use of numerical targets.[840] Section 20(1) of the EEA provides that a designated employer must prepare and implement an employment equity plan which must include affirmative action measures under s 15 of the EEA. Section 20(3) provides that a person may be suitably qualified for a job as a result of any of, or a combination of the person's formal qualifications, prior learning, relevant experience or the capacity to acquire, within a reasonable time, the ability to do the job. Further, s 20(5) prohibits designated employers from unfairly discriminating against a person on the grounds of their relevant experience. These provisions provide designated employers with a powerful tool to achieve the goals of affirmative action under the EEA.

Unfortunately, Chapter Three has no comparable enforcement provision to s 10 of Chapter Two. This gives rise to the question whether, to vindicate Chapter Three entitlements, persons can bring claims to the CCMA and the Labour Court or whether they have to rely on the 'Monitoring, Enforcement and Legal Proceedings' in Chapter Five of the EEA. The Labour Courts have held that unless the enforcement mechanisms under Chapter Five have been exhausted, a claimant cannot use Chapter Three as a sword.[841] Unfortunately, the Chapter Five enforcement mechanism is not effective, leaving possible claimants with little recourse when seeking to enforce the affirmative action provisions in Chapter Three. To understand the significance of the barrier to access courts to enforce Chapter Three, the next section explores the Chapter Five enforcement mechanism and illustrates how it is ineffective to vindicating the right to equality.

---

[840] EEA s 15(2).

[841] *Dudley LC* (n 738) [64]; *Dudley LAC* (n 21) [42]-[43].

3.2. Chapter Five's Failing Enforcement

In terms of Chapter Five of the EEA, an employee or trade union can report non-compliance with the provisions of the EEA to a labour inspector, the Director-General of the Department of Labour (Director General) and the Commission for Employment Equity (the Commission).[842] The labour inspector has the authority to enter, question and inspect a workplace and, in cases where she finds non-compliance, she can issue a compliance order.[843] Similarly, the Director-General has the power to 'review' and make recommendations to ensure compliance. The Labour Court has jurisdiction after the employer has failed to comply with a written undertaking issued by the labour inspector or recommendations by the Director-General. Even then, this must be on the application of the Director-General, who can ask the Labour Court to make the labour inspectors' compliance undertaking and her recommendations and order of the court or issue a fine.[844]

A fundamental problem with this mechanism is that it presumes an efficient, well-resourced and skilled labour inspectorate.[845] This is unfortunately not the case for the South African Department of Labour (the DoL). An ILO Technical Memorandum on South Africa notes that the DoL's labour inspectorate is significantly understaffed.[846] This, together with a high turnover due to low pay, makes it very difficult for labour inspectors to discharge their mandate under the EEA and other labour legislation.[847] In its 2011-2016 Strategic Plan, the

---

[842] EEA s 34.

[843] ibid 36(1).

[844] EEA ss 37(6), 44.

[845] Fergus and Collier (n 59) 491.

[846] International Labour Office - Geneva, 'Technical Memorandum: South Africa Labour Administration and Inspection Need Assessment' <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_151314.pdf> accessed 14 January 2020.

[847] ibid.

DoL confirmed these problems and added to their woes - the absence of a standardised inspection and enforcement manual, leading to non-uniform enforcement procedure; the lack of a structured relationship with the Department of Justice and Constitutional Development to secure a more efficient and effective prosecution process; as well as the lack of a coherent communication strategy to educate employers and employees.[848] The DoL highlighted the same issues in the 2014 – 2019 strategic plan. The 2014 -2019 strategic plan also includes fraud and corruption as labour inspectors are allegedly bribed to 'pass' labour inspections.[849]

In addition to the inefficiencies in the enforcement mechanism, there is also a chronic lack of compliance with the EEA.[850] This has led to the legislature's increase of fines applicable under the EEA.[851] As a measure of last resort to force compliance with the statute, the Employment Equity Act Amendment Bill, 2020 seeks to bring s 53 into force. The provision requires employers entering into contracts with the State to have a certificate as evidence of compliance with their obligations in Chapters Two and Three of the EEA, failing which the State can refuse an offer or terminate an already existing agreement.

As will be illustrated below, the Labour Courts have held that Chapter Three measures can only be enforced via the Chapter Five enforcement mechanism, thereby creating a dichotomy in the enforcement of Chapters Two and Three of the EEA. This

---

[848] Department of Labour, 'Strategic Plan 2011-2016' 23–24 <http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Department%20of%20Labour%20Strategic%20Plan/2011-2016/strat%20plan%202011prog1_2.pdf>.

[849] Strategic Plan: Department of Labour 2014 -2019 available at Department of Labour, 'Strategic Plan 2011-2016' 23–24 <http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Department%20of%20Labour%20Strategic%20Plan/2011-2016/strat%20plan%202011prog1_2.pdf>. 16 accessed 8 November 2020.

[850] Commission for Employment Equity, 'Annual Report 2019-2020' 3 <http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf> accessed 8 November 2020.

[851] Section 27 of the Employment Equity Amendment Act, 47 of 2013, increased the maximum fines for the failure to comply with the EEA by as much as ZAR1 million more than under the previous regime.

dichotomy bars individual applicants and employees who belong to disadvantaged groups from vindicating their right to equality as it relates to Chapter Three affirmative action measures. In addition to the court's refusal to accept jurisdiction under Chapter Three, the courts have also limited the possibility of affirmative action acting as a sword by failing to recognise a duty to implement affirmative action under Chapter Two of the EEA and by preventing claimants in s 6(2) unfair discrimination claims from relying on the affirmative action provisions in Chapter Three. In the section below, I take a close and critical look at the Labour Court jurisprudence on the recognition of a duty to implement affirmative action under the EEA.

3.3. The Labour Court Judgements

In early Labour Court cases, the applicants, members of the designated groups under the EEA, argued that the failure to appoint or promote them was in contravention of a designated employer's obligations to implement affirmative action under the EEA (a Chapter Three claim) and/or that the failure to implement affirmative action was a form of unfair discrimination under s 6(1) of the EEA (a Chapter Two claim). The possibility of these claims hinged on whether the courts would accept the bifurcation between Chapters Two and Three, and their understanding of the demands of a commitment to substantive equality and its relationship with the purposes of the EEA.

3.3.1. The *Harmse* decision

In *Harmse,*[852] the court rejected a strict separation between Chapters Two and Three of the EEA and recognised a right to affirmative action under this statute. The applicant in the case, a Black man, applied for one of three executive positions advertised by the Cape Town Municipality (the Municipality) and was not shortlisted for an interview.[853] Two white men

[852] *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC).

[853] ibid [1].

and one African man were shortlisted.[854] Mr Harmse argued that the failure to shortlist him amounted to unfair discrimination on grounds including race and due to his lack of experience, a claim under s 6(1), Chapter Two of the EEA.[855] The difficulty in this case was that Mr Harmse's unfair discrimination argument was based on the wide definition of suitably qualified in ss 20(3) and 20(4) of the EEA as well as s 20(5) (provisions in Chapter Three of the EEA).

Essentially, Mr Harmse argued that had the employer taken the factors in ss 20(3) and 20(4) into account, he would have been shortlisted. In response, the Municipality raised several exceptions to the unfair discrimination claim. One of the exceptions was that the claim was vague and embarrassing and disclosed no cause of action. According to the Municipality, to sustain an unfair discrimination claim under s 6(1) of the EEA, Mr Harmse had to show that he had not been shortlisted *because of his race* and that the persons who were, were shortlisted *because of their race*.[856] This reading of s 6 of the EEA precluded Mr Harmse from relying on provisions in Chapter Three of the EEA to prove his unfair discrimination claim.[857] For its part, the Municipality argued that he had not been appointed or called for an interview because he did not have the relevant experience and was thus not qualified for the position.[858]

Waglay J had to determine whether a claimant could rely on the affirmative action provisions in Chapter Three of the EEA to sustain a Chapter Two, s 6(1) unfair discrimination claim. He held that they could. Referring to s 6(2) of the EEA, Waglay J

---

[854] Harmse (n 852) [14], [21].

[855] ibid [1]-[2].

[856] ibid [12], [20].

[857] ibid [30].

[858] ibid [37].

affirmed that affirmative action was a shield for employers in unfair discrimination claims.[859] However, relying on s 5 of the EEA, he held that all employers had *an obligation* to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination. For Waglay J, one of the ways in which an employer could eliminate unfair discrimination is by taking affirmative action measures which were consistent with the purposes of the EEA.[860]

Further, Waglay J held that because s 5 of the EEA obliged *every employer* (not just designated employers) to take steps to promote equal opportunity in the workplace, *all employers* had a duty to take affirmative action measures as they were a key instrument to eliminating unfair discrimination in the workplace.[861] This finding linked the prohibition of unfair discrimination in Chapter Two and the affirmative action provisions in Chapter Three of the EEA. The core of Waglay J's finding is that, in addition to being a defence available to an employer against claims that it has discriminated unfairly against an employee, there is also a duty to take measures to eliminate unfair discrimination through affirmative action.[862] According to Waglay J:

> The definition of affirmative action in section 15 indicates a role for affirmative action that goes beyond the passivity of its status as a defence. Affirmative action measures include measures to "eliminate employment barriers", to "further diversity" in the workplace and to ensure "equitable representation". In these respects, affirmative action involves more than just a defensive posture. It includes proactiveness and self-activity on the part of the employer. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace.[863]

Further integrating chapters Two and Three of the EEA, Waglay J held that the provisions in Chapter Three, including ss 20(3) to 20(5), applied to the EEA as a whole, not just Chapter

---

[859] Harmse (n 852) [33].

[860] ibid [32].

[861] ibid [39].

[862] ibid [33], [44].

[863] ibid [33].

Three.[864] These provisions were 'an integral part of steps to be taken by an employer to promote equal opportunity'.[865] Thus, as required by s 20(5) of the EEA, all employers were prohibited from discriminating against persons based on a lack of relevant experience and all employers had a duty to take affirmative action.[866] This was because, according to Waglay J, 'One way in which employers could unfairly discriminate is by elevating "lack of relevant experience" to a "sine qua non"', the prohibition in s 20(5) was thus a species of unfair discrimination under s 6(1).[867]

For Waglay J, it was inconceivable that affirmative action merely provided a shield to those who were already in a position of power, the employer. Referring to s 9(2) of the Constitution, he held that if affirmative action were only a shield, 'employees would, in so far as their full and equal enjoyment of all rights and freedoms is concerned, be at the mercy of an employer with no or no real remedy should the employer fail to promote substantive equality'.[868] In sum, the principles coming out of *Harmse*, as summarised by Waglay J, are that:

> If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against...In either case, the issue is whether the employer has violated an employee's right not to be discriminated against. To this extent, affirmative action can found a basis for a cause of action.[869]

The quote above recognises that the failure to implement affirmative action founds a cause of action for an unfair discrimination claim under s 6(1) of the EEA. This would allow the

---

[864] *Harmse* (n 852) [39].

[865] ibid [41].

[866] ibid [39].

[867] ibid [41]-[42].

[868] ibid [46].

[869] ibid [47].

claimant to rely on the s 10 mechanism – engaging the jurisdiction of the Labour Court for the failure to take or implement affirmative action. Further, because of the integrated reading of chapters Two and Three, a claimant could rely on the provisions in Chapter Three to establish the unfair discrimination claim - this is the right to affirmative action.[870] It is a right to (i) having qualifications defined and understood in accordance with ss 20(3)-(4) of the EEA; (ii) to not be discriminated against because of one's relevant experience; (iii) it is a right to be preferred over candidates from non-designated groups if one meets the 'suitably qualified threshold' understood with reference to Chapter Three – to the extent that this aligns with the purposes of the EEA in s 2 and with s 5's duty to promote equal employment opportunity. Unfortunately, the Labour Courts subsequently rejected the decision in *Harmse*.[871]

3.3.2. Post *Harmse: Dudley* and Others

In *Dudley*, the claimant, a Black woman, applied for a position with the City of Cape Town (the City), a designated employer under the EEA. Following the interview, the City appointed a white man for the position.[872] Following the appointment of the white man, Ms Dudley brought a claim to the Labour Court arguing that:

(i) First, the failure to appoint her unfairly discriminated against her on the grounds of her race and gender, breaching ss 5 and 6 of the EEA. The argument was based on the analysis that, as a suitably qualified candidate, the employer would have appointed her if it had taken the provisions in s 20(3) of the EEA into account.[873]

---

[870] *Harmse* (n 852) [49].

[871] *Dudley LC* (n 738); *Cupido v Glaxosmithkline SA (Pty) Ltd* (2005) 26 ILJ 868 (LC); *Thekiso v IBM South Africa (Pty) Ltd* [2007] 3 BLLR 253 (LC); *PSA on behalf of Karriem v SAPS & Another* (2007) 28 ILJ 158 (LC).

[872] *Dudley LC* (n 738) [6]-[10].

[873] ibid [23]-[25].

(ii) Second, she argued that the failure to prefer and appoint her over the white man was in breach of the City's obligations under the EEA and its EEP. She averred that this failure amounted to unfair discrimination on the grounds of race and gender.[874]

(iii) Third, she argued that the failure to appoint her had breached her constitutional rights to equality, ss 9(2) and 9(3), her right to dignity, s 10, and the right to fair labour practices, s 23(1).[875]

As in *Harmse*, the City raised exceptions to Ms Dudley's claim. First, it argued that the failure to implement an affirmative action measure did not constitute unfair discrimination. Thus, there was no cause of action.[876] Second, it argued that the Labour Court had no jurisdiction to hear a claim based on the failure to draft or implement an affirmative action measure under the EEA until the enforcement mechanisms in Chapter Five were exhausted.[877] Third, it argued that her unfair discrimination claim could not pass because on the one hand, she argued that she was the best candidate for the job and should have been appointed on that basis and on the other, she argued that she should have been 'preferred' – arguments the City considered to be inconsistent.[878]

Rejecting the approach in *Harmse,* the court found in favour of the City. First, it held that the prohibition against unfair discrimination was directly enforceable by an individual.[879] By contrast, the provisions in Chapter Three were not directly enforceable by an individual.

---

[874] *Dudley LC* (n 738) [26]-[28].

[875] ibid [21].

[876] ibid [34].

[877] ibid [36].

[878] ibid [37].

[879] ibid [42].

There was no 'individual right to affirmative action' under the EEA or arising from an affirmative action measure.[880] According to the court, Chapter Three could only be brought into operation in a 'collective environment',[881] its 'essential nature was programmatic and systematic' with an 'uncompromisingly collective' methodology.[882]

Second, the court held that there was no right to direct access to the Labour Court.[883] According to the court, allowing direct access to the Labour Court would displace Chapter Five's enforcement provisions.[884] The *amicus* in the case, the Women's Legal Trust Centre, argued that the Chapter Five enforcement mechanism was an additional, administrative enforcement route which an employee could elect to follow. It did not exclude direct access to the court.[885] Rejecting this argument, the court held that the Director General played a very important role in the enforcement mechanism in Chapter Five.[886]

While the court acknowledged that affirmative action measures (in Chapter Three) were essential to remove 'residual systematic unfair discrimination' (as required under Chapter Two) it held that this did not create a bridge between these different sections of the EEA.[887] Concluding that there was 'no sound basis' upon which the provisions in Chapter Three could be read together with those in Chapter Two.[888] Accordingly, Ms Dudley could

---

[880] *Dudley LC* (n 738) [81], [83].

[881] ibid [43].

[882] ibid [49].

[883] ibid [81].

[884] ibid [70].

[885] ibid [59].

[886] ibid [60]-[62].

[887] ibid [75].

[888] ibid [79].

not rely on ss 20(3) to (5) of the EEA to make a claim under ss 5 and 6 of the EEA. Her only recourse was to prove unfair discrimination without the aid of the wide definition of suitable qualification and the prohibition of discrimination based on relevant experience in terms of Chapter Three.

On appeal, the Labour Appeal Court upheld the finding that the failure to implement affirmative action did not amount to unfair discrimination.[889] Thus, while Ms Dudley could bring an unfair discrimination claim based on her race and gender, she could not bring a claim *that the failure to prefer her* over the white man amounted to unfair discrimination.[890] However, Zondo JP left some room for recourse. First, he held that if the 'right of preference' arose from a collective agreement, Ms Dudley and claimants in her position could have a claim thereunder.[891] It is not clear what he meant by this though. For example, considering the nature of EEP's concluded in the public sector - almost in the form of collective agreements - would a failure to implement an EEP constitute a breach to the plan - recognising a duty to implement affirmative action measures stipulated therein?

Second, agreeing with the Labour Court, Zondo JP held that absent an express provision allowing direct access to the Labour Court under Chapter Three of the EEA, it was clear that the legislature intended these measures to be enforced via the Chapter Five enforcement mechanisms.[892] However, unlike the Labour Court, he held that once the enforcement mechanisms in Chapter Five were exhausted, a claimant could approach the Labour Court and have standing.[893]

---

[889] *Dudley LAC* (n 21) [52].

[890] ibid [54].

[891] ibid [52].

[892] ibid [42]-[49].

[893] ibid [49].

3.4. Rebutting the arguments: towards the recognition of a duty to take affirmative action under the EEA

In the commentary on these cases, there is more support for the approach taken in *Dudley*.[894] The core argument against *Harmse* seems to be that there is no need to recognise a duty to implement affirmative action because persons can rely on the Chapter Five enforcement mechanism. I have already illustrated the problems with relying on the Chapter Five enforcement mechanism. Moreover, even if we resolved the problems with Chapter Five, as argued by the *amicus* in *Dudley,*[895] that the EEA provides an administrative option for enforcement should not preclude: the recognition of a duty to implement affirmative action measures under the EEA; the standing of persons with claims under Chapter Three of the EEA; and the ability to rely on Chapter Three's affirmative action provisions when bringing a Chapter Two unfair discrimination claim.

The second argument is that claimants can simply bring unfair discrimination claims under s 9(3) of the Constitution or s 6(1) of the EEA.[896] The problem with this argument is that, without recourse to the provisions in Chapter Three, bringing an unfair discrimination claim in circumstances where there has been a failure to implement affirmative action or draft an affirmative action measure under the EEA is difficult. Most of the claims are likely to be fatal. This is because, in practice, an employer could simply rely on s 6(2)(b) to argue that the decision to 'distinguish, exclude, or prefer' a person was due to an inherent job requirement. Without recourse to the wide definition of suitably qualified in Chapter Three and the prohibition of discrimination based on relevant experience, a claimant will find it

---

[894] See for example, Christoph Garbers, 'The Right of a Job Candidate to Affirmative Action Selection : A Landmark Case?' Contemporary Labour Law. Thompson and Van der Walt (n 21); Coetzer (n 21); McGregor, 'The Nature of Affirmative Action: A Defence or a Right?' (n 59).

[895] *Dudley LC* (n 738) [59].

[896] Coetzer (n 21) 96.

difficult to show that, the failure to appoint her was on the grounds of her race, gender or disability status.

The *Barnard* case's facts illustrate the difficulty in succeeding in an unfair discrimination claim in these circumstances. In the second round of interviews, the gap between Ms Barnard and the next candidate, a Black man, was not as wide as in the first interview. Mr Mogadima scored 7.33 per cent lower than Ms Barnard.[897] Thus, the panel recommended him as one of the three candidates for the post, with Ms Barnard being the first preferred candidate. Based on the panel's recommendation, Mr Mogadima was at least suitably qualified for the position. The SAPS acknowledged that the appointment of Ms Barnard would not redress the underrepresentation of Black persons at the salary level for which she applied, and that the gap between her and Mr Mogadima was small.[898] However, in their recommendation, Ms Barnard had first preference because 'she displayed a distinct brand of passion and enthusiasm vital to the service delivery needs' of the SAPS.[899]

Under the circumstances described above, and in line with *Dudley,* Mr Mogadima would not be able to argue that the employer had breached his Chapter Three obligations. The only recourse available would be an unfair discrimination claim under s 6(1) of the EEA. In this regard, Mr Mogadima would have to prove that he had been discriminated against on the grounds of his race. His claim would likely fail. As discussed in Chapter Four of the thesis, the test for unfair discrimination under the EEA is in practice the same as the *Harksen* test. He would pass the first leg of the Harksen test – a *prima facie* case of discrimination on the grounds of his race. However, the SAPS could argue that Ms Barnard, as made clear by the interviewing panel's recommendations, was *the best* candidate. Without recourse to the

---

[897] *Barnard CC* (n 13) [11].

[898] ibid [12].

[899] ibid.

wide definition of suitably qualified in Chapter Three of the EEA or the prohibition of unfair discrimination on the grounds of relevant experience, or the numerical targets in the EEP, he would struggle to refute this argument. In essence, what the Labour Appeal Court has done is make individual merit, beyond suitable qualification, a tool available to an employer to defeat unfair discrimination claims brought by intended beneficiaries of affirmative action. As Collier and Fergus have noted:

> The effect of the EEA's unenforceable provisions for affirmative action is that while they legitimately shield non-designated employees from undue and irrational acts of unfair discrimination, they may simultaneously bar the very people the Act was designed to protect from progressing in the workplace.[900]

Another critique levelled against the approach in *Harmse* is that the recognition of a right to affirmative action would give rise to frivolous lawsuits and vexatious litigation against employers.[901] This is a very weak argument. Frivolous and vexatious litigation claims can be dealt with in accordance with ordinary civil procedure under similar circumstances. If a claim is frivolous and vexatious, it will be dismissed accordingly. There is no reason why these kinds of cases should be treated differently.

Overall, the divide between the prohibition of unfair discrimination and the employers' duty to implement affirmative action measures, one which is immediately justiciable and the other which depends on the willingness of the designated employer and the efficacy of the enforcement mechanisms in Chapter Five, frustrates the achievement of substantive equality.[902] The better approach, one which aligns with the commitment to substantive equality and a wholistic reading of the EEA, is similar to that taken by the court in *Harmse*. Under Chapter Two of the EEA, all employers have a duty to take affirmative action measures. This is inherent in a substantive reading of s 2, 5 and 6 of the EEA. Section

---

[900] Fergus and Collier (n 59) 498 fn 94.

[901] Coetzer (n 21) 96.

[902] Fergus and Collier (n 59) 489.

5 of the EEA obliges all employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination'. As held in *Harmse*, one of the ways to eliminate unfair discrimination is through affirmative action – a tool that the EEA foregrounds.

In addition, the courts should recognise that the failure to take or implement affirmative action will in some cases amount to unfair discrimination. However, under this approach, the claimant should have recourse to the affirmative action provisions in Chapter Three of the EEA. That the employer did not take their race, gender or disability into account when they met the suitably qualified criterion set in Chapter Three of the EEA and in light of the prohibition of discrimination based on relevant experience should be available to help establish the unfair discrimination claim.

4. A Duty to Fulfil the Right to Equality Under the Equality Act

In line with s 9(2) of the Constitution, and s 6(2) of the EEA, s 14(1) of the Equality Act provides that, 'it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination'. The use of the terms 'it is not unfair discrimination' is similar to the permissive language in the Indian Constitution, recall that Article 16(4) starts with '*Nothing shall prevent'* and the use of the term 'may' in s 9(2) of the Constitution. For the same reasons as discussed earlier in the chapter, the use of this permissive language should not bar the recognition of a positive duty to take positive step to fulfil the right to equality. Thus, a similar argument as that made under s 9 of the Constitution should apply to the context of the EEA, at least in relation to the State's obligations (not private persons) under this statute.

Further, in addition to the general prohibition of unfair discrimination and the affirmative action provision, the Equality Act has provisions which use language that leaves

much room for the recognition of a positive duty to fulfil the right to equality. Unfortunately, these provisions, ss 24 -28 have yet to come into effect.

Section 24 of the Equality Act, 'the general responsibility to promote equality' provides that the State and all persons have a 'duty and responsibility' to promote and achieve equality. In addition, s 28(3)(a) of the Equality Act, part of the 'Special measures to promote equality with regard to race, gender and disability' heading, provides that the state, institutions performing public functions and all persons have a *duty* and *responsibility* to eliminate discrimination and promote equality on the basis of race, gender and disability. The Equality Act further prescribes ways in which the duty holders can realise their 'duty and responsibility'. This includes enacting appropriate laws, developing progressive policies and codes of good practice to eliminate unfair discrimination. In addition, the s 28(3)(b)(iii) includes the adoption of 'viable action plans for the promotion and achievement of equality in respect of race, gender and disability'. The language of 'duty and responsibility' in the provisions outlined above give more room for the argument that the Equality Act imposes an obligation to promote the achievement of equality.

Unlike the EEA, there is no enforcement hurdle under the Equality Act. The Equality Act provides jurisdiction for the Equality Court in all cases brought under its provisions. Under s 20 of the Equality Act, individuals, groups, organisations acting in the public interest and in the interests of its members can bring claims to the Equality Courts.

5. Affirmative Action as a Remedy for Breaching the Right to Equality

So far in this chapter, I have argued that it is possible to interpret ss 7(2) and 9 of the Constitution and the provisions in the Equality Act as imposing a positive duty to promote the achievement of equality, failing which a breach of the equality right could arise. Also, I have shown how under the EEA, it is possible to read the provisions as imposing a duty on all employers to take affirmative action measures as an instrument to achieve the goals of

that statute. Once we recognise these possibilities, and that they accord with the commitment to transformation and substantive equality, the next issue to consider is whether the courts can use affirmative action as a remedy.

In answering this question, this section of the chapter will show that affirmative action is a possible remedy in the South African courts' broad remedial powers. There will be cases where a court should order taking positive steps to vindicate the right to equality, including affirmative action when it is an 'appropriate' and 'just and equitable' remedy. To make this argument, it is important to explore the nature and scope of the South African court's remedial powers. I turn to this below.

5.1. Appropriate and just and equitable relief

In cases where there has been a breach of a right in the Bill of Rights, s 38 of the Constitution provides that persons have a right to approach the courts alleging an infringement of their rights. In these cases, the courts have the power to grant 'appropriate relief'. Further, s 172(1)(b) of the Constitution provides that when deciding a constitutional matter, the courts have the power to grant 'just and equitable relief'. The use of the terms 'appropriate' and 'just and equitable' give judges a lot of discretion when designing remedies - there is no list of recommended or mandated remedies.[903] Thus, in principle, there is no reason why affirmative action should not be available as a remedy. As noted above, the question that I want to consider is whether and in what cases affirmative action could be 'appropriate' and/or 'just and equitable' relief. It is thus important to consider how the Constitutional Court has defined these terms.

[903] This is a 'flexible approach to remedies' as no particular remedy is provided Currie and De Waal (n 173) 181.

5.1.1. An *appropriate* remedy is an effective remedy

In *Fose*, the Constitutional Court held that an 'appropriate' remedy is one that is required to protect and enforce the Constitution.[904] This includes a declaration of rights, an interdict, a mandamus 'or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced'.[905] This definition is very broad as there are many different kinds of remedies that a court could order to protect and enforce rights, some of which will be more effective than others. Thus, the Constitutional Court further held that an appropriate remedy meant an *effective* remedy - one that allowed for the vindication of rights.[906]

An *effective remedy* is 'relief that leaves no gap between right and remedy: it makes the constitutional ideal a reality'.[907] In *Modderklip,* Langa CJ identified the right of access to courts in s 34 of the Constitution and the rule of law as guaranteeing a right to an *effective remedy*.[908] Without an effective remedy, he reasoned that 'the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced'.[909] In that case, the Court upheld a remedy in which the State had to pay damages to a private landowner, as compensation for the unlawful occupation of land by a community. In this way, the remedy served to vindicate the community's right to access to housing, the prohibition of arbitrary evictions and the property owner's right to property.[910] In *Hoffmann*, the Court ordered an

---

[904] *Fose* (n 736) [19].

[905] ibid [19].

[906] ibid [69]; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) [58].

[907] M Bishop, 'Remedies' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, 2008) 67.

[908] *Modderklip* (n 906) [51].

[909] *Fose* (n 736) [69].

[910] *Modderklip* (n 906) 65.

employer to appoint an applicant whom they had refused to appoint because he was HIV positive. The Court held that the order of appointment was 'a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution'.[911] This was because such a remedy effectively struck at the source of the unfair discrimination in the case.[912] It is clear from these cases that the requirement that an appropriate remedy is effective is 'victim centred'.[913] By this, I mean that the courts seek a remedy that will vindicate the infringed right(s) to the fullest extent possible.

5.1.2. A 'just and equitable remedy' requires a balancing of interests

The 'just and equitable' criterion requires the courts to balance the rights and interests of all relevant parties. The rights and interests balanced in a case will depend on the facts of the case. For example, in *PE Municipality*, the Constitutional Court held that the requirement of just and equitable required the courts (in deciding whether or not to grant an eviction) to balance the interests of the landowners and the occupiers of land. This assessment took 'extraneous' factors including 'morality, fairness, social values' into account.[914] In *Du Toit,* the Court held that in expropriation cases, just and equitable compensation for expropriation required a balance between the public interest and the interests of those affected by the expropriation.[915]

---

[911] *Hoffmann* (n 280) 50.

[912] ibid.

[913] Bishop (n 907) 57.

[914] *PE Municipality* (n 309) [33].

[915] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) [32]-[33].

5.1.3. An appropriate remedy is a just and equitable remedy

The requirement of 'appropriate' and 'just and equitable relief' seems to pull in opposite directions - the former focuses on vindicating the infringed right and the latter on achieving a holistic, value-based balancing of competing rights and interests. However, the Constitutional Court has read them to be complementary – an appropriate remedy must also be just and equitable.[916] In *Hoffman,* the Constitutional Court specifically held that 'appropriate relief must be *fair and just in the circumstances of the particular* case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate'.[917]

In the affirmative action context, finding an appropriate and just and equitable remedy should be underlined by the approach put forward in Chapters Two to Four of the thesis. Affirmative action cases give rise to multiple, complex and often conflicting rights and interests. As discussed in Chapter Four, this includes the interests of disadvantaged groups which affirmative action measures seek to advance; the interests of non-beneficiaries of affirmative action; the interests of the specific duty bearer in a particular case (for example, an employer); and the interest of the public (for example, service delivery concerns in the public service). However, as argued in Chapter Four (in the context of the judicial review of affirmative action) the balancing of competing interests to reach an 'appropriate' and 'just and equitable' remedy in affirmative action cases should give more weight to the interests of the intended beneficiaries of affirmative action. Further, and in accordance with Chapters Two and Three of the thesis, it should seek to further the goals of transformation, and optimise the different dimensions of substantive equality. At the same time, it should look at the impact on other persons affected by the remedy and consider whether the remedy

---

[916] *Fose* (n 736) [38].

[917] *Hoffmann* (n 280) [42] (my emphasis).

would have the impact of entrenching any of the disadvantages that substantive equality seeks to remedy.

5.2. Factors taken into account to find an appropriate and just and equitable remedy

When crafting an appropriate and just and equitable remedy, the courts have to consider several factors. The first is separation of powers considerations. In *National Coalition II,* the Constitutional Court held that when designing a remedy, it had to consider the deference it owes other branches of government.[918] However, the Constitutional Court has also held that while separation of powers considerations are important, a court cannot avoid its obligation to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.[919]

Considering the importance of affirmative action, the Constitutional Court has rightly held that when exercising its judicial review powers, it will be deferent to the other branches of government. However, as argued in Chapters Two and Four, the courts should be less deferent when there has been a failure to take or implement measures to fulfil the right to equality. Under a classic liberal ideal of the separation of powers, ordering positive steps to vindicate the right to equality, including affirmative action, may be seen as an encroachment on other branches' domain. However, under the purposive approach to separation of powers, in cases where such remedies could vindicate the right to equality, the courts should not be deterred from being less deferent in their remedial design.

The *Modderklip* case (discussed above) is an example of the willingness to retract from deference in pursuit of vindicating the rights in the Bill of Rights. A fundamental objection to the remedy, in that case, was that it amounted to the Court forcing the State to expropriate

---

[918] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 [66].

[919] *Fourie* (n 285) [170].

land to meet its Constitutional obligations, breaching the separation of powers.[920] While the Court characterised the remedy as a form of compensation rather than expropriation, it did not pay heed to the separation of powers argument; this was arguably because the remedy in this case was the most effective. Absent showing that the State had alternative land to move the community, and in light of the State's obligations to the community and the property owner's rights, the Court persisted that the remedy was 'the most appropriate' for that case.[921]

The second factor has to do with the capacity and expertise of courts.[922] For example, in the employment cases, the issue that arises is the extent to which the courts should be deferent to the employer's assessment of who to appoint, promote or how it should allocate its resources. This question is particularly salient when the court is asked to order an affirmative action measure as a remedy - as opposed to an order for the implementation of an already existing affirmative action measure. In this case, the best approach would be to set the broad parameters for a valid affirmative action measure that would meet the requirements in s 9(2) of the Constitution. As argued in Chapter Four, the assistance of *amicus* and the use of expertise to support the court's capacity would be instrumental in this regard. However, as seen in the example of the *Hoffman* case, the courts should be able to go as far as ordering persons' appointment to give effect to an affirmative action measure or where the failure to take such measure violates the right to equality.

A third important consideration is the financial cost. Courts may be hesitant to grant a remedy if it leads to a heavy financial burden.[923] This consideration should not be a bar in designing affirmative action remedies as they mostly involve the redistribution of an already

---

[920] *Modderklip* (n 906) [63]-[65].

[921] ibid [65].

[922] Bishop (n 907) 77.

[923] ibid 76.

existing resource in a manner that prefers and prioritises disadvantaged groups. In cases where it does impose a financial cost on the duty bearer, for example, when an employer has to provide adequate training and support for employees, the court should consider this cost. In this regard, the courts should consider that if the duty bearer does not bear the burden, it will fall on the disadvantaged groups.

The fourth is the impact that a remedy will have on third parties.[924] As noted above, the courts should consider the effect that an affirmative action remedy has on third parties – this includes the interest of non-beneficiaries and the public. It bears emphasis that the adverse impact on the interests of non-beneficiaries should not bar taking affirmative action remedies. The nature and severity of the remedy is material. For example, in the employment context, a remedy that an employer should appoint a person who belongs to a disadvantaged group is likely to meet the appropriate and just and equitable threshold if it does not require the demotion or removal of a non-beneficiary candidate appointed by the employer. In such cases, an appropriate and just and equitable remedy would grant damages to the disadvantaged person and provide that they be appointed once a similar position becomes available. Further, in its deliberation, the court should use all available resources, including the testimony of those affected by the remedy.

Overall, it is clear that, under ss 38 and 172(1)(b), there is no express bar to ordering affirmative action as a remedy; to amending an already existing affirmative action measure; and giving individual or group relief based on an existing affirmative action measure. In cases where affirmative action is an effective remedy, it should be available to the courts. What remains is the question, under which circumstances will taking affirmative action measures be an effective remedy? Before answering this, the section below turns to whether affirmative action measures are available as remedies under the EEA and Equality Act.

---

[924] Albertyn and Goldblatt (n 209) 76–77.

5.3. Affirmative action as a remedy under the EEA and Equality Act

Under the EEA, the Labour Court has broad remedial powers. In cases where the Labour Court has found that there has been unfair discrimination, s 50(2) empowers the court to make 'any *appropriate* order that is *just and equitable* in the circumstances.' This *includes* an order to pay compensation or damages to an employee; an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; and an order to comply with Chapter Three of the EEA.[925] This provision should be interpreted in line with the constitutional provisions explored above. Accordingly, to the extent that affirmative action measures are available as a remedy under s 9, they too are available under the EEA.

The key difference between s 9 and the EEA in relation to remedies is that the EEA sets detailed requirements for the content of affirmative action measures.[926] The EEA also provides some guidance for the inputs required in the design of affirmative action measures.[927] This includes the obligation on designated employers when drafting affirmative action measures, to consult with employees and trade unions;[928] and to conduct an analysis of its employment policies, practices, procedures, and a profile of the employer's workforce.[929] In *Dudley,* the Labour Court relied on this to find that the collaborative requirements for designing affirmative action measures under the EEA preclude courts' intervention.[930] However, a better approach is for the courts to use their remedial power to

---

[925] EEA s 50(2)(c) and (d).

[926] ibid s 20.

[927] ibid ss 16–19.

[928] ibid ss 15–19.

[929] ibid s 19.

[930] *Dudley LC* (n 738) [70].

ensure that employers do take these measures, including for example by using supervisory mechanisms to ensure compliance with the processes outlined in the EEA.

As with s 9 of the Constitution and the EEA, the Equality Act provides the Equality Courts with a wide measure of discretion when exercising its remedial powers. Section 21(2) of the Equality Act states that the Equality Courts have the power to make 'an appropriate order in the circumstances'. This includes an order to make specific opportunities and privileges unfairly denied available;[931] an order for the *implementation of special measures* to address unfair discrimination;[932] an order directing the *reasonable accommodation* of a group or class of persons;[933] and an order to comply with any provision of the Equality Act.[934] However, going further than the EEA, the Equality Act's language is more open to the use of affirmative action as a remedy.

For example, one possible remedy is to order the implementation of special measures to address unfair discrimination. As I have argued, one way to remedy unfair discrimination is through affirmative action. Thus, the *special measures* envisaged in the Equality Act could include affirmative action. Another example is the order for making opportunities and privileges previously denied available. The courts could remedy the failure to take affirmative action and appoint, admit or promote persons (making a specific resource or opportunity available to them) by making such opportunity or resource available to them.

A good example of how this would work in practice is the example of the remedy in *Singh*. In *Singh*, the Equality Court held that there was a duty to take affirmative action

---

[931] Equality Act s 21(2)(g).

[932] ibid 21(2)(h).

[933] ibid 21(2)(i).

[934] ibid 21(2)(p).

measures to advance and promote disabled persons.[935] The court held that the failure to take Ms Singh's disability into account in the shortlisting to be a form of unfair discrimination. As a remedy, the court held that the Magistrates Commission had to reconsider the shortlisting of candidates and take the disability, race and gender of Ms Singh into account in its revised shortlisting.[936] While this did not guarantee that she would be shortlisted, the Magistrates Commission had a duty to show that it had taken these criteria into account in realising its duty to promote and advance disabled persons.[937] In addition, the court ordered the Magistrates Commission to comply with ss 174 and 9 of the Constitution, its obligations under the Equality Act and the obligations in its international law treaties.[938] The court went as far as ordering the Magistrates Commission, within ten months of the order, 'to make a formal and comprehensive statement of policies and criteria to be used and/or applied in shortlisting, evaluation and appointment for positions as Magistrates'.[939]

Taking into account the limitations to the exercise of the court's remedial powers, this remedy passes muster. Regarding the separation of powers and questions related to the capacity and expertise, the court's remedy extended to an injunction to design affirmative action measures that met the requirements set in the Constitution, the Equality Act and international law. However, it deferred the policy's actual design to the Magistrates Commission, giving it a sufficient period to comply, ten months.

The second consideration is the financial cost. In this case, there isn't a clear financial burden on the Magistrates Commission. Though, it could be argued that taking affirmative

---

[935] *Singh* (n 783) [31]-[33].

[936] ibid [1].

[937] ibid [42].

[938] ibid [1] (Ledwaba J cites his earlier order in the case).

[939] ibid.

action measures in favour of disabled persons necessarily includes having a budget for any reasonable accommodation needed for the disabled person. Reasonable accommodation could place a financial cost on the duty bearer. That the Magistrates Commission would incur financial costs in such cases should not suffice to exclude this remedy. As I have argued, if not the duty bearer, then the burden falls on the disadvantaged. Moreover, the standard of reasonableness in providing accommodation for disabled persons will ensure that the accommodation does not impose an 'undue burden' on the duty bearer.

In *Pillay*, the Constitutional Court made it clear that reasonable accommodation requires the duty bearers to take 'positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.[940] This is to ensure disabled persons are not relegated 'to the margins of society because they do not or cannot conform to certain social norms'.[941] In relation to the extent of the cost on the duty bearer, the court aligned itself with the Canadian Supreme Court's approach that, in contrast with the 'de minimis cost' approach by the US Supreme Court, requires the duty bearer to take 'more than mere negligible effort' to meet its obligation to accommodate.[942]

The third consideration is the impact that the remedy will have on third parties. In this case, the remedy required a revision of shortlisting criteria. The remedy did not require Ms Singh to be shortlisted or that a person is removed from the shortlist. However, it is possible that taking into account the new criteria, a candidate who may have been on the shortlist, falls off, in favour of shortlisting Ms Singh. However, this impact should not outweigh the importance of realising the right to equality and giving a remedy that effectively vindicates this right. In relation to the public, the remedy will likely have a positive impact,

---

[940] *Pillay* (n 359) [73].

[941] ibid.

[942] ibid [76].

ensuring that the Magistrates Commission meets its obligation to enable the inclusion of disabled persons in the judiciary.

6. Conclusion

The majority of the claims being brought before the courts are from the perspective that these measures are either 'too much' or are 'the wrong thing' – seen from the perspective of persons who have been adversely affected by these measures: the white male parliamentarian in *Van Heerden*, the white female police officer in *Barnard*, the Coloured and white correctional officials in *Correctional Services,* and an organisation representing insolvency lawyers and commercial business in *SARIPA*. This chapter attempts to change the face of the claimants in affirmative action cases, which will hopefully push the courts' affirmative action jurisprudence to a different, more transformative place. In line with this, the chapter has argued that the right to equality, read with s 7(2) of the Constitution and international law, imposes a positive duty on the state to fulfil and promote the achievement of equality.

In cases where there has been a failure to take or implement such measures or where they are not sufficient to vindicate the right to equality, disadvantaged persons can bring a claim arguing that their right to equalityhas been violated. I argued that of all the three possible claims, under ss 9(1), 9(2) and 9(3), the strongest is the s 9(3) argument – that the failure to take positive steps to fulfill, protect and promote the right to equality could amount to unfair discrimination. Even so, a commitment to a purposive, generous and transformative interpretation of the equality right requires all three provisions to be read together – embodying a commitment to substantive equality – a commitment that includes an obligation to take positive steps to fulfill the right to equality, including through affirmative action. This approach could also apply to the Equality Act. Under the EEA, I argued that all employers have a duty to take Chapter Three affirmative action measures, failing which a claim for unfair discrimination could arise. In the last section of the chapter, I argued that, when exercising their remedial power, the courts can use affirmative action as

a remedy to vindicate the right to equality. It bears emphasis that the chapter's arguments are limited to the context of the States obligations under s 9 of the Constitution and the Equality Act and private persons who are the duty bearers under the EEA.

PART III: FOR WHAT, FOR WHOM, THROUGH WHAT MEANS AND FOR HOW LONG?

CHAPTER SIX: FOR WHAT AND FOR WHOM?

Introduction

Against the background of a commitment to transformative constitutionalism, a multi-dimensional conception of substantive equality and the commitment to transformative adjudication discussed in the previous chapters, this chapter considers how the South African courts should interpret and develop affirmative action under s 9(2) of the Constitution and the provisions in the Equality Statutes in relation to two pertinent questions. The first question explores the justification for and thus the question of *what* purpose(s) affirmative action *should* pursue under s 9(2) of the Constitution and the Equality Statutes. For *whom*, the second question, explores the boundaries for the demarcation of the beneficiary groups of affirmative action. These questions are complex, interrelated, and frame much of the debate on affirmative action in South Africa. Accordingly, there can be no closure on any of them. In this chapter, I seek to explore the arguments and suggest how a commitment to a transformative approach to affirmative action can help the courts and the broader community of constitutional interpreters give meaning and content to affirmative action.

I have divided the chapter into two sections, each responding to one of the two questions above. In relation to the first question, while s 9(2) provides that measures should promote the achievement of equality through the *advancement* and *protection* of persons or categories of persons disadvantaged by unfair discrimination, it is not clear what *specific objectives* can legitimately be pursued as affirmative action measures under s 9(2) of the Constitution. For example, is the pursuit of diversity, as in the United States,[943] a legitimate purpose under s 9(2) of the Constitution? What is the relationship between the EEA's focus

[943] See *Bakke* (n 438); *Grutter* (n 438); *Gratz* (n 438); *Fisher (2016)* (n 438).

on achieving 'equitable representation in all occupational levels in the workplace'[944] and substantive equality? In exploring these questions and seeking to provide more clarity and coherence for how far s 9(2) should stretch and how to give meaning and interpret the provisions in the Equality Statutes, the first section will explore the Constitutional Court's understanding of affirmative action as a 'remedial' and 'restitutionary' measure,[945] within the context of broader debates about compensatory versus distributive justifications for affirmative action as well as the divide between instrumental and moral justifications for affirmative action. The section will argue that the multiple dimensions of substantive equality discussed in Chapter Three (redistribution, recognition, participation, freedom and structural change) offer a framework within which a wide range of purposes can legitimately be pursued as affirmative action measures under s 9(2) and the Equality Statutes.

In the second section, I explore the criteria for the demarcation of the beneficiary groups of affirmative action in relation to the range of purposes discussed in the previous section. While the EEA expressly lists women, Black people and people with disabilities as designated beneficiaries,[946] s 9(2) of the Constitution and the Equality Act are vague on who the beneficiaries of affirmative action are. As noted above, it merely mentions 'persons, or categories of persons, disadvantaged by unfair discrimination'. This provision does not provide clarity about the criteria to be used to determine disadvantage. I draw from the multiple dimensions of substantive equality and argue that affirmative action should seek to redress the different forms of disadvantage identified by the different dimensions – encompassing the complex intersection between social, economic and other forms of disadvantage. These should guide the classification of beneficiaries. In addition, in light of

---

[944] EEA s 2(b).

[945] *Van Heerden* (n 1) [30].

[946] EEA s 1.

the multiple and complex forms in which disadvantage arises and intersects, the demarcation of affirmative action beneficiaries should take varying degrees of disadvantage and intersectionality into account. Further, I argue that there must be room for flexibility. Disadvantage is not static. As new patterns of group-based disadvantage emerge, it should be possible to recognise new beneficiary classes.

1. For What? Drawing Purpose from the Multiple Dimensions of Substantive Equality

The South African courts have yet to clarify the justification for and thus, the range of legitimate purposes that affirmative action can pursue.[947] On the one hand, it is considered a form of redress for the injustice of colonial and apartheid discrimination - as backwards-looking and thus focussed on compensation for past injustice.[948] On the other hand, it is considered a means to achieve specific societal aims - as forward-looking and centred around redistributing material and non-material resources in a more egalitarian manner. As Mokgoro J held in *Van Heerden*, s 9(2) measures are 'an instrument for transformation and the creation of a truly equal society'.[949] These two conceptions are linked by the Constitutional Court's acknowledgement that 'whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds'.[950]

Under the EEA, affirmative action is seen as one of the measures to achieve equal employment opportunity by redressing 'the disadvantages in employment experienced by

---

[947] Ockert Dupper, 'In Defence of Affirmative Action in South Africa' [2004] SALJ 187 (For an analysis of the justifications for affirmative action, focussing on employment).

[948] *Van Heerden* (n 1) [25] Moseneke J notes that s 9(2) is for 'reparation for past exclusion, dispossession and indignity'. Similar links between affirmative action as a remedy for past injustices are made by Mokgoro J, [75] and Ngcobo J [116].

[949] ibid [87].

[950] *Barnard CC* (n 13) [29].

designated groups, in order to ensure their equitable representation in all occupational levels in the workforce'.[951] Essentially, under the EEA, the purpose of affirmative action is to eradicate the barriers to entry into the labour market by creating obligations that will increase the representation of the different beneficiary groups under that statute. What is not clear is the relationship between the EEA's focus on representation and substantive equality's concern with redressing group-based disadvantage. Is demographic representation a complete proxy for redressing group-based disadvantage as understood in Chapter Three?

In Chapter Three, I explored the South African courts' commitment to substantive equality, in particular, that s 9 of the Constitution is focussed on redressing group-based disadvantage. I noted that the Constitutional Court has struggled to agree on the meaning of substantive equality. In contrast with the dominant approach, centring dignity-based harm, I argued in favour of an approach that includes multiple dimensions of substantive equality. Drawing on this work, in this section of the chapter, I explore the range of purposes that affirmative action measures should pursue under the multi-dimensional conception of substantive equality.

To begin, however, I explore the relationship between 'backward' and 'forward' looking justifications for affirmative action – particularly the relationship between affirmative action as a form of compensatory and distributive justice and the divide between instrumental and moral justifications for affirmative action. I conclude by arguing that the multiple dimensions of substantive equality allow us to traverse the boundaries between these different classifications.

---

[951] EEA s 2(b).

1.1. Compensatory versus distributive justice

1.1.1. Compensatory justice

The Constitutional Court has used 'remedial' and 'restitutionary' to refer to measures under s 9(2) of the Constitution and affirmative action measures under the EEA. As will be apparent in the discussion below, this language is that of compensatory justice. However, the Court has not expressly grappled with the theory of compensatory justice and its approach to affirmative action.

Briefly, compensatory justice is dominantly understood as encompassing compensation for victims for past wrongs. Compensatory justice focusses on redressing injustices inflicted upon *specific victims* by a *specific perpetrator*. The aim is to return the victim to the position she would have been in but for the harm inflicted or rights violation. As Hill summarises, 'compensatory justice involves someone being injured (the victim), a person committing the injury (the victimizer), and quantifiable damage that can be restored by the victimizer through the paying of compensation or the return of stolen goods'.[952] As a rationale for affirmative action, this understanding of compensatory justice is subject to four interrelated objections. These objections are grounded in the nature of compensatory justice - 'compensation should be paid to the one harmed and it should be paid by the one who caused the harm'.[953]

First, critics point to the mismatch between the current beneficiaries of affirmative action and the victims of past injustice.[954] Second, they point at the mismatch between the perpetrators and the persons who bear the burden. It is, so the argument goes, a burden

---

[952] Renee Hill, 'Compensatory Justice: Over Time and Between Groups' [2002] The Journal of Political Philosophy 392, 392; Elllen Paul, 'Set-Asides, Reparaations, and Compensatory Justice' [1991] Nomos 97, 103.

[953] Ronald Fiscus, *The Constitutional Logic of Affirmative Action* (Duke University Press 1992) 9.

[954] ibid 10.

placed on 'innocent' persons who belong to non-beneficiary groups, in particular white men, even if they were not perpetrators of the past injustice. Writing in relation to race-based affirmative action, Fiscus summarises this argument in noting that, 'The current generation of whites cannot be said to be responsible for the harm inflicted by earlier generations of whites'.[955] Third, the critics argue that the burden for compensation is not evenly spread on all those who may have benefitted from past discrimination.[956] The example used is that of young white men without a disability as the most affected by these measures. Thus, the burden of compensation is said to be arbitrarily distributed.[957] Fourth, if compensation for past injustice is just, this opens the floodgates for any person who has suffered *any form of past harm* to compensation. How should we go about deciding what harms deserve to be compensated?[958] For example, if the harm we are redressing is discrimination, there are many different bases upon which persons have been discriminated against.

According to Simon, the only conclusion is that there is no relevant group. All persons who have been similarly injured to those injured based on race and gender should benefit as *individuals*.[959] If so, he argues that group-based classifications cannot be used.[960] Further, he notes that if we insist that compensation is owed to the group, that only specific group members benefit renders affirmative action arbitrary.[961] This is the over and under-

---

[955] ibid.

[956] Robert Simon, 'Preferential Hiring: A Reply to Judith Jarvis Thomson', *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977) 45.

[957] ibid 46–7; George Sher, 'Justifying Reverse Discrimination in Employment' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment* (Princeton University Press 1977) 52.

[958] Simon (n 956) 41.

[959] ibid.

[960] ibid 43.

[961] ibid.

inclusivity argument against compensatory affirmative action. As Anderson summarises in relation to race, 'race is an imperfect proxy for victimization-by-discrimination. It is overinclusive, in selecting some individuals in the target groups who have not experienced discrimination, and underinclusive, in excluding individuals outside the targeted groups who have suffered discrimination'.[962]

The arguments above relate to a conception of compensatory justice that requires identifying a specific perpetrator and victim. However, substantive equality has illustrated the structural and systemic nature of group-based disadvantage. Deeply entrenched systems of injustice, racism and sexism, rooted in white supremacy and patriarchy, cannot be attributed to individual perpetrators. Thus, we can rebut the arguments above by affirming the systemic and structural nature of the disadvantage that results in the historical subordination and domination of groups to others' advantage. Having recognised this, there is no need to identify individual perpetrators and victims.

In addition, proponents of affirmative action as a form of compensatory justice, accepting the victim/perpetrator model, argue that there need not be a perfect match between victim and perpetrator. The focus should be on the persisting impact of past discrimination, its effects on members of specific groups and the fact that some groups (the non-beneficiary group) have and continue to benefit from past discriminatory practices and thus bear the burden of compensation. Rather than focusing on individual victims and perpetrators, the argument is that the focus should be on the relative disadvantage and advantage based on group membership. Thus, not all group members must prove that they are disadvantaged specifically; they benefit as individuals because of their membership to a group that has been subject to discrimination. This argument is based on two assumptions that link compensatory justice and distributive justice (discussed below). First, even if they

[962] Anderson (n 37) 138.

have not themselves been unjustly excluded, the present members of the currently excluded groups suffer the effects of discrimination – they suffer harm that makes them 'victims' of past injustice.[963] Second, the present members of the privileged group are beneficiaries of this past injustice, even if they did not contribute to it.[964]

Against the history of racial, gender and other forms of past discrimination – it seems intuitive that affirmative action in South Africa is a tool for 'reparation'.[965] That the current beneficiaries of affirmative action are not necessarily the direct 'victims' of colonial and apartheid domination and oppression should not be material. The focus should be on the effects of past injustice and the continuity between past discrimination and current inequality. There is nothing in the text of the Constitution that prohibits this approach. Indeed, the Court's affirmative action jurisprudence's use of 'remedial' and 'restitutionary' to refer to s 9(2) measures is an indication that they too consider this approach as being consonant with the Constitution. However, as discussed above, there are some conceptual problems with this approach.

1.1.2. Distributive Justice

Another possible justification for affirmative action is that it is an aspect of distributive justice. Broadly, distributive justice theories are concerned with achieving an equal distribution of resources or goods in society.[966] The distributive justice claim argues that an individual or group has a right to positions, advantages or benefits they would have been

---

[963] Kennedy (n 10) 84 (Writing in the context of race-based affirmative action in the US as a form of compensation for the effects of past racial injustice, Kennedy notes 'The children, grandchildren and great-grandchildren of immediate victims ...are indirect victims...They have lost out in terms of inherited financial wealth, access to education, and access to human capital').

[964] Judith Jarvis Thomson, 'Preferential Hiring' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977) 38–9.

[965] *Van Heerden* (n 1) [25]. See also, *Barnard CC* (n 13) [79] , Cameron et al. JJ note that the Constitution 'licenses reparative measures'.

[966] For an analysis of the wide range of distributive justice theories Serena Olsaretti, *The Oxford Handbook of Distributive Justice* (OUP 2018).

awarded under fair conditions.[967] Distributive justice identifies unequal distribution as a product of unfair conditions. The corollary to this is that it locates claims of individual merit and unfairness of the historically advantaged as a product of past injustice – of unfair conditions. 'The merit claimed by these individuals is in fact, a false merit because it is based on unfair competition'.[968] Distributive justice is present-forward looking in the sense that it is concerned with redressing current unequal distributions to achieve a specific goal – an egalitarian distribution of resources.

In addition to using the language of compensatory justice, the Constitutional Court's approach shows a concern with achieving an equitable redistribution of resources. Thus, it has held that the reach of the equality right has to be understood with reference to South Africa's history – a history of colonial and apartheid discrimination,[969] which predominantly divided our society along the lines of race and gender.[970] In *Van Heerden*, Moseneke J characterised the role of s 9(2) measures as 'the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity'.[971] Further, the Court considers affirmative action to be measures that entail a 'positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege'.[972] For Sachs J, the purpose of s 9(2) measures is to 'anchor the equality provision as a whole around the need to dismantle the structures of disadvantage

---

[967] Fiscus (n 953) 8.

[968] ibid 14.

[969] *Van Heerden* (n 1) [26].

[970] *Barnard CC* (n 13) [29].

[971] *Van Heerden* (n 1) [25].

[972] ibid [31].

left behind by centuries of legalised racial domination, and millennia of legally and socially structured patriarchal subordination'.[973]

In *Barnard,* Moseneke ACJ held that affirmative action measures were 'steps towards the attainment of substantive equality…Their purpose is to protect and develop those persons who suffered unfair discrimination because of past injustices'.[974] This quote illustrates a link between redressing past injustice and grappling with its effects in the present. Thus, rather than locating affirmative action in the either/or of compensatory versus distributive justice – the Court arguably takes the position that there is a continuum between the two. In *Bato Star*, Ngcobo J captured this continuum and noted that:

> Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.[975]

While conceptually distinct, distributive and compensatory justifications merge when past injustice has continuing effects – 'in that case, the distributive justice argument has subsumed or incorporated the compensation claim; the argument says that in an ideal world, such harms have to be corrected - ended, really - even if belatedly'.[976] Sher captures this connection and argues that the best justification for affirmative action is that they are a 'way of neutralizing the present competitive disadvantage caused by those past privations and thus a way of restoring equal access to those goods which society distributes competitively'.[977] This, I argue, is the case in South Africa. While the language in the Court's affirmative action jurisprudence gives a sense that affirmative action is a form of compensation, distribution of

---

[973] *Van Heerden* (n 1) [141].

[974] *Barnard CC* (n 13) [35].

[975] *Bato Star* (n 66) [74].

[976] Fiscus (n 953) 9.

[977] Sher (n 957) 53.

material and non-material resources is at the core of the commitment to redressing group-based disadvantage that arises because of past and persisting discrimination. This approach is desirable because it allows both a concern with redressing the effects of past injustice, and it leaves room to cater to new patterns of disadvantage as they emerge.

1.2. Instrumental versus moral

In addition to the separation between compensatory and distributive justifications for affirmative action, there is also a distinction made between moral and instrumental. According to Moses, the moral justifications focus on affirmative action as a tool to redress injustice; 'emphasizing compensatory, corrective action to rectify unfair treatment by race, ethnicity, and sex'[978] and eliminating institutionalised inequality.[979] Thus, the moral argument encompasses the discussion of compensatory versus distributive justifications of affirmative action discussed above.

While moral justifications appeal to 'deeper beliefs about what is right and good and how people ought to be treated',[980] instrumental justifications 'view affirmative action policies merely as a means to an end; the policy serves the purpose of meeting a certain goal'.[981] Nagel gives an example, 'Suppose…that there is need for a great increase in the number of black doctors because the health needs of the black community are unlikely to be met otherwise….This is a strong argument for accepting reverse discrimination, not on grounds of justice but on grounds of social utility'.[982]

---

[978] Michele S Moses, *Living with Moral Disagreement: The Enduring Controversy about Affirmative Action* (The University of Chicago Press 2016) 48–49.

[979] ibid 48.

[980] ibid.

[981] ibid.

[982] Thomas Nagel, 'Equal Treatment and Compensatory Discrimination' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy and Public Affairs Reader* (Princeton University Press 1977) 16.

Prominent instrumental purposes include increasing economic efficiency, achieving diversity, and integrating historically excluded groups into the mainstream. However, the line between moral and instrumental justifications is thin. In particular, most of what is classified as instrumental is supported by a commitment to either a compensatory or redistributive aim. In the quote above, for example, the 'dominant' position of those adversely affected by affirmative action supports the justness of using affirmative action to achieve the societal aim.

Economic efficiency and societal contribution - The economic efficiency argument states that the increase of historically disadvantaged groups' participation in the economy (by increasing their representation in the workforce and higher education institutions) will increase the economic contribution of this group to society as a whole.[983] Apart from economic contribution, the increase of persons belonging to a disadvantaged group in a profession is also justified by the argument that this will increase the number of professionals willing to work in underserved communities. In *Bakke* for example, one of the arguments made (and rejected) for the admissions program was that the increase in the number of African American doctors would increase the number of doctors willing to serve disadvantaged communities and thus improve the health outcomes of these communities.[984]

Role models - The role models argument justifies affirmative action as providing role models for historically disadvantaged groups.[985] This argument is that the exclusion of, for example, women and Black persons in academic roles leads Black and female students 'to suffer a constricting ambition. They need to see members of their race or sex who are

---

[983] Moses (n 978) 49.

[984] *Bakke* (n 438) 310–11.

[985] Moses (n 978) 49.

accepted, successful professionals'.[986] In the higher education context, the argument extends to being that this representation is important for enabling students who belong to disadvantaged groups to learn and do well.[987] In addition to serving as role models for disadvantaged groups, the increase in the representation of disadvantaged groups is justified by the hope that it will lead to structural changes that alter disadvantaged groups' position in society. The argument is that 'the very presence of women or other disadvantaged groups in higher status positions will lead to structural change'.[988] This is based on the assumption that those included will represent their group's needs and interests.[989]

Diversity - A prominent instrumental justification for affirmative action is the diversity argument. The diversity argument justifies affirmative action to increase the 'cultural and epistemic' diversity of institutions.[990] The diversity argument entails that disadvantaged groups, by virtue of their historical and cultural difference, bring diverse ideas and life experiences,[991] enabling a 'robust exchange of ideas'.[992] Diversity is valued for either increasing the efficiency of the workplace or the educational experience. It is said to enrich 'the educational mission of schools, the public discourse needed to advance democracy, and the ability of corporations to design and market products and services that appeal to diverse

---

[986] Jarvis Thomson (n 964) 22.

[987] ibid.

[988] Fredman, *Discrimination Law* (n 16) 264.

[989] ibid.

[990] Anderson (n 37) 135.

[991] ibid.

[992] *Bakke* (n 438) 313.

communities'.[993] In the US, the diversity argument for affirmative action emerged in higher education admissions criteria and broadcast licences.[994]

In *Bakke*, Powell J accepted diversity in higher education as a compelling state interest under strict scrutiny.[995] Powell J's finding was affirmed in *Grutter*, accepting diversity as a compelling interest in higher education, the US Supreme Court held that 'the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom'.[996] Under the diversity model, the beneficiaries are those who bring 'diversity' into the institution. Thus, the burden is carried by those whose perspectives and ideas are considered to be already represented.[997] Diversity is thus closely tied to increasing the representation of excluded viewpoints and perspectives. Under the diversity rationale, the beneficiaries' unique qualities and perspectives are seen as an addition to their competence and qualification. It 'contends that conventional indica of talent, achievement, and potential must be supplemented by other indicators' previously ignored'.[998] The beneficiaries are chosen for their purported impact on the institution, not as compensation for past or present injustice or to redistribute resources.

In South Africa, there is no clear separation between instrumental and moral justifications for affirmative action. The connection between these two approaches is most

---

[993] Anderson (n 37) 135; Kennedy (n 10) 95–97 (For an analysis of the diversity argument in the US employment and higher education context).

[994] *Metro Broadcasting Inc v Federal Communications Commission* 497 US 547 (1990) (The US Supreme Court upheld an affirmative action measure that gave preferences to minority owned broadcasting companies to increase diversity in public broadcasts).The diversity rationale in higher education was recognised in *Bakke* (n 438); *Grutter* (n 438); *Fisher (2016)* (n 438); *Students for Fair Admission v President and Fellows of Harvard College* Civil Action No 14-cv-14176-ADB (October 2019) ('*Fair Admissions*'); but it was rejected outside the context of higher education in *Seattle Schools* (n 507).

[995] *Bakke* (n 438) 313–315.

[996] *Grutter* (n 438) 319.

[997] Anderson (n 37) 141.

[998] Kennedy (n 10) 99.

evident under the EEA. Section 2(b) states that one of the purposes of affirmative action is to redress the disadvantage experienced by women, Black people and people with disabilities in the workplace through achieving their equitable representation at each occupational level. This purpose encompasses a concern with both the moral justification and the instrumentality of affirmative action. The commitment to distributive justice can be relied on to justify achieving broad representation of persons in the workplace. This is what they would have been able to receive under fair conditions. Moreover, affirmative action measures under the EEA thwart the competitive advantage enjoyed by historically privileged groups by allowing disadvantaged groups' preferential treatment, even when they are not the *more* qualified candidate. This is the broad 'suitably qualified' standard under the EEA.

As noted previously, the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'.[999] The Labour Court has defined equal employment opportunities as going beyond the requirement that equally situated persons are given an equal opportunity to 'compete'.[1000] Instead, the court acknowledged the limitations on disadvantaged groups to compete on an 'equal playing field'.[1001] This fits with the EEA's broad and generous definition of suitable qualification and the fact that it allows for the preferential treatment of disadvantaged groups.[1002] In this, equal employment opportunity is understood as serving the purpose of redressing the competitive advantage conferred on privileged groups.

---

[999] EEA s 15(1).

[1000] *Correctional Services LC* (n 236) [30].

[1001] ibid.

[1002] EEA s 15(3) on preferential treatment and ss 20(3)-(4) defining suitably qualified.

The setting of numerical targets for beneficiary groups and the use of preferential treatment under the EEA works to thwart substantive barriers to entry for historically disadvantaged groups. In this context, affirmative action works to combat discriminatory habits and unconscious bias,[1003] enabling a more just distribution of scarce resources. Seen from this perspective, the commitment to equitable representation and achieving employment equity is tied to the distributive justification for affirmative action. The beneficiaries are those who belong to groups historically excluded from the labour market by past discriminatory practices. It is thus also tied to compensatory justice.

The diversity, economic efficiency, and role model arguments are present but not very prominent in the South African courts' discussion of affirmative action. While the EEA mentions diversity and efficiency in the workplace as one of its goals,[1004] these are not defined. In *Barnard*, Van der Westhuizen J noted the 'instrumental' efficiency gain of having a police service reflective of the country's demographics, he noted:

> Representivity may increase service delivery and efficiency, because it raises the legitimacy of a public institution in the eyes of the community it is meant to serve. A police service which is representative of the community it serves is more likely to enjoy the trust, cooperation and support of that community.[1005]

Similarly, in *Singh*, the Equality Court held that s 174(2) of the Constitution, which requires that the need for the judiciary to broadly reflect race and gender demographics should be taken into account when making appointments, also required disability status to be taken into account. According to the court, the judiciary needed to be representative of the population. The court in *Singh* offered two reasons for the value of diversity in the judiciary.

[1003] Anderson (n 37) 146.

[1004] EEA (the EEA's preamble lists diversity, promoting economic development and efficiency in the workforce as goals; s 15(2)(b) lists measures designed to further diversity in the workforce as one aspect of affirmative action).

[1005] *Barnard CC* (n 13) [185].

First, it would improve the legitimacy of the judiciary. Second, it would improve the outcomes of judicial decisions by increasing the range of judicial officers perspectives.[1006]

More recently, in *Cape Bar,* the Equality Court accepted the rationales of achieving diversity', 'inclusivity' and 'reconciliation' as 'crucial elements to transformation' in the legal profession.[1007] These kinds of justifications work well for the specific context of some professions, in particular, those in which representation and legitimacy are important. Thus, they would likely found the basis to justify s 195(1)(i) of the Constitution. Similar to s 174(2) of the Constitution, s 195(1)(i) requires the public administration to 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.'

The presence of instrumental bases for affirmative action in South Africa's affirmative action jurisprudence and the legislative provisions' text must be understood in line with substantive equality's core commitment – redressing group-based disadvantage. Failing which the opposite could be true. For example, as the sole justification for affirmative action in South Africa, diversity is too diffuse. It could have the impact of shifting our focus away from redressing group-based disadvantage. Many identity characteristics can count for diversity. Thus, unless we couple the diversity rationale with specific, disadvantaged groups, it would be too broad.

If separated from the moral justifications for affirmative action, diversity does not explain the choice of including groups based on race, gender and disability over other characteristics that could also bring diversity,[1008] for example, political opinion. Further,

---

[1006] *Singh* (n 783) [30].

[1007] *The Cape Bar v Minister of Justice and Correctional Services* Case no:9435/19 (10 June 2019) [81].

[1008] Anderson (n 37) 142.

diversity can entrench stereotypes and essentialise persons who belong to disadvantaged groups – those marked as diverse.[1009] Those who do not conform to formally held stereotypes could be rejected as not being 'diverse' enough, or for not bringing the right kind of diversity. Carter and Steele have argued that, in the US, only certain kinds of black people are desirable as diverse – conservative or black people who share the views and opinions of the already represented groups are marked as undesirable.[1010] As Carter summarises, in the context of race in the US:

> [S]uccessful black people who hold the "wrong" views do not belong on the inside because they are bringing nothing new to the table. They are expressing opinions that white males can express perfectly well. They are not bona fide representatives of the people.[1011]

The problems which arise with a narrow focus on diversity for its own sake are evident in the *Cape Bar* case. In *Cape Bar,* the Equality Court affirmed the constitutionality of race and gender targets that created a cap for historically disadvantaged groups while preserving historically privileged groups' allocations. The case concerned the constitutionality of rules and regulations under the Legal Practice Act 28 of 2014 (LPA). The LPA was enacted to provide a framework for the transformation and restructuring of the legal profession, and broaden access to justice by putting measures that would provide equal opportunities for all aspirant legal practitioners to achieve a legal profession that broadly reflects South Africa's demographics.[1012] This included establishing a framework aimed at 'transforming and restructuring the governance and regulation of the legal profession, that is broadly representative of the demographics of South Africa.[1013] In addition, at the provincial level,

---

[1009] Anderson (n 37) 142.

[1010] See in general Carter (n 10); Steele (n 10).

[1011] Carter (n 10) 33.

[1012] Legal Practice Act 28 of 2014 s 4.[1013] *Cape Bar* (n 1007) [2]; LPA ss 5–7.

[1013] *Cape Bar* (n 1007) [2]; LPA ss 5–7.

the LPA provides for the establishment of Provincial Councils.[1014] The impugned provisions concerned the composition of Provincial Councils.

The rules and regulations for voting for the Provincial Council members required 50 per cent of the Provincial Council members to be female and 50 per cent to be male.[1015] In addition, they also set a table for the composition of the Provincial Councils. In each province it had to comprise of six attorneys and four advocates. In relation to the advocates, they had to comprise of one white male, one white female, one Black male and one Black female.[1016] The implications of this was that the rules guaranteed at least one position for each category. Thus, even if a Black female had more votes than a white female, a Black male and even a white male – if there was another Black female with more votes than her – she would not be appointed to the seat. In essence, the regulations and rules created a ceiling, even for historically disadvantaged groups.

Citing Moseneke J's judgement in *Van Heerden,*[1017] the judges held that three of the four council provisions were allocated to disadvantaged groups. Thus, as in *Van Heerden,* that white males benefited did not invalidate the scheme.[1018] This was supported by the court having accepted diversity, inclusivity and reconciliation as the basis for this measure. Problematically, the court held:

> The goals of diversity, inclusivity and ongoing reconciliation are for the societal good. White male practitioners are part of the profession and a large segment in it. For

---

[1014] *Cape Bar* (n 1007) [2]; LPA s 23.

[1015] ibid [8], [20].

[1016] ibid [8], [23]. In this case, the term 'Black' was given the same meaning as in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003, read with the Broad-Based Economic Empowerment Amendment Act 46 of 2013. This includes African, Coloured and Indian people.

[1017] ibid [63].

[1018] ibid.

> transformation to succeed they should collectively participate in and contribute towards the achievement of our constitutional and statutory objectives.[1019]

The quote above shows that the court understood diversity and inclusivity to be symmetrical and decontextualized goals. This approach ignored the underlying reality of the hegemony of white males in the legal profession, something which the LPA sought to remedy. It elevated diversity and inclusiveness for their own sake. As argued in Chapter Three, substantive equality is deliberately asymmetrical, it is concerned with 'women rather than men, black people rather than whites, people with disabilities rather than able-bodied, or gay people rather than heterosexuals'.[1020]

The problem with the *Cape Bar* case is that the policy was formulated in a manner that required representatives based on race and gender. A better policy would have required the inclusion of persons belonging to historically disadvantaged groups and left a position open for 'competition'. Under this approach, white males could possibly be appointed without expressly reserving a position in their favour. Essentially, three of the four positions on the Provincial Council should have been ring-fenced in favour of candidates belonging to disadvantaged groups - leaving one open position open for all candidates to compete. Thus, a white male could possibly be appointed if he received the most votes in the open category. The approach in the case, necessitated by the formulation of the policy, creates the problematic assumption that for diversity, reconciliation and transformation, white males must be in the room. My argument is that they need not be – it should be possible to have a Provincial Council that has no white males, so long as they had not been precluded from competing for the position. As will be disccused in Chapter Seven, the absolute exclusion of historically privileged classes, in this case white males, cannot pass constitutional muster.

[1019] ibid [81].

[1020] Fredman, 'Substantive Equality Revisited' (n 16) 728–729.[1021] Fredman, *Discrimination Law* (n 16) (For a discussion of this limitation).

Similarly, alone, economic efficiency, role models and representation rationales can be too limited. For example, the representation rationale loses force if the representatives do not act on behalf of the group or if they do not act in a way that effects structural changes in favour of the group they belong to.[1021] Overall, there are a wide range of purposes that affirmative action can legitimately pursue under s 9 and the Equality Statutes. The breadth of the Constitutional text, the statutory provisions and the courts' judgements rightly leave a lot of room for the design of affirmative action measures. I thus suggest that rather than a focus on the distinction between the compensatory/distributive and moral/instrumental distinctions, the multiple dimensions of substantive equality offer a framework within which different purposes of affirmative action can be justified and reviewed in a manner that centres redressing group-based disadvantage while giving room to and acknowledging different ends that affirmative action should be able to pursue.

1.3. Purpose derived from multiple dimensions of substantive equality

The analysis in the section above looked at the different approaches to justifying and thus finding the purpose of affirmative action. In this section, I suggest that the approach that aligns with the development of a transformative approach to affirmative action requires that we locate the justification for affirmative action measures in the nature of the disadvantage which the right to equality seeks to redress.

This approach draws from Fredman's argument in 'Reimagining power relations: Hierarchies of disadvantage and affirmative action'.[1022] In this article, Fredman argues that a truly transformative affirmative action measure should be calibrated to redress the multiple dimensions of substantive equality.[1023] This approach is desirable because it allows us to see

---

[1021] Fredman, *Discrimination Law* (n 16) (For a discussion of this limitation).

[1022] Fredman, 'Reimagining Power Relations' (n 16). A similar approach can be seen in Albertyn, 'Adjudicating AA' (n 16) 727–728.

[1023] Fredman, 'Reimagining Power Relations' (n 16) 124.

the strengths of affirmative action and its limitations. In particular, it draws us into honesty about affirmative action's bluntness to effecting structural change while showcasing the impact it can have in at least undermining the different forms of disadvantage. As discussed in Chapter Three, the approach to substantive equality relied on in this thesis has multiple dimensions – redistribution; countering stigma, stereotyping, humiliation and violence; enhancing participation and voice; enhancing freedom; accommodating difference and achieving structural change.

My understanding of these dimensions of substantive equality is that they traverse the boundaries between the compensatory and distributive justification for affirmative action – as is evident, though not coherently articulated in the Court's affirmative action jurisprudence thus far. Further, under this approach, affirmative action's instrumental justifications are embedded in different and sometimes overlapping dimensions, capturing a specific harm or multiple harms that substantive equality seeks to eradicate. However, the grounding of the dimensions in redressing group-based disadvantage gives meaning and content to the instrumental justifications that escape some of the pitfalls that arise when we divorce instrumental and moral justifications for affirmative action.

Redistribution - The first dimension is concerned with a redistribution of resources, jobs, admission to higher education institutions and other benefits. In South Africa, most of the Court's cases have had to do with a redistribution of material resources - the distribution of jobs and appointments in *Barnard*, *Correctional Services* and *SARIPA*. However, this need not be limited to this, it is possible to envisage a redistribution that grapples with other forms of social goods to respond to the different forms in which socio-economic disadvantage arises:

> Sprawling and over-crowded informal townships inhabited by poor and jobless people without property to call their own and without many of the basic amenities necessary for a dignified human existence sit beside most affluent neighbourhoods

> with people who have access to the best schools, the best jobs and the best opportunities.[1024]

To grapple with the maldistribution concerns in the quote above, s 9(2) of the Constitution can be relied on, alone or together with other rights in the Bill of Rights to target and prioritise the redistribution of resources to historically disadvantaged groups. For example, the bursary scheme in *Fundza Lushaka*.[1025] In that case, the right to access basic education and the right to equality underlined the preference of bursary beneficiaries whose education would have the impact of improving access to education to historically disadvantaged groups. Seen in this light, these kinds of measures can push against the limited scope of affirmative action as merely distributing jobs and resources rather than tackling some of the structural problems which underlie prevailing inequalities in South Africa.

Recognition - The second dimension focusses on countering prejudice, stigma, stereotyping, humiliation and violence based on status such as race, gender and disability – recognition harms. The recognition dimension remains important for explaining affirmative action measures whose purposes are not tied to resource redistribution. This could encompass increasing role models to lift the esteem of disadvantaged groups 'revaluing disrespected identities and the cultural products of maligned groups; recognising and properly valorising cultural diversity or transforming wholesale societal patterns of representation'.[1026] Dupper has identified two forward-looking rationales for affirmative action in employment that fit this dimension well. First, he argues that affirmative action can overcome prejudice by changing attitudes towards members of disadvantaged groups.[1027] According to Dupper, the increase of historically disadvantaged groups in the workplace will

---

[1024] *Van Heerden* (n 1) [73].

[1025] *Fundza Lushaka* (n 265).

[1026] Fraser and Honneth (n 64) 13.

[1027] Dupper (n 943) 206.

change perceptions about the group's capabilities.[1028] The attitude changing argument is that affirmative action measures open 'opportunities for black people and women to demonstrate their abilities and skills and enhances the standing of the entire targeted group'.[1029]

Another argument which could fit under the recognition dimension is the *Cape Bar* decision's 'reconciliation' argument.[1030] While the court did not define this, a substantive understanding of reconciliation would see the benefit that affirmative action measures can have in bringing together groups that have historically been segregated based on criteria such as race, gender – undermining prevailing balkanisation. However, this cannot be at the cost of redressing social and economic disadvantage. Thus, this argument should have failed on the facts of that case. This is because all four dimensions must be optimised – the recognition dimension should not take priority over the others. On the other hand, measures redressing the maldistribution of resources should be structured in a manner that does not entrench prejudice, stigma and balkanisation.

Participation - The participation dimension recognises that individuals are social beings and have a voice so that their marginalisation from social life can thus be dehumanising.[1031] Accordingly, it asks whether everyone has an 'equal say in political, social and economic institutions, regardless of wealth, property, class, power and privilege'.[1032] The participation dimension is important in relation to the purpose of increasing the representation of disadvantaged groups into the workplace and in higher education; this increase in representation enables real participation of groups in structures and institutions

---

[1028] ibid.

[1029] ibid 207.

[1030] *Cape Bar* (n 1007) [79]-[81].

[1031] Fredman, *Discrimination Law* (n 16) 32; 'Substantive Equality Revisited' (n 16) 731; Albertyn and Fredman (n 16) 439.

[1032]Albertyn, 'Contested Equality' (n 16) 467.

from which they were previously excluded. This representation may be instrumental in effecting real structural change and may serve a broader instrumental role – giving the benefits of diversity to institutions. However, the difference with diversity in this approach is that it is grounded in an asymmetrical approach – benefiting historically disadvantaged groups. Again, this is because all the dimensions must be optimized; thus, diversity ends should be underlined by the focus on redressing group-based disadvantage.

Structural Change - The structural change dimension requires a transformation of institutions 'to respect and accommodate difference'. It recognises that the mere redistribution of resources and increase in the representation of historically disadvantaged groups may come at a cost to the beneficiaries if they are included in institutions but have to assimilate into the dominant structure. This means that 'existing social structures must be changed to accommodate difference, rather than requiring members of out-groups to conform to the dominant norm'.[1033] On its own, the structural change dimension can be the basis of reasonable accommodation obligations in affirmative action measures. For example, it may require an investment in changing the workplace's built environment and in higher education institutions. As seen in the *Singh* example, this dimension can justify changing and adjusting qualification criteria and more contextual approaches to merit, as exemplified by the EEA's broad definition of suitably qualified.[1034]

Freedom - As discussed in Chapter Three, a positive conception of freedom can help justify and open up the range of purposes that affirmative action measures can pursue. Freedom requires a focus 'on creating the conditions necessary for the development and exercise of individual capacities and collective cooperation'.[1035] In Chapter Three, I argued

---

[1033] Fredman, 'Substantive Equality Revisited' (n 16) 733.

[1034] EEA s 20(3) and (4).

[1035] Young, *Justice and the Politics of Difference* (n 368) 39.

that affirmative action measures should create conditions in which the beneficiaries of affirmative action can exercise valuable choices – an example being skills development and training and providing learning support to disadvantaged students admitted to higher education institutions. It thus requires the creation of just social institutions, which 'provide conditions for all persons to learn and use satisfying and expansive skills in socially recognized settings'.[1036]

The approach suggested above would give the State and persons with obligations under the EEA and Equality Act a wide scope when designing and implementing affirmative action measures. The ideal affirmative action measure would be designed and implemented in a manner that sought to address all the dimensions. However, to be valid, it need not. For example, the EEA's focus on achieving equitable representation in all occupational levels in the workplace is strong on the redistribution of material resources, increasing representation and participation. However, if is it not coupled with other measures to address structural change it falls short on this dimension. Further, because of the wide definition of suitably qualified under the EEA, achieving demographic representation could create the perception that there has been a loss in efficiency or that a beneficiary group is inherently uncapable - entrenching stigma and stereotyping towards the beneficiary group. However, in light of the impact of the measure in these other dimensions, rather than strike the measure down, the courts should seek remedies designed to optimize the other dimensions of substantive equality. For example, anti-racist training and development in the workplace.

It bears emphasis thatthe conflict between different dimensions should be resolved by grounding the analysis on the question whether the measure furthers redressing group-based disadvantage. A diversity rationale can be justified as redistributing material resources and increasing participation – if the beneficiary status is related to historic disadvantage.

[1036] Young, *Inclusion and Democracy* (n 393) 32.

Thus, there is a close link between the purpose and the beneficiary group, I turn to the latter in the next section.

2. For Whom? Demarcating Beneficiary Groups

The previous section of the chapter explored the range of purposes that affirmative action should, in line with a transformative interpretation of s 9 of the Constitution and the provisions in the EEA and Equality Act pursue. In particular, drawing from the multiple dimensions of substantive equality, it argued that affirmative action measures should be designed, to the fullest extent possible, in a manner that undermines the different forms of disadvantage. Once we have determined the range of purposes that affirmative action should pursue, the next question is what criteria should be used to demarcate the beneficiaries of affirmative action. This section of the Chapter turns to this question.

2.1. The Targeted Groups

As discussed in Chapter Four, the beneficiary group question is answered in the *Van Heerden* test's first leg. The first question is related to the criteria that should be used to identify 'disadvantage'. While this is one of the most contested questions in the academic literature on affirmative action,[1037] under s 9(2) of the Constitution and under the EEA, this leg of the test has not been a hurdle in the court's affirmative action jurisprudence. Because of the history of racial and patriarchal domination and oppression in South Africa, race and gender are salient classifications; but they are not the only possible markers of disadvantage.[1038]

[1037] See for example Ockert Dupper, 'Affirmative Action: Who, How and How Long?' (2008) 24 SAJHR 425; Marie McGregor, 'Categorisation to Determine Beneficiaries of Affirmative Action: Advantages and Deficiencies' Codicillus 1 (who argue for the inclusion of class criterion); Helen Papacostantis and Muriel 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 PELJ 1; Muriel Mushariwa, 'Who Are the True Beneficiaries of Affirmative Action? - Solidarity Obo Barnard v SAPS 2010 5 BLLR 561 (LC)' (2011) 32 Obiter 439 (calling for intersectionality in the demarcation of beneficiary groups); Banatar (n 45) (for a critique of race as a classification) .

[1038] See, *Barnard CC* (n 13) [27], where Moseneke ACJ identified race gender and class as markers of disadvantage and division in South Africa, noting that, 'At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class.' In the same case, Cameron et al. JJ

Under the EEA, the beneficiary groups are classified using race, gender and disability status. Thus, the cases under the EEA have been in relation to the relationship and tension between these classifications, specifically race and gender.[1039] Further, in theory, the different grounds listed in s 9(3) of the Constitution, s 6(1) of the EEA and s 6(1) of the Equality Act and analogous grounds could be used for the classification of the beneficiaries of affirmative action. Moreover, due to the complex nature of disadvantage and the intersection of multiple statuses, it should be possible to classify beneficiaries based on multiple criteria.[1040]

As noted above, the use of race, gender and disability status under the EEA and in the context of s 9(2) has not been a controversial issue in the courts. However, the use of these status, particularly race, has been the subject of critique in the debate on affirmative action in South Africa.[1041] I thus focus on these classifications and consider the core criticism levelled against them, in particular, race. The first argument is that the use of race and gender may have the impact of perpetuating race and gender tensions or balkanization along these status groups - in conflict with the constitutional goal of achieving a 'non-sexist' and 'non-racist' society.[1042] The second argument is that the beneficiary groups are over-inclusive because all the group members benefit even if they are not economically disadvantaged. The third argument is that, to the extent that affirmative action measures are likely to benefit the

---

wrote note that 'For reasons of history, racial and gender disadvantage are the most prominent. But they are not the only. They do not exclude other signifiers of disadvantage, like social origin or birth.' [76].

[1039] EEA s 1. In *Barnard CC* (n 13) Cameron et al. JJ at [120] and Van der Westhuizen J, [153]-[155] engaged with the tensions between the race and gender classification. In *Correctional Services CC* (n 675), the Court had to grapple with the relative disadvantage within the racial classification 'Black' and the relative advantage and disadvantage between African and Coloured people [40], [41], [46] (Zondo J).

[1040] Albertyn and Goldblatt (n 209) ch 35 p 36. For example, the classification in *SARIPA CC* (n 13) used race, gender and date of citizenship.

[1041] Martin Brassey, 'The More Things Change: Multiracialism in Contemporary South Africa' [2019] CCR 443; 'The Employment Equity Act: Bad for Employment and Bad for Equity' [1998] ILJ 1359; Banatar (n 45). See also, Kristina Bentley and Adam Habib, 'An Alternative Framework for Redress and Citizenship' in Kristina Bentley and Adam Habib (eds), *Racial Redress and Citizenship in South Africa* (Human Science Research Council 2008) 344.

[1042] Bentley and Habib (n 1041) 344.

more socio-economically advantaged group members and exclude the most disadvantaged, they are under-inclusive. Closely related is the argument that affirmative action is underinclusive for excluding other economically disadvantaged groups, in particular, poor white males.

Drawing from the lessons in the comparator jurisdictions, the section below addresses the questions above. It suggests how the South African courts *should* respond to these within the context of a wide range of criteria. It begins with a defence of the use of status such as race, gender and disability status to capture the multiple forms of disadvantage which affirmative action seeks to address.

2.2. The legitimacy of status-based classifications

A key argument against the use of statuses such as race and gender to demarcate the beneficiaries of affirmative action is that it contradicts the Constitution's commitment to 'non-racialism' and 'non-sexism'.[1043] This critique points to the irony of using categories constructed by the colonial and apartheid regimes in redressing disadvantage, arguing that this risks legitimising these classifications.[1044]

A simple rebuttal to this argument is that we cannot ignore the disadvantage that attaches to belonging to these specific groups. Affirmative action measures which seek to redress group-based disadvantage must take these criteria into account. While a definition of non-racialism and non-sexism is beyond the scope of this thesis, these two concepts, within the context of a commitment to transformation and substantive equality, cannot mean that enduring inequality based on race and gender and rooted in systemic and structural racism

[1043] Brassey, 'The More Things Change: Multiracialism in Contemporary South Africa' (n 1041) 467–468; Banatar (n 45) 301.

[1044] Banatar (n 45) 301.

and sexism are irrelevant.[1045] Unlike the US Supreme Court's 'colour-blind' approach,[1046] the commitment to substantive equality and transformation necessitates using these classifications. Thus, in *Van Heerden*, the Court made it clear that 'where disadvantage was imposed because of race, then race may appropriately be taken into account in dealing with such disadvantage (the same would apply to gender, disability, language and so on)'.[1047] Further, the Court also noted that 'Remedial action by its nature has to take specific account of race, gender and the other factors which have been used to inhibit people from enjoying their rights'.[1048]

Thus, the choice of beneficiary groups is rightly tied to the questions about which groups should be compensated for past disadvantage and who should benefit from a more just distribution of resources – disadvantage understood as extending beyond economic status – as argued above, a form of compensatory and distributive justice that understands the harm as encompassing the multiple dimensions of substantive equality. Further, it is also tied to questions about the current patterns of inequality – redressing the effects of past injustice on specific groups and in light of the different harms that substantive equality seeks to address.

[1045] For an analysis of the different and contested meaning of non-racialism see, David Everatt, 'Non-Racialism in South Africa:Status and Prospects' [2012] Politikon 5; Raymond Suttner, 'Understanding Non-Racialism as an Emancipatory Concept in South Africa' [2012] Theoria: A Journal of Social and Political Theory 22; David Everatt, *The Origins of Non-Racialism* (Wits University Press 2009).

[1046] For an in depth history and critique of the US Supreme Court's 'color-blind' approach Kennedy (n 10) ch 3.

[1047] *Van Heerden* (n 1) [143].

[1048] ibid [144].

2.3. Over-inclusivity

The second issue is that of over-inclusivity.[1049] Group membership is sufficient to benefit from an affirmative action measure under s 9(2) and under the EEA and Equality Act. Thus, under the EEA, for example, all women, Black people and disabled people can benefit. In this way, group membership is used as a proxy for the disadvantage which affirmative action seeks to address – individual beneficiaries need not prove disadvantage. This approach is criticised because some of the beneficiaries may be well-off persons, making the beneficiary class over-inclusive.[1050]

In *Stoman,* responding to the argument that an individual beneficiary of affirmative action was not himself disadvantaged and should not have been preferred over the complainant in that case, a white male, the High Court held that the legislature could not have intended these measures to be dependent on the individual circumstances of each particular case.[1051] Thus, even if an individual member of a group was relatively privileged, the court held that the emphasis was on the group or category of persons. It is the group that has been disadvantaged. Thus, 'the aim is not to reward the fourth respondent as an individual, but to advance the category of persons to which he belongs and to achieve substantive equality'.[1052]

The argument made in *Stoman* points to the tension between the different forms of disadvantage which attach to statuses such as race, gender and disability and economic disadvantage. If affirmative action merely served to redress economic disadvantage, then the

---

[1049] For a discussion of this critique in the South African context, McGregor, 'Categorisation to Determine Beneficiaries of Affirmative Action: Advantages and Deficiencies' (n 1037) 6.

[1050] See the arguments made in *Stoman v Minister of Safety & (and) Security & (and) Others* (2002) 23 Industrial Law Journal (Juta) 1020 1035; Bentley and Habib (n 1037) 342.

[1051] *Stoman* (n 1050).

[1052] ibid.

use of these criteria as opposed to economic disadvantage could be assailed for being too broad. However, under the approach discussed in the previous section, the use of these classifications is legitimate because it captures the fact that affirmative action seeks to address more than economic disadvantage. Thus, even if the individual beneficiary of an affirmative action measure is not economically disadvantaged, there is still a fit between the purpose of affirmative action and the beneficiary class.

Moreover, affirmative action beneficiaries are likely to be the more socio-economically advanced members of the beneficiary groups.[1053] They are the ones who are likely to meet, for example, the admissions criteria (even when lowered) in higher education admissions or the 'suitably qualified' criteria under the EEA. However, even if an affirmative action measure *materially* benefits individuals who are relatively more privileged than members of the group, the focus on different harms under the multidimensional approach shows us that the measure could still have an impact on the group as a whole. For example, the individual who is given a job may serve as a role model or representative for the larger group, having an impact on stigma and participation dimensions of substantive equality. Further, even when economically advantaged, persons belonging to historically disadvantaged groups may still suffer from stigma, prejudice and other forms of marginalisation – creating a substantive barrier to their participation in society and to any chance of achieving structural change.

In *Van Heerden*, the over-inclusivity question arose in a different context. In that case, Moseneke J held that not all the members of the beneficiary group needed to be disadvantaged. He held that a beneficiary group was legitimate so long as an 'overwhelming majority' of the beneficiary group comprised of persons 'designated as disadvantaged by

---

[1053] Kennedy (n 10) 89; Bentley and Habib (n 1041) 342.

unfair exclusion'.[1054] The 'hard cases' or 'windfall beneficiaries' would not render the classification impermissible.[1055] This was because, as Moseneke J held, it would be difficult, impractical or undesirable to have a 'pure' differentiation demarcating the targeted group.[1056] As discussed previously, the *Van Heerden* case concerned the allocation of pension benefits for old and new members of parliament. In that case, the affirmative action measure allocated more benefits to new members of parliament, the majority of whom were Black. The purpose was to redress the disadvantage in the accumulation of pension benefits for persons who were excluded from being members of parliament on account of their race. However, the measure did not use race as a proxy. All new parliamentarians could benefit, including white persons.

On the facts of the case, there was disagreement about the fit between group membership and disadvantage. For Mokgoro J, because s 9(2) of the Constitution insulated affirmative action measures from the unfair discrimination analysis and was a 'powerful' and 'unapologetic' provision, there had to be a tighter fit between group membership and disadvantage.[1057] Referring to Moseneke J's 'overwhelming majority' standard, she held that it was not necessary to decide on the correct test on whether all the members of the beneficiary group should be disadvantaged. However, s 9(2) measures had to be 'carefully crafted in relation to the group targeted'.[1058] Thus, there needed to be a tighter fit between the purpose of the affirmative action measure and its beneficiary group. In Moseneke J's judgement, it was sufficient that most of the parliamentarians, seventy-nine per cent, who

---

[1054] *Van Heerden* (n 1) [40].

[1055] ibid [39].

[1056] ibid.

[1057] ibid [87].

[1058] *Van Heerden* (n 1) [89].

would benefit were Black persons, belonging to a group that had been subjected to racial discrimination.[1059] However, for both Mokgoro and Ngcobo JJ, this was not enough: that the measure had white beneficiaries rendered it outside the scope of s 9(2) of the Constitution.[1060]

Mokgoro J's scepticism was in relation to white persons who were new parliamentarians. While acknowledging that some white persons may not have been able to join the apartheid parliament because of their political convictions, there was, for her, a substantive difference between that and the legal prohibition of new Black parliamentarians from becoming members of parliament during apartheid.[1061] Moseneke J's instinct that mere group membership on the basis of race, gender and disability, for example, should be sufficient to benefit from affirmative action aligns with the commitment to redress the different forms of disadvantage under the multiple dimensions of substantive equality. However, the 'group' in the *Van Heerden* case was too broad. The inclusion of white persons in the beneficiary class, while not a form of unfair discrimination because of its laudable aims (as per Mokgoro and Ngcobo JJ's judgements), should have fallen outside the scope of s 9(2) and scrutinised under s 9(3), under which it could still survive constitutional scrutiny. In the alternative, the Court could have used its remedial power to expressly use race as the criterion for the benefits, creating a tighter fit between the beneficiary class and the policy's purpose.

In this section, I have argued that the beneficiaries of affirmative action must be part of a disadvantaged group – not just any group. However, once group membership is established, individuals within the group should not have to prove that they are disadvantaged or have specifically been discriminated against. However, in some

---

[1059] ibid [41].

[1060] ibid [92]-[98] (Mokgoro J), [108] (Ngcobo J).

[1061] ibid [90]–[92].

jurisdictions, more than group membership is required to benefit from affirmative action. I discuss the example of the US and India below. These illustrate some of the problems which could arise with seeking individualised proof disadvantage.

2.3.1. Disadvantage-Plus: The US Supreme Court's Approach

In the US, a part of the early 'color-blind' reading of the Fourteenth Amendment cases required the beneficiaries of affirmative action programmes to prove they had suffered the specific disadvantage sought to be redressed by the affirmative action measure. This approach was due to the characterisation of the Fourteenth Amendment as protecting individual and not group rights.[1062] This foreclosed the possibility for the recognition of group-based racial disadvantage that could be redressed through affirmative action, as Powell J held in *Bakke*, '…the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group'.[1063]

In the cases where the US Supreme Court upheld the use of race or ethnicity in demarcating the beneficiary group, it was not, as in South Africa and India, based on the acceptance of group-based disadvantage *per se*. Evidence was required to show that in addition to belonging to a specific race or ethnic minority group, the individual beneficiary had been affected by past discriminatory practices. In *Fullilove,* the affirmative action measure aimed to achieve equal economic opportunity for minority businesses that, due to past discriminatory practices, had been excluded from benefiting from federal construction contracts.[1064] The measure targeted minority business defined by race and ethnicity as well as ownership. The targeted groups included African Americans, Hispanics, Asian Americans,

---

[1062] *Bakke* (n 438) 299.

[1063] ibid.

[1064] *Fullilove v Klutznick* (1980) 448 US 448 455.

Eskimos, and Indigenous people.[1065] In upholding this classification, the majority relied on proof that these specific minority groups had 'been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination'.[1066]

Another factor which convinced the court in *Fullilove* was that the small businesses were required to be owned by persons belonging to racial minorities and they had to be economically and socially disadvantaged. Only those businesses whose competitive position *had been impaired* by the effects of past discrimination could benefit.[1067] In *Croson,* a similar policy failed the strict scrutiny standard because there was no proof that the targeted groups were discriminated against in the specific jurisdiction and in the context of the construction industry.[1068] That there was a history of racial segregation and congressional reports about racial inequality in the construction industry as a whole was not sufficient.[1069]

Similarly, in *Adarand*, the affirmative action measure contained a presumption that specific racial groups were socially and economically disadvantaged. The case concerned the constitutionality of a subcontracting clause which gave prime contractors more funds if they subcontracted small businesses owned and controlled by socially and economically disadvantaged groups, the subcontractor compensation clause.[1070] The provision had a presumption that specific racial groups, including 'Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans' and women, were socially and economically

---

[1065] ibid 454.

[1066] ibid 477–478.

[1067] ibid 471.

[1068] *Richmond v JA Croson Co* 488 US 469 (1989) 505–6.

[1069] ibid 505.

[1070] *Adarand* (n 438) 205.

disadvantaged.[1071] The *Adarand* case was the first case where the US Supreme Court held that the strict scrutiny standard applied to race-based affirmative action in the same way as it did to invidious racial discrimination cases.[1072] The policy failed the strict scrutiny standard applied by the majority. What is relevant here is that even under the intermediate level of scrutiny relied on by Steven J's dissent, which focused on the beneficiary group's demarcation, more than just group membership was required.

First, rejecting the application of strict scrutiny to affirmative action measures, Stevens J held that a 'single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."'[1073] For him, it would be better to focus on the relevant characteristics of the disadvantaged group. He thus argued,

> [I]f the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause.[1074]

His focus on the beneficiary group's demarcation led him to conclude that the measure was constitutionally permissible. He held that the measure was not just based on racial classification. Although there was a presumption that specific race groups were socially and economically disadvantaged, other small businesses could prove social and economic disadvantage.[1075] Second, not all minority businesses could benefit; they had to be socially

---

[1071] ibid.

[1072] ibid 227.

[1073] ibid 246.

[1074] ibid.

[1075] Adarand (n 438) 260.

and economically disadvantaged.[1076] Third, the measure allowed for periodic review of the status of the minority business' social and economic disadvantage. Once the minority group was no longer socially and economically disadvantaged, they could no longer benefit from the program.[1077]

The approach described above makes sense under an understanding that the Equal Protection Clause is not concerned with redressing group-based disadvantage. However, it does not fit South Africa's focus on redressing group-based disadvantage, especially the multi-dimensional approach suggested in this thesis. Even so, commentators on South Africa's status based classification have suggested using economic disadvantage,[1078] or race and economic disadvantage.[1079] An example of this approach is that taken by the Indian Supreme Court, the creamy-layer approach. I explore the merits and limitations of the creamy-layer approach below.

2.3.2. India's Creamy-layer approach

In India, the beneficiary classes, the Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) were classified based on criteria that sought to capture distinct (though overlapping) forms of disadvantage. The SCs were identified based on a wide range of criteria linked to a pre-colonial census that sought to capture the disadvantage in relation to the place of a specific caste group in Hindu caste hierarchy, particularly, the

---

[1076] ibid.

[1077] ibid 262.

[1078] Marie McGregor, 'Actual Past Discrimination or Group Membership as a Requirement to Benefit from Affirmative Action : A Comparison between South African and American Case Law' [2004] Journal for Juridical Science 122, 145 (Comparing the US and South African affirmative action regime, McGregor argued that the US affirmative action regime showed that the most privileged members of the disadvanatged groups benefited. She thus suggested that South Africa consider moving to a class based classification).

[1079] Bentley and Habib (n 1041) 347.

extent of 'untouchability'.[1080] Thus, the SCs were classified based on the historic disadvantages linked to their low status in the Hindu caste hierarchy. By contrast, the rationale for the classification of STs 'was related to their rights to land and forests and their way of life'.[1081] Thus, the STs were largely defined based on cultural and spatial isolation from the rest of the population, including criteria that focused on the social, religious, linguistic and cultural distinctiveness and geographical remoteness.[1082]

The most challenging classification was that in relation to the OBC classification. It required two commissions of inquiry, the Kaka Kalelkar Commission of 1955 and the Mandal Commission of 1980, seeking to find the correct criteria to identify the OBC classification.[1083] According to Sitapati, the controversy about the correct criteria was because OBC's are not a distinct social group in the way that SCs and STs could be identified.[1084] He describes them as 'middle castes within (mainly) Hinduism, in between upper castes and SCs. Some of these castes are numerically large and control agricultural land, and are thus politically dominant, but they are under-represented in higher education and the professions'.[1085] Hassan similarly describes the OBC's as those who belong to 'peasant and

---

[1080] Sitapati (n 10) 721; Deshpande (n 10) 61. Untouchability is broadly defined as referring to practices of marginalisation and exclusion of castes with the lowest ritual standing and usually the lowest economic position in Hindu caste hierarchy. See also, Galanter (n 38). Who notes 'Untouchables are often associated with the most unclean and degrading occupations sweepers and scavengers, attendants at cremation grounds, hide and leather workers but include other artisan groups such as weavers and toddy tappers' 13.

[1081] Verma (n 10) 59.

[1082] Deshpande (n 10) 64–66; Galanter (n 38) 147–153.

[1083] For a detailed discussion of the criteria used by the two commissions see Sitapati (n 10) 721–725; Deshpande (n 10) 66–78; Hassan (n 10) ch 4.

[1084] Sitapati (n 10) 722.

[1085] ibid.

agrarian communities; they are not untouchable but are considered backward owing to their lowly peasant status and because they lack education and access to public institutions'.[1086]

An argument made against the OBC beneficiary class was that the OBC beneficiary group was overinclusive. To address this, the Indian Supreme Court introduced the 'creamy-layer' approach. In *Indra Sawhney*, the court held that due to the socio-economic gains made since the enactment of the Indian Constitution, some individuals and families in the OBC's had improved their socio-economic status and could 'compete with others in every field' without the benefit of reservations.[1087] In the case, it was argued that there was a section of the OBC that comprised the 'forward section of that particular backward class - as forward as any other forward class member' but were the ones 'lapping up all the benefits of reservations' at the expense of the 'truly backward' within the group.[1088] The Indian Supreme Court held that in the context of Article 16(4), social backwardness served as a connecting link between all the members of the group, 'If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class'.[1089]

Drawing from India's creamy-layer approach, McGregor argues for an economic disadvantage based system of allocating beneficiaries.[1090] She argues that a means test could be used to determine economic disadvantage as is done for purposes of social grants and

---

[1086] Hassan (n 10) 80.

[1087] *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 277 (Sawant J).

[1088] ibid 722–723.

[1089] ibid 724.

[1090] Marie McGregor, 'Blowing the Whistle on Affirmative Action: The Future of Affirmative Action in South Africa (Part 2)' [2014] SAMLJ 282, 302.

taxes.[1091] However, the creamy-layer approach is not itself a purely economic criterion. In *Indra Sawhney*, the Indian Supreme Court held that 'The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement'.[1092] Thus, while it may appear that India's approach excludes economically advanced OBCs, economic progress is used as a proxy for advancement only when it is of such an extent that it is an indication of broader social advancement. This arguably captures the fact that the court was aware that purely focussing on economic advancement would fail to capture other forms of disadvantage which the reservations regime seeks to address as well. Moreover, the creamy-layer approach applies only to one class of beneficiaries in India, the OBCs. It does not apply to SCs and STs, a recognition that reservations are about more than economic advancement for these groups.

Purely economic demarcations of beneficiaries will fall short of achieving the goals of affirmative action, even aims as limited as diversity. For example, following the banning of affirmative action in California State, proposition 209, there was a significant drop in minority enrolment when race stopped being used as a criteria for admission.[1093] Because the use of race was prohibited, the University of California sought other means that would allow it to keep their racial enrolment statistics. It did so by defining socio-economic status in such a way that would allow it to target predominantly Black and Latino students – taking into account 'parent's educational attainment, parent's assets, and the zip code'.[1094] These are criteria which Kennedy has described as 'race conscious, class-focused redistribution with

---

[1091] ibid.

[1092] *Indra Sawhney* (n 1087) 724.

[1093] For a discussion of the politics behind this ballot measure and the impact it had on significantly decreasing racial minority enrolment in the US, see James Sterba, *Affirmative Action for the Future* (Cornell University Press 2009) 22–25.

[1094] Kennedy (n 10) 92.

racial indica erased from the exterior'.[1095] In light of recent campaigns to bring back 'race conscious' affirmative action in that state, it is clear that even this attempt to make race relevant (without expressly using race) has not been effective.[1096]

Moreover, the focus on economic status limits affirmative action to only having a redistributive purpose. As argued in the previous section, affirmative action measures should pursue a wide range of purposes which are all important to realising the goal of substantive equality. Stigma and stereotyping, lack of voice and structural inequality may still affect individual members of the group, regardless of economic progress. A narrow focus on redressing economic disadvantage falls short of redressing the different dimensions of substantive equality. Even so, although economic advancement can be an indication of progress in the other dimensions, this should not be assumed, it must be shown.

It bears emphasis that the social and economic gains noted by the Indian Supreme Court have not sufficiently materialised in South Africa. That there is a growing Black middle-class and the rise of intra-racial inequality sits alongside statistics showing that nearly half of South Africa's population lives below the poverty line, with the young, Black people and women being the worst affected.[1097] Moreover, as Zizziama et al have shown, despite the change in the racial composition of the middle-class in South Africa, Africans are still underrepresented in the middle-class compared to their share in the overall population and 'race remains a strong predictor of poverty in South Africa, with Africans being at the highest

---

[1095] ibid.

[1096] The proposal to repeal Proposition 209 was passed by both houses of the Californian legislature and needed to be approved in the ballot on 3rd November, 2020.(see https://www.theguardian.com/us-news/2020/jun/24/california-affirmative-action-aca5-vote) UC has voted to reinstate AA with race as a factor – see e.g. https://edsource.org/2020/california-universities-prepare-for-possible-return-of-affirmative-action-in-admissions/634178. As of 19 November 2020, the Associated press reports that, 57 per cent of voters have voted against the repeal.

[1097] 'Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015' (Statistics South Africa 2017) 14 <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> accessed 4 October 2020.

risk to poverty even after controlling for differences in education and employment'.[1098] Thus, Bentley and Habib's argument that race and economic status[1099] should be used will too be insufficient. This is because, as noted above, those who meet the basic criteria for 'suitable qualification' or university admissions requirements are likely to be the more economically advantaged members of the group – their exclusion would substantively shrink the beneficiary class. Lastly, from the perspective of a multi-dimensional approach to substantive equality, any 'creamy-layer' within the beneficiary groups, if solely defined based on economic status, are not protected from the other forms of disadvantage.

2.4. Under-inclusivity

The third issue is that of under inclusivity. Here the argument is that the mere use of group membership is under-inclusive because it excludes persons who, while belonging to historically privileged groups, may be economically disadvantaged, in particular white males.[1100] The trade union Solidarity has been at the forefront of a campaign that argues that the implementation of affirmative action has created a system of 'neo-racialism' which unfairly discriminates against white people.[1101] Similarly, Banatar has argued that white people, because of poverty or the experience of abuse may have been equally disadvantaged as the members of the beneficiary groups.[1102] He argues that 'a compensatory mechanism

---

[1098] Rocco Zizzamia and others, 'Vulnerability and the Middle Class in South Africa' (Southern Africa Labour and Development Research Unit, University of Cape Town 2016) 32 <http://www.opensaldru.uct.ac.za/bitstream/handle/11090/846/2016_188_Saldruwp.pdf?sequence=1> accessed 19 November 2020.

[1099] While the authors use the term class, they mainly refer to material/economic disadvantage as being a necessary component for the demarcation of beneficiaries, Bentley and Habib (n 1037) 347.

[1100] Banatar (n 45) 282.

[1101] Constructing a Future Based on Race: 'Racial Representivity' Through Affirmative Action and Broad-Based Black Economic Empowerment in South Africa' (2015) <https://solidariteit.co.za/wp-content/uploads/2016/08/VN-verslag-finaal.pdf> accessed 5 October 2019.

[1102] Banatar (n 45) 282.

that gives preference to 'blacks' over equally disadvantaged whites is surely unfair'.[1103] As I have argued above, the disadvantage which affirmative action should seek to redress has multiple, intersecting dimensions. Taking this into account, Banatar's reference to equal disadvantage between poor white males and Black people does not account for disadvantage related to recognition, participation and the other harms which affirmative action should seek to redress.

In India, the argument for reservations based on economic disadvantage led to the most recent amendment to the Indian Constitution. This amendment comes decades after the landmark *Indra Sawhney* case, where the Indian Supreme Court rejected a ten per cent reservation based on economic disadvantage.[1104] In 2019, The Constitution of India (One Hundred and Third Amendment) Act, 2019 (the Amendment) was enacted to extend reservations in higher education and employment to include a 10 per cent allocation for 'economically weaker sections'. According to the Amendment, economically weaker sections will be defined by the State on the basis of 'family income and other indicators of economic disadvantage'. According to Bhatia, to the extent that reservations serve the purpose of redressing group-based disadvantage, the Amendment falls outside the scope of this goal. He notes:

> The scheme of Articles 14, 15 and 16 is one that acknowledges the historical fact that in India, group membership has been the primary basis of institutional and structural disadvantage. One's access to opportunity and chances of social and economic mobility have been mediated by one's group identity – and primary, that identity has been structured around caste.[1105]

[1103] ibid 283.

[1104] *Indra Sawhney* (n 1087) 328–329.

[1105] Gautam Bhatia, 'Is the 103rd Amendment Unconstitutional?' (*Indian Constitutional Law and Philosophy*, 13 January 2019) <https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/> accessed 20 November 2020. For a different approach to this amendment see Anup Surendranath, 'The Ambiguity of Reservations for the Poor' (*The Hindu*, 22 January 2019) <https://www.thehindu.com/opinion/lead/the-ambiguity-of-reservations-for-the-poor/article26053843.ece> accessed 20 November 2020.

Essentially, the groups that should benefit are those that have been disadvantaged because of a history of institutionalised prejudice and stigma, a historical exclusion from participation and structural disadvantage in ways which combine to create continuing disadvantage. In South Africa, affirmative action measures help redress economic disadvantage but, as is hopefully clear in the thesis so far, this is not its sole focus. It is asymmetrical in its application – focussing on disadvantaged groups as opposed to economically disadvantaged individuals. As Mokgoro J held in *Van Heerden*:

> The approach of apartheid was to categorise people and attach consequences to those categories.No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered out according to one's membership of a group. Recognising this, section 9(2) allows for measures to be enacted which target whole categories of persons. Therefore a person or groups of persons are advanced on the basis of membership of a group.[1106]

In light of the complex and intersectional nature of disadvantage, and the fact that, affirmative action measures are likely to benefit the more advantaged members of a beneficiary group, the question which arises is whether it should be possible to demarcate the benefits of affirmative action using multiple criteria to prioritise the most disadvantaged within and between the different beneficiary groups. The tension between and within the disadvantaged groups arises from a key limitation of affirmative action - there is no expansion of the pool of resources available. It is thus inevitable that it creates competition for those resources between different groups. Accordingly, we need conceptual tools that allow us to balance these competing interests. I turn to this below.

2.5. Intersectionality and varying degrees of disadvantage

This section of the chapter explores how intersectionality and varying degrees of disadvantage between different beneficiary groups should be used in the design and implementation of affirmative action. To be clear, the difference between the approaches

---

[1106] *Van Heerden* (n 1) [85].

discussed in this section and the creamy-layer is that they are geared towards more just intra-group demarcations and not the exclusion of those who are economically advantaged.

2.5.1. Intersectionality

Disadvantage can arise from a single ground, race, gender or disability status. However, it also manifests based on multiple, intersecting identities. In addition, taking the multiple dimensions of substantive equality into account, disadvantage manifests in complex and intersecting ways in relation to the different forms of disadvantage. Intersectionality allows us to see how different systems of domination and oppression gain meaning when seen in relation to one another.[1107] For example, the intersection between the institutions of white supremacy and patriarchy in Black women's lives.[1108] This intersectional experience of disadvantage creates 'different and multiple forms of inequality which cannot be explained or understood simply by reference to one of the grounds'.[1109] As explored in Chapter Three, intersectionality theory offers a tool, a framework that can be used to capture the complex axes where multiple identities intersect.[1110]

In light of substantive equality's concern with context and redressing group-based disadvantage and the commitment to transformation, intersectionality is a necessary component of the identification of disadvantage and providing a framework for the design, implementation and evaluation of affirmative action measures. It enables the interrogation of the social, political and legal context in which disadvantage is embedded and facilitates

---

[1107] Patricia Hill and Sirma (n 408) 27.

[1108] For a discussion of the intersection between race, gender and class in the lives of Black women, in particular, domestic workers, in South Africa *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24 [95]-[102].

[1109] Albertyn and Goldblatt (n 15) 253.

[1110] See Patricia Hill and Sirma (n 408). The authors offer a brief history of intersectionality as a tool for critical inquiry and praxis. See also, Hancock (n 408); *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (n 408); Nash (n 408) (for a critical account of the meaning[s]/use[s] and institutionalisation of intersectionality).

the 'examination of the substantive arrangements that determine a group's social or economic position, including the relationship between disadvantaged or vulnerable groups and more powerful and privileged groups'.[1111]

The Constitutional Court's equality jurisprudence has taken intersectionality into account. This has been done under s 9(3) in relation to unfair discrimination claims. For example, in *Hassan*, the Court recognised that discrimination could occur on multiple intersecting grounds of gender, religion and marital status.[1112] In *Brink,* the Court noted the intersection between discrimination based on race and gender.[1113] In *Mahlangu,* Victor AJ specifically held that intersectionality required the courts to 'examine the nature and context' of an individual or group as well as their historical treatment in law and society.[1114]

However, there is no clear framework for how intersectionality should figure in the affirmative action context. What is clear is that the commitment to substantive equality necessitates taking an intersectional approach in the demarcation of the beneficiaries of affirmative action. In some cases, intersectionality will require a higher allocation of benefits to groups that, because of the impact of belonging to multiple disadvantaged groups are more disadvantaged than the other beneficiary classes. This has to be done in context – for example, in the *SARIPA* case, the impugned measure prioritised Black women because of that group's specific marginalisation in the insolvency practice.[1115] This specific group's marginalisation is a product of the intersection between the discrimination they face based

---

[1111] Albertyn, 'Substantive Equality and Transformation' (n 16) 259. While Albertyn was writing in the context of a substantive equality inquiry, this analysis is also valuable in the context of intersectionality.

[1112] *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC) [33]; See also, *Women's Legal Trust* (n 747) (Court held that the failure to regulate Muslim marriages unfairly discriminated against Muslim women on account of their religion, marital status, gender and sex). For a detailed analysis of the role of intersectionality in the s 9(3) unfair discrimination analysis see, *Mahlangu* (n 1108) paras [73]-[104].

[1113] *Brink* (n 36) [44].

[1114] *Mahlangu* (n 1108) [95].

[1115] *SARIPA CC* (n 13) [19].

on their race and gender. At the same time, intersectionality requires us to take heed of the complex intersection between advantage and disadvantage. While white women are disadvantaged because of their gender, they are privileged because of their race. This fact should be relevant to analysing how the benefits of affirmative action ought to be spread within the beneficiary class based on gender.

In addition to the need to address intersectionality, there is also the fact that some groups within the beneficiary groups may be more disadvantaged than others – not because of an intersection of different group memberships but in relation to different placements in the social hierarchy. The question then arises, can affirmative action measures be used to specifically target or privilege such groups against the other groups? I turn to this below.

2.5.2. Varying degrees of disadvantage

Under colonial and apartheid rule, persons not classified as white were subject to racial domination and oppression. However, this was not to the same degree. While all Black persons (African, Indian, Coloured and Chinese) benefit from the current affirmative action regime – they were not similarly situated in the colonial and apartheid racial hierarchy. Should this be taken into account when demarcating beneficiaries?

In *Motala,* the High Court upheld the constitutionality of an admissions policy which had lower score requirements for African students than for Indian students. The court found that while there was no doubt that 'the Indian group' was decidedly disadvantaged by the apartheid system, the evidence established that the degree of disadvantage to which African pupils were subjected under the 'four-tier' system of education was 'significantly greater than that suffered by their Indian counterparts'.[1116] This judgement acknowledges that as non-white, both Indian and African people were discriminated against and subject to discrimination and oppression under the apartheid regime. However, it also recognises that

[1116] *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D) [27].

this was to different degrees. More specifically, access to quality education was most restricted for Africans. For the court, this justified prioritising this group over Indians in the University's admissions policy. Similarly, in *Barnard*, Moseneke ACJ acknowledged that 'although under apartheid and racial discriminatory laws and practices all Black people suffered hardships, the greatest hardships were suffered by the African people'.[1117]

The recognition of varying degrees of disadvantage within different groups requires us to look into the extent and nature of disadvantage experienced on the basis of a specific ground – in *Motala,* race in the context of a specifically corrosive form of disadvantage – access to quality education. As in *Motala*, a substantive approach to equality requires the recognition of different degrees of disadvantage. Thus, it should be possible to design and implement affirmative action measures that target or allocate more resources to those identified as the most disadvantaged. An example of this approach is that taken by the Indian Supreme Court.

In *Indra Sawhney*, the Indian Supreme Court held that so long as the demarcation was reasonably done, it was constitutionally permissible to divide the OBC beneficiary group and recognise the 'more backward class' within the larger group.[1118] Some Indian states have divided the OBC, with the more backward members being given higher priority in the allocation of reservations.[1119] However, the classification of some groups as more backward than others, and thus, recognising different degrees of disadvantage is only permissible in the context of OBCs and not SCs and STs.[1120] Balagopal has argued that this approach treats

---

[1117] *Barnard CC* (n 13) [42]; In *Stoman* (n 1050) 1036f, Van der Westhuizen J held that 'It is a given fact that African people were discriminated against very severely under apartheid and that other race groups who were regarded as non-white were also discriminated against, although not necessarily to the same extent.'

[1118] *Indra Sawhney* (n 1087) 296.

[1119] Verma (n 10) 131.

[1120] *EVChinnaiah v State of Andhra Pradesh* (2005) 1 SCC 394.

SCs as a homogenous group, which they are not—entrenching intra-group inequality.[1121] Hopefully, in the South African context, the *Motala* case evinces the importance of taking context into account and focussing on existing intra-group inequality, failing which we risk entrenching past patterns of inequality, especially those that were designed to divide and conquer the subordinated racial groups.

Taking intersectionality and varying degrees of disadvantage into account will not be easy. First, there is the risk of a rigid hierarchical ranking that could entrench intra-beneficiary group resentment, prejudice, hostility and social division. For example, the courts, executive or legislature could use a general presumption that Black males are more disadvantaged than Indian females. This should be addressed by rejecting an abstract ranking in favour of a contextual analysis of patterns of inequality within and between different beneficiary groups.

In *Motala*, the court did not assume that African males were more disadvantaged than Indian females in the context of access to education. Instead, Hurt J considered evidence of the context and history of access to quality education between these different groups.[1122] This led him to conclude that, 'the degree of disadvantage to which African pupils were subjected under the "four-tier" system of education was significantly greater than that suffered by their Indian counterpart'.[1123] While it is not clear what evidence he relied on in the case, it can be assumed that he looked into past legislation, educational spending and its impact on access to education between the different racial groups under apartheid.

Overall, it is important that the courts bear in mind that the government will not be able to, and need not, advance all disadvantaged groups at the same time or use affirmative action as a mechanism to advance a specific group. The real question should be whether and

---

[1121] K Balagopal, 'Justice for Dalits among Dalits: All the Ghosts Resurface' [2005] Economic and Political Weekly 3128.

[1122] *Motala* (n 1119) [28].

[1123] ibid [28].

to what extent one beneficiary group can legitimately be advanced over another. In this section, I have suggested how intersectionality and taking varying degrees of disadvantage into account can and should be used for this purpose. Ultimately, as argued in Chapters Four and Five, excluded groups should be able to claim that the failure to include them or that the criteria used to demarcate the benefits of an affirmative action measure – a case that would have to be decided in terms of the *Van Heerden* test.

2.6. Recognition of new groups

Thus far in this section of the chapter, I have explored some of the difficulties in identifying the beneficiaries of affirmative action and grappling with how to take intersectionality and varying degrees of disadvantage into account. In this section, I focus on the need for flexibility in the demarcation of beneficiaries of affirmative action. In particular, I argue that flexibility will allow the recognition of new beneficiary classes of affirmative action.

While South Africa's affirmative action regime has largely focussed on race, gender and disability, the Court has consistently stated that these are not the only possible classifications. As Cameron et al. JJ note in *Barnard,*

> Race continues to be an important component of many restitutionary measures. However, previous disadvantage because of unfair discrimination is not restricted to racial groups. The Constitution clearly recognises that unfair discrimination, based on a range of grounds including social origin, disability, culture, language and birth, is unacceptable. It envisages measures to protect those disadvantaged by unfair discrimination on any of these grounds.[1124]

The quote above envisages the inclusion, as beneficiaries of affirmative action, other groups based on the grounds listed in s 9(3) of the Constitution. This approach fits the commitment to redressing patterns of disadvantage. Disadvantage is not static. As redistributive and other measures take effect; the current patterns of disadvantage will too change. Thus, groups currently recognised as disadvantaged will be advanced. At the same time, new patterns of disadvantage may emerge or we may include groups that had always been disadvantaged but

---

[1124] *Barnard CC* (n 13) [139].

which were initially excluded as beneficiaries of affirmative action. In line with the commitment to substantive equality, the demarcation of the beneficiary groups of affirmative action must be flexible enough to respond to changing patterns of disadvantage.

In India for example, Hassan argues that the classification of beneficiaries focussed on addressing the backwardness of groups based on untouchability. Thus, it focussed on addressing disadvantage primarily rooted in the Hindu caste system as opposed to more general criteria for backwardness, leading to the exclusion of Muslims as a salient beneficiary class.[1125] However, the Indian Supreme Court has affirmed the need for flexibility in the recognition of other disadvantaged groups and the need for the extension of reservations to these groups. In the *Ram Singh* case, the court specifically noted that:

> Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action.[1126]

Thus, the court made it clear that there is room for the expansion of the current beneficiary groups and the recognition of new forms of disadvantage that must be addressed, noting that the state could not 'blind itself to the existence of other forms and instances of backwardness'.[1127] The court in *Ram Singh* went as far as suggesting that the state must exercise a 'high degree of vigilance' and 'discover emerging forms of backwardness'.[1128] This required that in addition to looking at the patterns of disadvantage related to historic injustice, the state must consider emerging patterns of disadvantage. According to the court:

> An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must

---

[1125] Hassan (n 10) 37.

[1126] *Ram Singh v Union of India* (2015) 4 SCC 697 729.

[1127] ibid.

[1128] ibid.

> engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice.[1129]

In Chapter Five, I argued that s 9(2) of the Constitution imposes a power plus a duty on the state to take positive steps to realise the right to equality when the failure to do so would render the right to equality nugatory. The approach in the quote above is an important first step to this. In demarcating the beneficiaries of affirmative action, there is a duty on the state to consider patterns of disadvantage related to historic injustice in South Africa. At the same time however, it cannot ignore emerging patterns of disadvantage. A comparative example of this vigilance is the 2014 inclusion of transgender people as beneficiaries of reservations in India. In *NALSA,* the Indian Supreme Court recognised that transgender people were also a socially and economically backward community and were thus entitled to the benefits of Articles 15(4) and 16(4) of the Indian Constitution. Thus, the state was found to have an obligation to 'take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied'.[1130]

3. Conclusion

This chapter sought to provide more clarity in the development of a transformative affirmative action jurisprudence in relation to three important issues. The first concerns the justification for and thus the legitimate purposes that affirmative action measures should, 'within the discipline' of the Constitution, be able to pursue. I explored the relationship between different justifications for affirmative action: compensatory versus distributive and the moral versus instrumental. I argued that in reality, these justifications are interrelated and are all present in South Africa's legislative framework for affirmative action. From this I argued that the best way to analyse whether the purpose of an affirmative action measures

---

[1129] ibid.

[1130] *National Legal Services Authority v Union of India* (2014) 5 SCC 438 443.

fits the schema of s 9 and the statutes is to ask whether it could fit under the multiple-dimensions – namely, whether it redresses disadvantage, addresses prejudice and stereotyping; facilitates voice and inclusion; and accommodates difference and achieves structural change. The best and most effective forms of affirmative action will arguably serve a range of purposes within the multiple dimensions.

In the second section of the chapter, I explored some of the challenges that arise with the status-based classification of beneficiaries – over-inclusivity and under inclusivity. Overall, I refuted these criticisms by pointing to the fact that affirmative action should seek to address the different harms highlighted in the multiple dimensions of substantive equality. This approach explains the focus on groups rather than individuals as well as solely focussing on economic disadvantage. However, I noted the problem that affirmative action measures benefit the more privileged members of the beneficiary class. Rather than reject group based classifications based on this, I argued that the better approach is to use intersectionality and a contextual analysis of varying degrees of disadvantage to target, in the design and implementation of affirmative action measures, the most disadvantaged within the beneficiary groups. Further, because disadvantage is not static, I argued for a flexible approach to the classification of new beneficiaries of affirmative action – responding to new patterns of disadvantage.

Having now explored the question for *what purpose* and *for whom*, the final two chapters of the thesis consider the question, through what means, tackling the specific problem of whether quotas are a constitutionally permissible form of affirmative action. In Chapter Eight, I conclude the thesis by asking for *how long*? Should there be a sunset clause to South Africa's affirmative action regime?

CHAPTER SEVEN: THROUGH WHAT MEANS? THE PERMISSIBILITY OF QUOTAS

'Quotas are rigid and exclusionary: they are required to be met, irrespective of circumstance. Goals, or targets, on the other hand, are flexible and inclusive: they are programme objectives translated into numbers, they provide a target to strive for.'[1131]

Introduction

In the previous chapter, I explored the legitimate purposes that affirmative action should, in line with the commitment to substantive equality and transformation, be able to pursue. The chapter also explored how to delineate affirmative action beneficiaries, the 'for what?' and 'for whom?' questions. In this chapter, I turn to consider the 'through what means?' question. I focus on whether quotas fall within the range of permissible s 9(2) measures.

The EEA permits the use of numerical targets but expressly prohibits quotas.[1132] However, it does not define quotas or provide any guidelines to help distinguish numerical targets from quotas, leaving the task to the courts. Unfortunately, the Court's quota jurisprudence is not very clear. In *Barnard,* Moseneke ACJ opined that under the EEA, the difference between permissible numerical targets and prohibited quotas lied in the flexibility of the former. According to Moseneke ACJ, 'Quotas amount to job reservation' while numerical targets, 'serve as a flexible employment guideline'.[1133] The flexibility threshold was affirmed in *Correctional Services*.[1134] However, the majority and concurring judgments disagreed on the requisite standard for determining the flexibility of numerical targets.

[1131] Murray Cloete, 'Second Respondent's Answering Affidavit, *SARIPA CC'* [23].

[1132] EEA s 15(3).

[1133] *Barnard CC* (n 13) [49].

[1134] *Correctional Services CC* (n 675) [51] (Zondo J), [118] (Nugent AJ).

Following the decisions in *Barnard* and *Correctional Services*, in *SARIPA*, the permissibility of quotas per se under s 9(2) of the Constitution featured for the first time.[1135] The lower court judgements in the case extended the prohibition of quotas beyond the EEA to include a prohibition of quotas under s 9(2) of the Constitution.[1136] In both judgments, the primary arguments for the impermissibility of quotas were that they were arbitrary, irrational and necessarily violated the right to dignity of those adversely affected. Accordingly, the argument goes, quotas failed to meet the *Van Heerden* test.[1137] Before the Constitutional Court, Jafta J's majority opinion did not challenge the lower courts' approach; he did not expressly endorse it either. Instead, he found the affirmative action measure unconstitutional on other grounds.[1138] However, in his dissenting opinion, Madlanga J showed some scepticism towards the lower Court's extension of the prohibition beyond the EEA. While he did not make any definitive findings, he noted that 'before invalidating a measure meant to achieve substantive equality for being rigid, it had to be looked at in context or a 'situation-sensitive" manner. It can never be a one-size-fits-all'.[1139] There is thus no clarity on whether quotas, by their nature, fail the *Van Heerden* test.

Thus far, some academic commentary has supported the lower court judgments' approach.[1140]According to Kohn and Cachalia, the inflexibility of the policy in *SARIPA* 'was

---

[1135] *SARIPA CC* (n 13).

[1136] *SARIPA HC* (n 25); *SARIPA SCA* (n 25).

[1137] *Van Heerden* (n 1) [37].

[1138] *SARIPA CC* (n 13) [41]-[43].

[1139] ibid [80].

[1140] Kohn and Cachalia (n 20); Pretorius, 'Limitations of Definitional Reasoning' (n 25); Andre M Louw, 'Extrapolating "Equality" from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998' [2006] SAMLJ 336.

offensive to the dignity of those affected in a manner which amounted to "undue harm".'[1141] For Pretorius, rigidity in affirmative action measures in employment frustrates the life chances of non-beneficiaries, 'causing race or gender-based contests' that are not in line with an 'inclusive notion of substantive equality'.[1142] Sharing the scepticism in Madlanga J's dissent, in this chapter, I disagree with these arguments. I argue that quotas can fall within the range of permissible measures under s 9(2) of the Constitution. In other words, there will be cases where quotas are a proportionate means of promoting the achievement of equality.

I have divided the chapter into three sections. In the first section, I explore how the Court has defined quotas and the reasons offered for why they are prohibited under the EEA. In the second section, I explore the expansion of the prohibition of quotas in Mathopo J and Katz AJ's reasoning in the lower court judgments and juxtapose their approach with Madlanga J's dissenting opinion in the Court's judgement. The section will illustrate how the lower court judges' reasoning and conclusions draw from the EEA jurisprudence and find that affirmative action measures must be flexible in taking the individual characteristics, skills, expertise and experience of persons into account. Failing which, the judgements hold that they are rigid quotas. Without a contextual and 'case-sensitive' inquiry, this rigidity is presumed arbitrary, irrational and violative of the right to dignity.

Using the *SARIPA* case and applying the approach to the *Van Heerden* test mapped in Chapter Four, section three makes a positive case for the permissibility of quotas. The section will argue that while there were gaps in the statistical evidence relied on in designing the impugned policy in SARIPA as well as inconsistencies and a lack of clarity about how the impugned policy in *SARIPA* would be implemented, the rigidity of the policy should

[1141] Kohn and Cachalia (n 20) 176.

[1142] Pretorius, 'Limitations of Definitional Reasoning' (n 25) 281–282.

not have been the linchpin for the finding that it failed the *Van Heerden* test. The core argument is that mere rigidity does not violate s 9(2) – some quotas can pass the standard set in *Van Heerden* – sometimes rigid and exclusionary measures are warranted.

1. The 'Look, Flavour and Characteristics of Quintessential Quotas' in South Africa

To understand the Court's quota jurisprudence, we have to take another look at several affirmative action provisions under the EEA. Section 15(1) of the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce'. According to s 20(3), a person may be suitably qualified for a job as a result of any of, or a combination of the person's formal qualifications, prior learning, relevant experience *or the capacity to acquire, within a reasonable time, the ability to do the job*. Further, when determining suitable qualification, s 20(5) prohibits employers from unfairly discriminating against a person on the grounds of their relevant experience.

The leading criterion to determine equitable representation has been whether the workplace, at each occupational level, reflects the economically active population's national and regional demographics.[1143] Another important provision is s 15(4). Section 15(4) prohibits measures that create an absolute barrier to 'the prospective or continued employment or advancement of people who are not from designated groups'.[1144] These provisions, in particular, the relationship between adhering to the EEA's numerical targets and the difference (if any) between the prohibition of quotas and the prohibition of creating and absolute barrier for non-beneficiary groups were at the core of the arguments made in *Barnard* and *Correctional Services*.

[1143] EEA s 42(a).

[1144] *Barnard CC* (n 13) [42].

In *Barnard*, one of the arguments Solidarity made was that the rigid implementation of numerical targets was impermissible because it amounted to quotas.[1145] According to Solidarity, the rigid implementation of numerical targets was unlawful because numerical targets were not concerned with redressing past discrimination. Instead, they amounted to a form of 'naked race and gender norming' in a process of 'social engineering' that sought to 'reshape the future'.[1146] This was because, according to Solidarity, strict adherence to numerical targets would mean that they could be used in favour of white males in cases where this group was underrepresented.

The Constitutional Court failed to address the race and gender norming argument. My proposed approach, as I argued in relation to the policy in *Cape Bar*, is that numerical targets should create a floor, not a ceiling for disadvantaged groups. At the same time, persons belonging to the historically privilieged classes should not be excluded. Thus, rather than focussing on a symmetrical approach to 'demographic representation', the better approach is to leave an open class in which all persons can benefit without taking affirmative action into account. This will give white males opportunities, without creating a ceiling for disadvantaged groups.

Rather than address the 'social engineering' argument, Moseneke ACJ suggested that the difference between quotas and numerical targets was the flexibility of the latter and rigidity of the former. Numerical targets were 'inclusive'[1147] and 'flexible employment guidelines' while quotas were 'rigid' and amounted to 'job reservations'.[1148] This definition was based on a reading of ss 15(3) and (4) of the EEA. According to Moseneke ACJ, the

---

[1145] Groenewald (n 55) [27].

[1146] ibid [28].

[1147] *Barnard CC* (n 13) [54].

[1148] ibid; *Correctional Services CC* (n 675) [51].

design or implementation of numerical targets in a manner that creates *an absolute barrier* converts permissible numerical targets into quotas. There must be a measure of flexibility. However, the requirement of flexibility is vague. In particular, it gives rise to two key questions. First, in relation to what and for whom are affirmative action measures required to be flexible? Second, what purpose does flexibility serve?

1.1. Flexibility in relation to *what* and for *whom*?

In response to the first question, there are two diverging approaches. The first approach, individualised flexibility, requires assessing the individual merit, skills, expertise and experience of persons beyond the suitable qualification threshold.[1149] The second approach is more general; flexibility for operational needs of the employer or the public interest is sufficient, the functional approach. As will be shown below, the former approach cannot be reconciled with the express provision for appointing suitably, rather than equally qualified candidates and the prohibition of discrimination based on a lack of experience. In fact, it contradicts these provisions, the EEA's purposes, and undermines the commitment to redressing group-based disadvantage.

1.1.1. The individualised approach: individual merit, skills and expertise

Under the individualised approach, affirmative action measures which view persons through the lens of their group membership (based on status such as race, gender etc.) and fail to take individual merit, skills, expertise and experience are rigid quotas. This approach can be seen in Cameron et al. JJ's judgment. The judges held that the implementation of affirmative action measures had to 'at a minimum' take account of 'the relevant aspects of a candidate's identity … To do otherwise would be to sanction rigidity that would convert the numerical targets specified in the Plan into impermissible quotas'.[1150]

[1149] Pretorius, 'Limitations of Definitional Reasoning' (n 25) (argues in favour of this approach as it reflects, at least for him, the commitment to non-racialism and non-sexism).

[1150] *Barnard CC* (n 13) [118]-[119].

Cameron et al. JJ's approach is confusing because, on the one hand, the Court sanctions the suitable qualification standard. On the other, it requires individual merit to still be a factor in making decisions. While the Court explained the flexibility requirement as being aligned with the prohibition of an *absolute barrier* against non-beneficiaries' appointment or advancement, these are two different things. Making appointments or promotions without an assessment *beyond* suitable qualification is not the same as absolutely barring the development of those adversely affected by such appointment or promotion.[1151] That there is a difference between these two things explains why, at the end, all the judgements in *Barnard* affirmed the lawfulness of the decision not to appoint her. While the judges took very different approaches, they all agreed that in light of the over-representation of white women for the position for which Ms Barnard applied, the decision not to appoint her was justified.[1152]

Individualised flexibility is problematic because it could entitle adversely affected persons, even when they are over-represented, to an individual assessment of merit, skills and expertise that may lead to, and justify, their continued over-representation. While this may be appropriate when competing against non-beneficiary classes, allowing disadvantaged beneficiary groups to compete with non-beneficiaries on merit, it does not fit when this would enable the hegemony of relatively more privileged groups amongst the beneficiary class to continue to dominate. Thus, as a beneficiary based on gender, Ms Barnard's individual skills, expertise and experience would be relevant in competition with white males, a non-beneficiary class – not in competition with the underrepresented Black men and women in the case.

[1151] See the argument made by the SAPS Nkrumah Mazibuko, 'Founding Affidavit, *Barnard CC'* [76.2].

[1152] *Barnard CC* (n 13) [66] (Moseneke ACJ), [123] (Cameron et al. JJ), [118] (Van der Westhuizen J), [230] (Jafta J).

In relation to the race and gender norming argument, it's important to reiterate that white males who do not have a disability are not beneficiaries under the EEA. As noted above, looking at the facts in *Barnard*, Ms Barnard's merit should have been taken into account against a non-beneficiary class. This is because, as I argued in Chapter Six, the pursuit of the instrumental aims of inclusion and representation have to be understood in line with substantive equality's commitment to redressing group-based disadvantage. However, the case was about her being the most, rather than just suitably qualified, when compared with the Black males and in the context where white women were over-represented. My argument is that to the extent that the numerical targets in the EEA have been used as a ceiling for the beneficiary classes, in competition with white males – this contradicts the commitment to substantive equality. However, if the numerical target for a beneficiary group has been met, they should still be able to compete on the basis of merit with the non-beneficiary class.

A difficult conflict is that between different beneficiary classes. The EEA seeks to achieve equitable representation of all the beneficiaries. It has set demographic representation as a benchmark for meeting this goal. One approach to this could mean that, for example, when African women are over-represented – they cannot compete with white women. Alternatively, it could be possible to prefer African women even if this would lead to their over-representation. In the Labour Appeal Court decision in *Correctional Services*, Waglay JP and Davis JA, citing *Motala*, held that an affirmative action measure could 'consider that Black persons within a designated group should have a greater claim to appointment than White women'.[1153] The judge's finding aligns with my argument in Chapter Six that the courts can resolve an intra-beneficiary conflict by taking intersectionality and the varying degrees of disadvantage into account. In some cases, adherence to numerical targets

[1153] *Correctional Services LAC* (n 688) [54].

could be warranted. However, in other cases, it should be possible for the more disadvantaged class to be overrepresented.

Unfortunately, in the Constitutional Court's judgement in *Correctional Services*, Zondo J took the opposite approach. Responding to the question 'whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people…are already overrepresented or adequately represented...' – the Barnard Principle, he held that it could. According to Zondo J, the workplace must be representative of all 'racial groups and both genders'. Further cementing this, Zondo J held that 'the level of representation of each group must broadly accord with its level of representation among the people of South Africa'.[1154]

Zondo J's approach is problematic because it elevates representation above redressing group-based disadvantage. It, in effect, reserves a demographic share of work for white males in all cases—lending itself to Solidarity's 'social engineering' argument. However, as I argued in relation to the *Cape Bar* decision in Chapter Six, white men are not a disadvantaged group – the pursuit of their inclusion or representation at the cost of disadvantaged groups does not accord with the commitment to substantive equality and transformation. Understood from this perspective, the numerical targets do not serve social engineering; they are properly focussed on the disadvantaged beneficiary groups in the EEA. While white males cannot be excluded, numerical targtes in their favour should not create a bar for historically disadvantaged groups. The implications of this approach is that it should be possible to have a workforce that is 100 per cent Black or 100 per cent female. This would be the case when we have met the target for Black people and women and, in 'open competition' with white males, they fare better than the white males. In essence, the pursuit

[1154] *Correctional Services CC* (n 677) [40].

of demographic representation must be underlied by the larger goal of redressing group-based disadvantaged.

Another problem with the individualised approach is that substantive equality requires a focus on the position of the larger group to which an individual belongs, not to their individual status. Seen against the context of the group and relative to the underrepresentation of Black males and females, Ms Barnard had no claim for individualised consideration. Thus, defining quotas in a manner that requires this individualised consideration does not fit the purpose of EEA, a statute underlined by a commitment to substantive equality and transformation.

Overall, creating an absolute bar for appointment and promotion is different from a lack of individualised flexibility. The rigid application of numerical targets to address a specific overrepresentation should not be prohibited; it is the absolute barrier to the advancement of a group which is prohibited. Seen against the background of the right to dignity, creating an *absolute barrier* to the advancement of a group will likely be a disproportionate means of promoting the achievement of equality. However, rigidity, in the sense discussed above, does not create an absolute barrier to the advancement of any-group. In *Barnard*, it created a ceiling for individuals in a relatively overrepresented group as against the underrepresentation of Black men and women. This accords with the commitment to substantive equality.

1.1.2. The Functional approach: Operational and other requirements

The second approach accepts flexibility that is not related to the individual's skills or merit. In terms of this approach, the possibility of deviation for operational requirements is sufficient. This approach comes out of the *Correctional Services* case. In this case, Zondo J (writing for the majority) and Nugent AJ (concurring opinion) took different approaches to the kind of flexibility required to protect numerical targets from the damning label of 'quota'. A difference that illuminates the problems with the prohibition of quotas.

In *Correctional Services*, the impugned policy contained numerical targets and expressly provided for circumstances in which deviations from the numerical targets could be made. According to the policy, the National Correctional Services Commissioner (the Commissioner) could deviate from the numerical targets and appoint persons from non-beneficiary groups in the context of scarce skills and where there was no suitably qualified candidate from the beneficiary group.[1155] The measure also created sanctions for managers who failed to meet the numerical targets.[1156] One of the issues that the Court had to decide was whether the possibility of deviation from the numerical targets in the circumstances above was enough to sufficiently render the numerical targets 'flexible' not to amount to impermissible quotas.[1157]

Before the Court, Zondo J held that the numerical targets were sufficiently flexible not to constitute quotas.[1158] For Zondo J, the possibility of deviation was not remote; deviations could happen in situations that occurred in reality.[1159] In this case, he found the possibility of deviation for operational requirements as constituting a wide power of discretion.[1160] That the Corrections Commissioner could only make deviations, or that managers could be sanctioned for failing to implement the numerical targets was also not sufficient to convert the numerical targets into quotas.[1161]

[1155] *Correctional Services CC* (n 677) [7].

[1156] ibid [16].

[1157] ibid [50].

[1158] *Correctional Services CC* (n 677) [50]–[64].

[1159] ibid [53].

[1160] ibid [54], [60].

[1161] ibid [61]-[63].

In contrast, Nugent AJ adopted the individualist approach to flexibility. For Nugent AJ, affirmative action measures had to reach an appropriate balance between the interests of all those affected by them; they had to be 'thoughtful, empathetic, and textured'.[1162] In this case, he held that the plan was 'only cold and impersonal arithmetic',[1163] it had the 'look, flavour and characteristics of quintessential quotas'.[1164] Following the argument in *Barnard,* the 'look and flavour' of quotas was the failure to take the individual circumstances of persons into account. For Nugent AJ, the possibility of deviation was separate from questions of the flexibility of the policy in individual cases, beyond the context of scarce skills or operational requirements.[1165] On Nugent AJ's definition, a flexible plan required flexibility in all individual appointments. There had to be discretion in the individual implementation of the numerical targets. This discretion was tied to the 'individual experience, application and verve' of applicants.[1166]

Returning to the question considered in this section, 'in relation to what and for whom do we need flexibility?' According to the Court, we should either be concerned with the individual circumstances, merit and skills of a person adversely affected by an affirmative action measure or with the operational requirements of an employer. As I have shown in the discussion above, the individualist approach does not fit with the other provisions in the EEA and, in practice, it could undermine the purpose of affirmative action measures under the EEA. Specifically, it renders the very purpose of preferential treatment and the threshold of suitable qualification within the beneficiary class redundant. Problematically, it could

---

[1162] ibid [102].

[1163] ibid [101].

[1164] ibid [108].

[1165] ibid [113].

[1166] *Correctional Services CC* (n 677) [118].

reinscribe a hierarchy within the beneficiary class, a hierarchy that would likely fall heaviest on Black women.

On the other hand, the functional approach makes sense. It requires flexibility to ensure that posts aren't left vacant for want of suitably qualified disadvantaged candidates. Thus, the functional approach is a mechanism that ensures that employers are not left stranded when in need of scarce skills, expertise and resources, and they have no suitably qualified candidates from the beneficiary class. It thus fits the EEA's concern with having an efficient workforce and enabling economic development.[1167] However, apart from the employer's operational and scarce skills requirements, it allows for a rigid implementation of numerical targets – this rigidity does not attract the damning label of quota.

1.2. Flexibility for what purpose?

The second question which arises is the rationale behind the flexibility requirement. Under the individualist approach to flexibility, the argument seems to be that the lack of flexibility in quotas, in particular, the failure to take individual merit, skills and characteristics beyond suitable qualification and group membership into account violates the right of non-beneficiaries to dignity and is a form of unfair discrimination.[1168] Agreeing with this assessment, Pretorius has critiqued Zondo J's 'definitional approach' and argued that the failure to take individual characteristics into account gives 'insufficient regard to the nature of the impact of the exceptions on the dignity of those affected'.[1169] This, according to Pretorius, does not accommodate 'all the implicit considerations of an inclusive notion of substantive equality'.[1170] The core of this argument appears to be that more than other forms

---

[1167] See the preamble, EEA.

[1168] See Katz AJ's findings in *SARIPA HC* (n 25) [215].

[1169] Pretorius, 'Limitations of Definitional Reasoning' (n 25) 282.

[1170] ibid 281.

of affirmative action, quotas disregard the individual rights of non-beneficiaries, leading to the foreclosure of opportunities for the innocent individual.

In addition to the argument that quotas cause harm to the non-beneficiaries or adversely affected disadvantaged groups, the 'quota candidates' are said to experience harm because when affirmative action measures are applied rigidly, they are disadvantaged by the 'invidious and usually false inference' that they have been appointed because of their membership of a disadvantaged group and not on account of their individual merit.[1171]

Before refuting these arguments, it is important to pause and summarise the analysis thus far. I have hopefully illustrated how the individualist definition of quotas under the EEA and the reasons underlying their prohibition is based on the assumption that quotas necessarily create an absolute barrier — which violates the right to dignity. I have shown that there is a substantive difference between creating an absolute barrier and creating a ceiling for individuals when their group is overrepresented. I have argued that this ceiling is contextual – Ms Barnard's individual merit, skills and capability would be relevant in other contexts. For example, in competition with white males.

By contrast, the functional approach merely requires some possibility of deviation, in particular, a policy can pass constitutional muster without requiring individual merit, skills and expertise to be considered. Unfortunately, as the analysis of the lower court decisions in *SARIPA* will illustrate, the individualist approach was adopted and transplanted to support the argument that quotas fall outside the scope of permissible measures under s 9(2) of the Constitution. I turn to this below.

[1171] *Barnard CC* (n 13) [80].

2. Extending The Prohibition Of Quotas To S 9(2) Of The Constitution

The question whether quotas are permissible under s 9(2) of the Constitution came to the fore in the *SARIPA* case. The *SARIPA* case concerned a policy by the Minister of Constitutional Development (the Minister) which sought to regulate the provisional appointment of insolvency practitioners.[1172] According to the Minister, the policy was aimed at redressing inequality and transforming the insolvency industry by increasing the number of appointments of previously disadvantaged and suitably qualified insolvency practitioners to insolvent estates.[1173] This was against a background of statistics that showed that white males received a disproportionate share of appointments.[1174] The policy would apply at the provisional stage; thus, the creditors of an estate retained the power of appointment at the final stage of liquidation or sequestration.

Under the impugned policy in the case, the Master of the High Court would have to appoint *suitably qualified* insolvency practitioners using an alphabetised list. The list created four categories in accordance with race, gender and date of citizenship. The policy ranked the different beneficiaries in four categories:

i. Category A of the Minister's policy consisted of Black women who became South African citizens before 27 April 1994;
ii. Category B consisted of Black men who became South African citizens before 27 April 1994;
iii. Category C consisted of white women who became South African citizens before 27 April 1994 and;

[1172] *SARIPA HC* (n 25) [45] (I use the term insolvency practitioners to refer to trustees, liquidators as well as other practitioners under different statutes regulating insolvency).

[1173] *SARIPA CC* (n 13) [4].

[1174] *SARIPA HC* (n 25) [79] (this was the argument made by the Minister).

iv. Category D consisted of Black men and women, white women, who became South African citizens on or after 27 April 1994 and white males regardless of when they became citizens.[1175]

Based on the four categories, the policy required appointments to be made in the ratio A4: B3: C2: D1. The letters represented the racial and gender categories, while the numbers represented the number of practitioners who should be appointed in each category.[1176] The list also separated junior and senior practitioners based on their relative experience.[1177] The date of citizenship is significant because it marks the beginning of the democratic dispensation. In separating the groups based on the date of citizenship, the policy prioritised Black women and men as well as white women (in that order) who were citizens before the democratic transition but treated all Black persons who were citizens after this date, the same as *all* white males.

The policy allowed for a deviation where the complexity of the matter and the suitability of the insolvency practitioner next in line required the joint appointment of a senior insolvency practitioner and the next junior or senior practitioner from the list.[1178] It was thus possible for the Master to appoint a person other than the next practitioner on the list. Thus, similar to the *Correctional Services* case, the deviation from the list for operational needs of the estate was possible.

Before its implementation, the policy was challenged on several grounds, including that it violated the right to equality; and that it was arbitrary and irrational.[1179] On the papers,

---

[1175] *SARIPA CC* (n 13) [20].

[1176] ibid [23].

[1177] *SARIPA HC* (n 25) [55].

[1178] *SARIPA CC* (n 13) [25].

[1179] *SARIPA HC* (n 25) [7].

a core argument was that the policy failed the *Van Heerden* test because it was an impermissible quota. Echoing the arguments made in the EEA context, the South African Restructuring and Insolvency Practitioners Association, (*SARIPA)* argued that the policy created an absolute barrier for white males and disadvantaged well established white women in the insolvency practice.[1180] According to SARIPA, this amounted to 'undue harm' and would set the gains made in the profession (for white women) back.[1181] Intervening in the case, the trade union Solidarity argued that the policy was a prohibited quota because it allowed for a mechanical allocation of work based on race and gender and without considering the individual qualities of applicants.[1182]

In support of the policy, the Minister argued that it was an affirmative action measure in line with s 9(2) of the Constitution and that it complied with Moseneke J's three-pronged test in *Van Heerden.*[1183] According to the Minister, the policy 'would facilitate access to the industry and restore the previously disadvantaged insolvency practitioners' rights to equality, dignity and would also realise their right to follow their trade, profession or occupation'.[1184] There were several findings made by the different courts in this case. For purposes of this chapter, I focus on the findings that the policy violated the right to equality and dignity and was arbitrary and irrational, *because it* was a rigid quota, starting with Katz AJ's Western Cape High Court judgment.

[1180] Johannes Steenkamp, 'First Respondent's Answering Affidavit, *SARIPA CC*' [29.5].

[1181] ibid [29.6.4].

[1182] 'Fourth Respondent's Heads of Argument, *SARIPA CC'* (n 234) [19].

[1183] *SARIPA HC* (n 25) [71].

[1184] *SARIPA SCA* (n 25) [24].

2.1. The High Court Judgement

It will be recalled that the *Van Heerden* test is a three-pronged inquiry into the validity of affirmative action measures. The first leg of the test requires the measure to target persons or categories of persons disadvantaged by unfair discrimination. The second requires the measure to be designed to promote and advance the intended beneficiaries and prohibits irrational and arbitrary measures. The last leg requires the measure to further the achievement of equality. The policy passed the first leg of inquiry, with Katz AJ finding that there was a need to transform the insolvency industry and that the policy targeted a class that has been disadvantaged by unfair discrimination.[1185] In the second leg of the inquiry, he held that the court had to determine whether the policy was rationally related to its purpose, improving the position of historically disadvantaged groups.[1186]

The Minister argued that the policy was rationally related to its purpose because, by intervening in the provisional appointment of insolvency practitioners, the policy would ensure that disadvantaged persons had exposure, enabling them to develop the skill and reputation necessary to build successful practices. According to the Minister, given the opportunity to demonstrate their skill at the provisional stage, the creditors would ultimately appoint them at the final stage, gradually transforming the insolvency industry.[1187] In response, the applicants argued that the policy prevented the Master from having regard to the skills, knowledge and expertise of practitioners, which would lead to the appointment of unsuitable candidates and the entrenchment of current patterns of exclusion as creditors would not want to nominate the 'unsuitable' provisional practitioners.[1188] Essentially, the

---

[1185] *SARIPA HC* (n 25) [138].

[1186] ibid [144].

[1187] *SARIPA HC* (n 25) [149].

[1188] ibid [154].

applicants rejected the suitable qualification standard set by the Minister and offered a definition that required a 'proper match between the sector specific expertise of an individual practitioner and the estate'.[1189] More importantly, they argued that the list system imposed a rigid quota.[1190]

Deciding in favour of the Applicants, Katz AJ held that the policy was arbitrary and irrational, for amongst other reasons, amounting to 'an inflexible and rigid roster system' which had the effect of arbitrarily redistributing work.[1191] Katz AJ gave two reasons for this finding. First, he held that quotas were contrary to the goal of achieving equality. According to Katz AJ, there was a tension between achieving the goals of equality and the use of quotas as they did not allow for competition in the insolvency industry. He thus noted:

> As a matter of logic, all practitioners operating in the insolvency environment should ultimately be able *to obtain work on an equitable basis* (which must, in the long term be related to the requirements of the work and the nomination practices of creditors). For a measure to effectively *assist all practitioners in equitably competing* for appointment requires something more than inflexible allocations.[1192]

Second, similar to the approach under the EEA, Katz AJ held that the rigid implementation of the policy's ratios did not leave scope for considering the skills, knowledge, expertise and experience' of individual candidates.[1193] Accordingly, it violated the dignity of both the beneficiaries of the measure and the excluded groups, specifically the white males in Category D.[1194] For Katz AJ, the commitment to non-racialism and non-sexism required individual skill and expertise to be approached from a neutral perspective. The context within which individual skills and expertise was amassed was not relevant to whether and the extent to

---

[1189] ibid [155].

[1190] ibid [137].

[1191] ibid [180].

[1192] ibid [199] (my emphasis).

[1193] *SARIPA HC* (n 25) [215].

[1194] ibid.

which, beyond suitable qualification, it should matter. Thus, in relation to the white males, Katz AJ argued that the ratios implicated their right to work and inherent dignity.[1195] Essentially, what separates a permissible numerical target from an impermissible quota under s 9(2) of the Constitution, as under the EEA, was flexibility, individualised flexibility.

The policy in *SARIPA,* according to Katz AJ, used race and gender categories which created silos 'which overly privilege[s] race and sex at the expense of all other relevant characteristics'.[1196] In addition to the dignity harm to the non-beneficiary class, Katz AJ also found that the use of quotas could cause harm to the interests of the intended beneficiaries of affirmative action. He reasoned that quotas create 'the impression that appointments are due only to race and exclusive of merit'.[1197]

2.2. The Supreme Court of Appeal Judgment

Before the Supreme Court of Appeal, Mathopo J's majority opinion affirmed Katz AJ's findings on the impermissibility of quotas under s 9(2) of the Constitution. According to Mathopo J, advancing employment equity and transformation required flexibility and inclusiveness.[1198] 'Rigidity in the application of the policy which has the effect of establishing a barrier to the future advancement of such previously advantaged insolvency practitioners is frowned upon and runs contrary to s 9(2) of the Constitution'.[1199] This was because quotas are a form of arbitrariness or naked preference that was prohibited under the second leg of

[1195] ibid.

[1196] ibid [216].

[1197] ibid [205].

[1198] *SARIPA SCA* (n 25) [29].

[1199] ibid.

the *Van Heerden* test.[1200] Further, he held that quotas unjustifiably encroached 'upon the human dignity of those affected by them'.[1201]

Dismissing the argument that the policy allowed for deviations and was thus flexible enough to escape the classification as an impermissible quota, Mathopo J began by acknowledging that the policy in this case, 'was almost identical' to the policy in the *Correctional Services* case.[1202] However, he distinguished the policy in *Correctional Services* from the policy in the present case by holding that the discretion to deviate from the plan in *Correctional Services* was 'general' and allowed for some discretion, in this case, it was not.[1203] It is not clear why the assessment of whether an estate is so complex that the next insolvency practitioner in line is not suitable, is not 'general' discretion. The deviation in *SARIPA* and that in *Correctional Services* were almost identical. Thus, it is pretty clear that the real issue lay with the kind of deviation possible in this case — one not related to individual skills, merit and expertise. Accordingly, while Mathopo J purported to endorse Zondo J's approach in *Correctional Services,* he, in fact, aligned with the individualised approach, the policy was rigid because it failed to take the individual circumstances of insolvency practitioners into account.

2.3. The Constitutional Court Judgments

The majority decision in the Court did not engage with whether quotas were impermissible under s 9(2) of the Constitution.[1204] Instead, applying the *Van Heerden* test, Jafta J found the policy unconstitutional for failing the second leg of *Van Heerden*. In contrast, Madlanga J's dissent cast some doubt on this absolute prohibition.

[1200] ibid [32].

[1201] ibid.

[1202] ibid [35].

[1203] ibid.

[1204] *SARIPA CC* (n 13) [10]-[14] (Jafta J summarises the lower court findings).

Jafta J held that the policy failed the second leg of the test because 'from the information on record' the policy was not likely to transform the insolvency industry.[1205] This was because it was not clear whether there was a single list or how it would be applied by the Masters in each court or if they would have their own list. Because of this 'paucity of information' in relation to the implementation of the policy, it could not be said that the policy was likely to achieve the stated goal.[1206] Further, Jafta J held that the most' serious defect' was in relation to Category D which lumped Black males and females who became citizens on or after 27 April 1994 with all white males and white females born on or after 27 April. Because white males would be the majority of this group, the allocation of one appointment would disadvantage the 'young' in favour of white males and the status quo would be retained as most appointments would go to them.[1207] Thus, he held that the policy perpetuated the disadvantage it purported to eradicate, discriminating against races on the basis of when they obtained their nationality, specifically those who fell under the groups that s 9(2) sought to advantage.[1208] Overall, Jafta J concluded that, under s 9(2), the facts on record did not show that the policy was likely to achieve equality.[1209]

In his dissenting opinion, Madlanga J characterised the policy as one step 'in the tortuous, long road towards the attainment of substantive equality'.[1210] While agreeing with the majority that the Category D classification was constitutionally invalid, he chose to sever

[1205] ibid [40].

[1206] *SARIPA CC* (n 13) [40].

[1207] ibid [41].

[1208] *SARIPA CC* (n 13) [42].

[1209] ibid [48].

[1210] ibid [64].

this clause and preserve the impugned policy.[1211] Of importance to this Chapter is his scepticism towards the need for flexibility; his analysis of the nature of the impact that the measure had on white males; and the question whether quotas fell outside the scope of s 9(2) of the Constitution.

Responding to the argument that the policy displaced the discretion of the Master, he reasoned that the preservation of discretion and the need for flexibility worked to preserve the status quo, removing such discretion through policies such as the one in the case eliminated the possibility of unfair and unjustified preference.[1212] Essentially, the absence of discretion could further the purpose of redressing group-based disadvantage. Moreover, he pointed out that the 'flexibility' standard required something more than the requirement of suitable qualification. If this approach was accepted, he reasoned that the fact that white people, in particular, white males, were more likely, as a 'function of previous naked racist preferences and exclusion of other groups from acquiring skills and opportunities' to meet the threshold beyond suitable qualification meant that the flexibility standard was designed to preserve their interests.[1213] Accordingly, he argued that if redressing the unequal redistribution of work was taken seriously; there was no need to leave room for the appointment of the more than just 'suitably qualified' candidate.[1214]

Under the heading 'Quotas, impermissible rigidity and arbitrariness', Madlanga J expressed reservation about the Supreme Court of Appeal's finding that rigid quotas were constitutionally impermissible. While he found it unnecessary to engage in a debate on

---

[1211] ibid [70].

[1212] ibid [77].

[1213] *SARIPA CC* (n 13) [78].

[1214] ibid.

whether 'under section 9(2) — quotas are similarly outlawed',[1215] he held that 'before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a "situation-sensitive" manner. It can never be a one-size-fits-all'.[1216]

In response to the argument that the policy would lead to the closure of the practices of white insolvency practitioners,[1217] he referred to the impact that maintaining the status quo had on disadvantaged practitioners. They 'cannot even begin truly to make a living in this area of practice' and those excluded from entry because of the dominance of white practitioners.[1218] Further, he held that the policy did not unduly invade the human dignity of those affected by them because they continued to benefit at the final stage of appointment. In this regard, he critiqued the failure to consider the 'indisputable reality of the domination of the final stage by white practitioners', for him the disadvantage caused by the policy was compensated in that the industry remained unaffected at the final stage of appointment.[1219] Referring to *Van Heerden,* he reiterated that just because a measure had an adverse impact on a non-beneficiary group did not mean that it was unconstitutional.[1220] Madlanga J questioned not only the extent of the adverse impact on white male insolvency practitioners but also the fact of the existence of a disadvantage in this case. Thus, he explained his use of 'perceived disadvantage' as a reference to the fact that there is no 'justification for white people, a small minority, to disproportionately dominate most professions and industries, including

[1215] ibid [79].

[1216] ibid [80].

[1217] Steenkamp (n 1180) [29.5].

[1218] *SARIPA CC* (n 13) [83].

[1219] ibid [81].

[1220] *SARIPA CC* (n 13) [83]-[84].

insolvency practice' as they did in South Africa.[1221] In this regard, he held that the goals of achieving equality would move at a snail pace if the focus was on the disadvantage caused to those affected.[1222] Referring to the majority's finding that the measure failed the second and third leg of the *Van Heerden* test because of the paucity of information on whether there would be one list or different lists applied by each Master, he held the opposite, finding that:

> Manifestly in time the measure must, and will, transform the insolvency industry. It affords section 9(2) beneficiaries significant advantage, albeit in varying degrees. Properly applied I do not see how that significant advantage cannot eventually uplift these beneficiaries to a point where the industry will be transformed. That to me is so plain as to require no explanation from the applicants.[1223]

The quote above is a gesture that the majority had applied a higher threshold than standard than required under the *Van Heerden* test. He thus notes:

> The future cannot always be predicted with precision; and that is an understatement. As *Van Heerden* tells us, "the future is hard to predict". And "[t]o require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn and defeat the objective of section 9(2)." Courts must exercise caution before knocking down measures calculated to redress the inequality of the past.[1224]

In all the judgments in this case, Madlanga J's dissenting opinion was the only judgment which did not accept the argument for the absolute impermissibility of quotas. The section below takes the baton from Madlanga J and argues that quotas, however rigid, can pass the s 9(2) threshold in the Constitution, in particular, they do not necessarily violate the dignity of the beneficiaries and non-beneficiaries of affirmative action.

[1221] ibid [81].

[1222] ibid [82].

[1223] ibid [89].

[1224] ibid [90].

3. Not All Quotas: A Situation-Sensitive Approach To Quotas

In Chapter Four, I argued that the *Van Heerden* test is a species of proportionality assessment designed to fit the context of affirmative action. The proportionality assessment under s 9(2) is relatively more deferent than 'traditional' proportionality assessment. In addition, unlike the fairness assessment under *Harksen,* the focus is on the important purpose served by these measures.[1225] The balancing under this test is concerned with questions of unequal power and relative advantage and disadvantage between affected groups. As Albertyn summarises, it 'is a contextual enquiry that looks at the issue holistically and should comprehend the structures of advantage and disadvantage that underpin the measure or decision'.[1226] In relation to the role that dignity should play in the analysis, I argued that rather than focus on dignity based harm alone, the courts should consider whether and the extent to which an affirmative action measure optimises the multiple dimensions of substantive equality explored in Chapter Three – redistribution, recognition, participation, freedom and structural change.

Earlier in this chapter, I explored the definition of and prohibition of quotas under the EEA. In this regard, I showed that the individualised approach to quotas contradicts and undermines provisions in the EEA. In particular, provisions which permit the preference of *suitably*, rather than *equally* qualified persons. Moreover, its focus on the individual and not the position of the larger group to which they belong does not align with substantive equality's concern with redressing group-based disadvantage. In the previous section, I explored the *SARIPA* case and showed that drawing on the EEA jurisprudence, the lower courts in *SARIPA* have adopted the individualised approach to defining quotas and have extended the prohibition of quotas outside the context of the EEA.

[1225] Albertyn, 'Adjudicating AA' (n 16) 731.

[1226] ibid 730.

Using the *SARIPA* case as an example, in this section of the Chapter, I argue that quotas can pass muster as permissible affirmative action measures under s 9(2) of the Constitution. As a point of departure, the arguments that follow rest on the assumption that, accepting the individualised definition of quotas extensively discussed in the preceding two sections, the impugned policy in *SARIPA* was a quota. The policy required the appointment of the next suitably qualified candidate on the list using the ratio of A:4; B:3; C:2 and D:1. Deviations were only allowed to meet the needs of specific estates. While allowing for flexibility, this flexibility was not tied to the skills, experience and expertise of individual insolvency practitioners in each case. Below, I consider each leg of the *Van Heerden* test and show how the quota in *SARIPA* could have passed constitutional muster.

3.1. Does the measure target disadvantaged groups?

As argued in Chapter Four, the first two legs of the *Van Heerden* test encompass the proper purpose and rationality requirement of a proportionality assessment. The first leg of the *Van Heerden* inquiry is concerned with the demarcation of the beneficiaries of these measures and requires 'comparison between affected classes', the beneficiary class and the excluded class.[1227]

The classification in *SARIPA* was based on race, gender and citizenship. The policy prioritised Black women who were citizens at the time of the democratic transition. They would receive four of every ten allocations by the Master.[1228] On the evidence provided by the Minister, the race and gender classifications were based on the level of under-representation of each group in the allocation of work.[1229] Overall, and for reasons explored in detail in Chapter Six, the race and gender classification easily meet this threshold. None

[1227] *Van Heerden* (n 1) [39].

[1228] *SARIPA CC* (n 13) [20].

[1229] *SARIPA HC* (n 25) [167].

of the judgments rightly disputed this fact. The problem was with the use of citizenship as a classification. The question being whether the classification was under-inclusive for excluding 'young' insolvency practitioners from the first three classes of beneficiaries, leaving them to 'compete' with all white males in Category D. The different courts dealt with this question in the second leg of the inquiry.[1230]

3.2. Does the measure protect and advance disadvantaged groups?

The second leg of the *Van Heerden* test requires that measure should be designed to advance and protect disadvantaged groups. Under this leg, there must be a rational connection between the affirmative action measure and its purpose. This is a low threshold; affirmative action measures must not be 'arbitrary, capricious or display naked preference'.[1231] As argued in Chapter Four, the low threshold gives room for experimentation in the design and implementation of affirmative action measures because, as the Court acknowledged, affirmative action measures are directed at a future outcome, a future that is hard to predict.[1232]

Applying this to *SARIPA*, the approach taken in the lower courts, and Jafta J's majority before the Court, was not in line with this threshold. In particular, there are two problems in the application of this leg in *SARIPA*. First, the courts asked for a tighter fit between the policy and its purpose – a standard akin to necessity. Second, as further proof of irrationality and arbitrariness, Katz AJ made the flawed assumption about the stigmatic harm of the measure to its intended beneficiaries. I turn to these below.

[1230] *SARIPA CC* (n 13) [40]-[42]; *SARIPA SCA* (n 25) [36]-[37].

[1231] *Van Heerden* (n 1) [41].

[1232] ibid.

3.2.1. More than rationality

In the High Court, Katz AJ required a much higher standard than rationality at this leg and placed a very high evidentiary burden on the Minister to show that the policy would in fact have the impact of advancing the beneficiaries of the impugned policy. While he began the assessment by noting that what needed to be shown was whether the policy adopted a rational formulation which was capable of meeting the impugned policy's objectives and promoting the achievement of equality,[1233] his analysis required much more.

First, Katz AJ found that there was insufficient evidence to show that there was a rational link between the policy and its purpose by suggesting that the only kind of policy which would be able to achieve this purpose was a policy which matched individual skill and expertise with the needs of an estate. Thus he held:

> Insofar as the Policy aims to make the insolvency industry accessible to previously disadvantaged individuals, it needs to do more than increase numbers, but ensure that there can be a match between individual skill and the requirements of the role within the system provided for by legislation.[1234]

There are two problems with this analysis. First, the quote above is not an inquiry into whether there is a rational link between the policy and its purpose — it is a comparison between the impugned policy and what Katz AJ contemplates would have been a better policy. As argued in Chapter Four, while it is a species of proportionality, the *Van Heerden* test does not require proof of necessity. Second, Katz AJ's requirement of a link between the individual skill of a practitioner and an estate misses the point of the policy. Most of the practitioners with skill and expertise would belong to the historically privileged group in this field, white males. Thus, his suggested policy is one which would likely entrench rather than redress the unequal distribution of work, completely undermining what the impugned policy sought to achieve.

[1233] *SARIPA HC* (n 25) [139].

[1234] ibid [156].

The second factor that he relied on to justify a lack of evidence that the policy was rational was that it did not have a time-limit.[1235] There is no requirement that measures under s 9(2) should have an express time-limit. As Madlanga J found in his dissenting opinion before the Court, when the goals of the impugned policy have been achieved, there will be no need to retain the policy and 'any person adversely affected by the continued application of the policy may well be entitled to bring an equality challenge to invalidate the policy. None of this affects the validity of the policy today'.[1236]

The third fact relied on by Katz AJ, that the impugned policy would not change creditor behaviour provides an even clearer example that his inquiry fell far beyond the scope of the second leg of the *Van Heerden* test. The Minister had argued that the policy would, by intervening at the provisional stage and allowing historically disadvantaged insolvency practitioners to develop their skills, expertise and build a reputation in the industry, lead to an increase in confidence in their competence and increase the likelihood of their appointment by the creditors.[1237] Katz AJ found that the Minister had not 'adduced any evidence to demonstrate the basis for their assumption that mechanical appointments can, *in fact*, change nomination behaviour by creditors'.[1238] This finding is not what is required under this leg. In *Van Heerden,* Moseneke J made it clear that because the future was 'hard to predict', a measure would not pass constitutional muster if it was clear that the measure was *'not* reasonably likely to achieve the end of advancing or benefiting the interests of those who

---

[1235] *SARIPA HC* (n 25) [160]-[161].

[1236] *SARIPA CC* (n 13) [89]; *UNISA v Reynhardt* [2010] 12 BLLR 1272 (LAC) (The court held that once numerical targets have been achieved, an employer cannot rely on an affirmative action measure for future appointments); Muriel Mushariwa, 'UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?' [2012] PELJ 66 (Mushariwa argues that once numerical targets have been attained, the employer has to ensure that they are maintained).

[1237] *SARIPA HC* (n 25)[149].

[1238] *SARIPA HC* (n 25) [162].

have been disadvantaged by unfair discrimination'.[1239] Whatever little faith Katz AJ had in the behaviour of creditors in South Africa, and their lack of confidence in Black and female practitioners, there was no basis for Katz AJ's finding that there was no reasonable likelihood that the Minister's intended benefit would accrue.

In all three judgments, there was a dispute about whether the list could work practically and whether the Minister had relied on the correct statistics to show the need for such a policy.[1240] Thus, for Mathopo J, the real problem with the policy was 'the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners'.[1241] Absent these, he held that one could not 'say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups'.[1242] For Jafta J, one of the reasons that the policy failed this leg of the inquiry was that it was not clear whether the policy would require a single list or whether each Master would have his own list.[1243] In the context of the Minister's testimony that work was underway to 'clean-up' the lists,[1244] it is not clear what more information could have been offered to establish a rational connection between appointing more persons belonging to disadvantaged groups and the goals of transforming the insolvency industry. As Madlanga J reasoned in his dissent, a policy such as the one impugned in this case would, in time, transform the insolvency industry as

---

[1239] *Van Heerden* (n 1)[41].

[1240] *SARIPA HC* (n 25) [166]-[182]; *SARIPA SCA* (n 25) [46]–[50].

[1241] *SARIPA SCA* (n 25) [47].

[1242] ibid.

[1243] *SARIPA CC* (n 13) [40].

[1244] *SARIPA HC* (n 25) [180].

it affords s 9(2) beneficiaries an advantage, a fact 'so plain as to require no explanation'.[1245] Again, what the lower courts and Jafta J were asking for was beyond what is required in the second leg of the *Van Heerden* test.

A common finding in the Constitutional Court and Supreme Court of Appeal's majority judgments is that the policy was irrational because of the citizenship classification. Thus, Mathopo J found that 'The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice an insolvency practitioner, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy'.[1246] For Jafta J, 'A section 9(2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance'.[1247] I agree with the judge's assessment that absent reasons for the use of citizenship, the classification cannot be said to be a rational one. Of course, the Minister could have provided evidence that older practitioners were more disadvantaged than the young practitioners or that parity had been reached in the allocation of work between white males and *all* other young insolvency practitioners. Absent such reasons, the classification cannot be said to be rational. Even while agreeing with the Court's assessment, the approach taken by Madlanga J, severing Category D from the rest of the policy accords with the commitment to preserving measures which genuinely seek to advance and protect disadvantaged groups. It aligns with the commitment to use the court's remedial powers in a manner that advanced substantive equality and the commitment to transformation.

Lastly, the courts should have grappled with whether Category D reserved a 'quota' for white males – falling into the argument that this was an over-inclusive classification and

---

[1245] *SARIPA CC* (n 13) [89].

[1246] *SARIPA SCA* (n 25) [36].

[1247] *SARIPA CC* (n 13) [42].

a form of social engineering. As I argued earlier in this chapter, the best approach to Category D would have been to ring-fence the allocation for open competition. It cannot be that white males have a quota working in their favour, they are not a disadvantaged class. However, we cannot exclude them. Thus, it should be possible, in 'open competition' for them to benefit from a Category D allocation. Under this approach, expertise, merit and individual skills would be relevant in 'equal competition' with others. In light of the history of the insolvency industry, this would have worked in favour of white males in most cases.

3.2.2. Illusive Stigmatic Harm

Another flawed finding under this leg is Katz AJ's argument that the impugned policy would cause harm to the intended beneficiaries as it did not allow the 'excellent' within the beneficiary group to thrive.[1248] Drawing from Cameron et al. JJ's finding in *Barnard* that 'over-rigidity' risks disadvantaging the intended beneficiaries of affirmative action by creating 'the impression that appointments are due only to race and exclusive of merit',[1249] Katz AJ suggested that rigidity, in the sense of not taking individual merit, expertise and experience into account, violated the right to dignity of the intended beneficiaries of affirmative action. This is a common argument made against affirmative action, often, including in this case, without offering sufficient evidence of this harm or proof that the harm outweighs the benefit of these measures.[1250]

[1248] *SARIPA HC* (n 25) [157]-[158], [205].

[1249] ibid 205, referring to Cameron et al. JJ in *Barnard CC* (n 13) [80].

[1250] For an analysis of the stigma argument in the US context see, Angela Onwuachi-Willig, Emily Hough and Mary Campbell, 'Cracking the Egg: Which Came First: Stigma or Affirmative Action?' [2008] California Law Review 1299; Ashley Hibbett, 'The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education' [2005] Harvard BlackLetter Law Journal 75; RA Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' [2004] New York Law Review 803; Andrew Halaby and Stephen McAllister, 'An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases' [1997] Michigan Journal of Race and Law 235; Kennedy (n 10) 116–126.

Stigmatic harm is said to manifest in two ways. First, it gives rise to stigma and prejudice towards the beneficiaries of affirmative action because of the perception that they are unqualified quota candidates. This is what Onwuachi-Willig, Hough and Campbell call 'external stigma' — the burden of others' (the privileged or dominant group) resentment or doubt about the qualifications of the beneficiaries of affirmative action.[1251] In *Barnard*, Cameron et al. JJ warned against allowing race to be the decisive factor in employment decisions as it could, 'suggest the invidious and usually false inference that the person who gets the job has not done so because of merit but only because of race'.[1252] Second, it 'burdens' the exceptional candidates within the beneficiary group. Thus, these measures cause an 'internal stigma' for those branded as affirmative action candidates.[1253] Katz AJ was referring to this internal stigma, reasoning that the policy was arbitrary for its failure to 'reward excellence'.[1254]

The stigma (both internal and external) argument has been particularly successful before the US Supreme Court.[1255] Capturing this stigma argument, in *Bakke,* Powell J argued that:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.[1256]

[1251] *SARIPA HC* (n 25) [158].

[1252] *Barnard CC* (n 13) [80].

[1253] Onwuachi-Willig, Hough and Campbell (n 1250) 1301.

[1254] *SARIPA HC* (n 25) [158].

[1255] Kennedy (n 10) 115–127; Onwuachi-Willig, Hough and Campbell (n 1246); Halaby and McAllister (n 1250); Hibbett (n 1250).

[1256] *Bakke* (n 438) 298.

There are two reasons why the stigma argument is not entirely persuasive, especially not for disqualifying a measure under the second leg of the *Van Heerden* test. First, the suggestion that persons belonging to groups that are beneficiaries of affirmative action are likely to be perceived as unqualified, incompetent, lacking in experience does not necessarily arise from being a beneficiary of affirmative action. It will often be rooted in past and persisting entrenched stereotypes and prejudices against specific groups.

In a study of internal and external stigma in higher education admissions in the United States, Onwuachi-Willig, Hough and Campbell concluded that it could not be shown that the observed stigma on beneficiaries was as a result of being a beneficiary of affirmative action. Focussing specifically on race, the authors argued that stigma is rooted in institutional racism. It is not a by-product of affirmative action.[1257] This conclusion was based on their finding that there was no difference in the experience of stigma between institutions that had affirmative action policies in place and those that did not.[1258]

Second, the stigma argument is unpersuasive because there is insufficient empirical evidence to show that the harms of internal stigma (accepting that there are) outweigh the benefits of affirmative action. In a famous empirical study on affirmative action in higher education in the United States, Bok and Bowen argued that, if the charge that the stigmatic impact of affirmative action outweighed the benefits, 'those who suffered from stigma would presumably be the ones most likely to feel its effects'.[1259] However, the empirical evidence did not support this. Thus they concluded: 'In the eyes of those best positioned to know, any punitive costs of race-based policies have been overwhelmed by the benefits gained

---

[1257] Onwuachi-Willig, Hough and Campbell (n 1250) 1321.

[1258] ibid 1332.

[1259] William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race and in College and University Admissions* (Princeton University Press 1998) 265; Kennedy (n 10) 125–127 (Who argue that the stigma argument is often an exaggeration).

through enhanced access'.[1260] Katz AJ problematically assumed this harm on behalf of all the intended beneficiaries.

The stigma argument is troubling for another reason. It is often based on the erroneous assumption that affirmative action measures necessarily allow for the appointment or promotion of unqualified or unskilled candidates — persons whose appointment attracts the stigma and prejudice related to their lack of capability, skill and expertise. This is because, so the argument goes, once appointed or promoted, the affirmative action beneficiaries will fail to perform their jobs, entrenching or creating a basis for prejudice and stereotyping against their group. This need not be the case. Under the EEA, the beneficiaries are suitably qualified; they just need not be *as* qualified as persons belonging to the non-beneficiary groups. Thus, in *Barnard*, Moseneke J rightly noted that affirmative action measures are not a refuge for the mediocre or incompetent.[1261] Seen in the context of the requirement of suitable qualification in *SARIPA*, and the fact that the impugned policy allowed for deviation in cases where an estate was a complex one and the next-in-line practitioner does not have the requisite skill, the stigma argument was not persuasive in this case.

3.3. Does the measure promote the overall achievement of equality?

The last leg of the *Van Heerden* test requires that the measure, in the long run, promote the achievement of equality.[1262] This leg of the test is an examination of 'the effects of the measure in the context of our broader society'.[1263] As argued in Chapter Four, in this leg, the court should be concerned with the impact that the measure will have on all those affected and in relation to the multiple dimensions of substantive equality.

[1260] Bowen and Bok (n 1259) 265.

[1261] *Barnard CC* (n 13) [41].

[1262] *Van Heerden* (n 1) [44].

[1263] ibid.

In *SARIPA,* because the measure failed the second leg of the test, very little analysis of this third prong occurred. However, the core argument against quotas is that they violate the right to dignity of non-beneficiaries. Following on the argument made by Kohn and Cachalia, the question whether quotas violate the dignity of non-beneficiaries properly falls under the third leg of the *Van Heerden* test.[1264] Kohn and Cachalia argue that the impugned policy violated the right to dignity of persons in Category D, white males and youth, because their right to work would come around so *rarely,* 'such that the Policy would essentially serve as an absolute barrier to the furtherance of their right to tackle their practice freely'.[1265] I have already dealt with severing the inclusion of youth from Category D.

The strongest argument that quotas violate the right to dignity of persons is that, in failing to take the individual merit, skills and expertise of individuals, looking at them through the lens of their race and gender, quotas negate the inherent human worth of persons and treat them as a means to an end. Closely related is the argument that rigidity violates the right of persons to practise their trade freely.[1266] In this regard, s 22 of the Constitution provides that 'Every citizen has the right to choose their trade, occupation or profession freely.' The s 22 right is closely related to the right to dignity in that, as the Court held in *Affordable Medicines*:

> Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole.[1267]

[1264] Kohn and Cachalia (n 20) 168–177.

[1265] ibid 177.

[1266] ibid 172.

[1267] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) [59].

The quote above captures what Woolman calls the 'self-actualisation' dimension of dignity.[1268] This refers to an individual's capacity to create meaning for herself, including through the development of her talent. According to Woolman, this generates 'an entitlement to respect for the unique set of ends that the individual pursues'.[1269] The question that arises is whether these rights, dignity and the right to practise one's trade freely entail a right to be treated based on one's individual merit.

Section 22 protects the right to choose a profession and the right to practise a profession.[1270] As with the right to dignity, s 22 has to be interpreted within the context of prevailing unequal distribution of work, in this case, against the background of the hegemony of white males in the insolvency industry. As Ngcobo J held in *Affordable Medicines*, s 22:

> [H]as to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus, in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection.[1271]

Taking the context outlined in the quote above, it would be ironic to argue that this right prohibits measures simply because they fail to take the individual merit, skills and expertise of persons when furthering the goal of redressing past exclusionary practices. The only way to conclude that quotas violate the right to dignity and the right to practise one's trade is if these rights were interpreted as entitling non-beneficiaries of affirmative action 'to competitions in which people are judged on the basis of individual merit, by which they

---

[1268] Woolman (n 303) chs 36–11.

[1269] Woolman (n 303) chs 36 11.

[1270] *Affordable Medicines* (n 1267) [66].

[1271] ibid [58].

mean skills and accomplishments attributable to themselves'.[1272] Such a reading of ss 10 and 22 of the Constitution would render affirmative action measures under s 9(2) superfluous.

Even if the right to dignity and freedom of trade did protect a right to individual and merit-based selection, the impairment of this in this case are, when measured against the important purpose served by the policy, is minimal. This is because the impugned policy, as Madlanga J stressed in his dissent, only applied in the provisional stage.[1273] Moreover, there was a possibility of deviating from the list system. This is markedly different from a measure which excludes a group from being able to choose a profession or practise their profession, especially on the grounds of race, gender or disability status. Such measures would 'obliterate' their opportunities and permanently disqualify them from entering or advancing in a particular career.[1274] This is the 'substantial and undue harm on those excluded from its benefits' that would threaten our 'long-term constitutional goal'.[1275] Thus, the prohibition of absolute barriers to the appointment or promotion of persons from historically privileged groups under the EEA and s 9(2) would accord with the respect for ss 22 and 10 of the Constitution. But quotas, however rigid, need not have this impact – the quota in *SARIPA* certainly didn't.

Every quota must be examined on its own merits and in its own context; this is what a 'situation-sensitive' approach demands. There will be cases where rigidity creates an absolute barrier for the advancement of non-beneficiaries or another adversely affected group. There will also be cases where it is clear that a quota will not advance or protect a disadvantaged group. However, rigidity alone is not sufficient to reach any of these findings.

[1272] Kennedy (n 10) 109.

[1273] *SARIPA CC* (n 13) [81].

[1274] Ackermann, *Lodestar* (n 30) 361; *Barnard CC* (n 13) [180].

[1275] *Van Heerden* (n 1) [44].

In this case, the impugned policy would have the impact of redistributing work to disadvantaged groups, increasing their participation in the insolvency industry and, in providing opportunities to improve their skills, it would have the impact of enhancing freedom.

On the other hand, while it would limit the number of appointments for white males, and as Solidarity argued, white women who had made advancements in the profession, they would still be involved in the trade and could possibly continue to advance in the profession if creditors continued to appoint them at the final stage. The policy sought to give insolvency practitioners belonging to the disadvantaged groups, and in relation to their underrepresentation in the profession, an opportunity to acquires skills and expertise that may well have the impact of redressing the stigma and prejudice that arguably underlined the creditors' preference for appointing white males. It cannot be said that the quota in this case was a disproportionate means of achieving the purpose of the impugned policy.

An example of a case where the use of a quota was arguably impermissible is in *Naidoo*.[1276] In *Naidoo*, an Indian woman applied for a position as cluster commander in the South African Police Services (SAPS). She was shortlisted for the position and had the second-highest score in the interviews.[1277] The interview panel recommended her appointment as it would address gender equity at that occupational level.[1278] However, the national panel rejected her appointment in favour of a Black male on the basis that 'Africans

[1276] *Naidoo v Minister of Safety and Security and Another* [2013] 5 BLLR 490 (LC).

[1277] ibid [2]-[4].

[1278] ibid [5].

were underrepresented and Indian females had an ideal representation'.[1279] This 'ideal representation' for Indian women was zero.[1280]

Ms Naidoo argued that she had been unfairly discriminated against on account of both her race and gender.[1281] In particular, she argued that the numerical target constituted an absolute barrier for the appointment of Indian women.[1282] On the evidence before the court, the practice was to prioritise race over gender, regardless of the context.[1283] In this case, there was a failure to take into account the fact that women are generally underrepresented in the SAPS and the public sector in general, especially at the high position for which Ms Naidoo applied. Further, without providing reasons, the plan had a gender allocation of 70 per cent male to 30 per cent female.[1284] This ratio was used despite a cabinet decision to achieve 50/50 gender representation in the senior management of the public service[1285] and the fact that at the time, national census statistics showed that women were 51 per cent of the national population.[1286] Taking all these factors into account, the court rightly concluded that the numerical target had 'a manifest exclusionary effect'.[1287]

The numerical targets in *Naidoo* and their rigid implementation in that case is an example of an impermissible quota. The quota in *Naidoo* completely foreclosed the

---

[1279] ibid [35].

[1280] ibid [42]-[43].

[1281] ibid [8].

[1282] ibid.

[1283] *Naidoo* (n 1276) [38].

[1284] ibid [50].

[1285] ibid [18]–[20].

[1286] ibid [17].

[1287] ibid [141]-[145].

appointment of Indian women. The absolute barrier created in this case, creating a complete bar for the advancement of a person belonging to multiple disadvantaged groups and based on numerical targets that express a lack of commitment to the inclusion of women in the SAPS, a group historically excluded from this service, undoubtedly had the impact of entrenching and perpetuating patterns of disadvantage. It cannot be said to be a proportionate means of achieving the goals of substantive equality. However, as is hopefully clear from the analysis above, the *Naidoo* facts are manifestly different from the facts in *SARIPA*.

4. Conclusion: The Real Impact of an Absolute Prohibition of Quotas

It bears emphasis that though affirmative action measures, including the use of quotas, may narrow the opportunities for non-beneficiaries, this is not the result of 'an effort to humiliate, ostracise or stigmatise' them.[1288] Moreover, rigidly applying quotas need not create an absolute barrier to the advancement of non-beneficiaries. The real impact of the extension of the quota-ban in *SARIPA* is a push towards bringing back individual merit. This will undermine the goal of realising the right to equality and dignity of historically disadvantaged groups through affirmative action.

The prevailing definition of quotas — based on whether there is sufficient flexibility to take individual skill, expertise and circumstances of claimants into account — neither fits the framework under the EEA nor s 9(2) of the Constitution. The EEA and the impugned policy in *SARIPA* were cognisant of the context of past and persisting racial, gender and other forms of domination and oppression which have allowed white males to assume skills, experience and expertise over other groups. As Madlanga J acknowledged in his dissent in *SARIPA*, white males are likely to have more expertise in the insolvency industry. This

[1288] Kennedy (n 10) 110.

relative experience and expertise are 'a function of previous naked racist preferences and the exclusion of other groups from acquiring skills and opportunities'.[1289] We can make the same argument across several sectors and institutions. From this perspective, the definition of quotas' focus on taking individual merit, skills and expertise into account undermines redressing group-based disadvantage.

Not only is it possible to find quotas to meet the challenge in s 9(2) of the Constitution, in cases where other, more flexible measures have failed, especially in cases where the failure is due to intractable, deeply-entrenched practices of nepotism or prejudice towards historically disadvantaged groups, they may be necessary. In his dissenting opinion in *SARIPA*, Madlanga J notes that we may need a 'simple, practical formula' to eliminate the possibility of undue preferences.[1290] In eliminating discretion, quotas are a simple and practical tool to prevent against the deep and hidden barriers to the entry of disadvantaged groups into a profession or institution. For example, the alleged corruption, fronting practices and preference for white male insolvency practitioners which the policy in *SARIPA* sought to address.[1291] By removing the discretion to take individual characteristics, skills and expertise into account, quotas are a better tool to further the goal of redressing group-based disadvantage and fulfil the right to equality and dignity of disadvantaged groups. This is because 'flexible' numerical targets under these conditions, could be used to thwart the purpose of affirmative action measures by giving decision-makers a defence for why there is an over-representation of privileged groups in an industry.

In addition, some institutions or professions could be resistant to realising their obligations under the Constitution or in other legislation or the practices and culture that

---

[1289] *SARIPA CC* (n 13) [78].

[1290] *SARIPA CC* (n 13) [78].

[1291] *SARIPA HC* (n 25) [49], [79], [164].

excludes historically disadvantaged groups may be so deeply entrenched that only a hammer, in the form of rigid quotas, can redress existing inequalities. In *SARIPA,* the impugned policy was not the first intervention by the Ministry. The previous policy attempted to redress existing patterns by pairing insolvency practitioners who belong to historically disadvantaged groups with those ordinarily appointed under the requisition system, presumably, the majority of whom would be white males. The Ministry argued that this intervention did not redress the inequitable redistribution of work in the industry. Accepting the policy in *SARIPA* as a rigid quota for failing to take into account the skills, expertise and experience of insolvency practitioners except in those cases where it was necessary to meet the needs of an estate, in light of the failure of past intervention, it could be argued that the use of a quota was necessary in this case.

Therefore, the current misconception that the Constitution requires an absolute ban on quotas is not only a flawed interpretation of constitutional text and principle but may act as its own barrier to achieving those very same constitutional goals affirmative action measures are intended to achieve. This is due to misunderstanding the relationship between dignity and substantive equality in this area of law. Ironically, it is the lack of a contextual and situation-sensitive approach to quotas that may become an absolute barrier itself to substantive equality and so perpetuate the iniquities of past and present inequality. This chapter has shown that, under a proper application of the *Van Heerden* test, some quotas can pass constitutional muster.

CHAPTER EIGHT: FOR HOW LONG: SETTING THE SUN FOR AFFIRMATIVE ACTION

> 'To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race'.[1292]

Introduction

The affirmative action regime in South Africa does not have an express sunset clause, a date when we will no longer need affirmative action as an intervention. However, if we believe that the egalitarian vision in the Constitution is possible, we must foresee a time when ones' race, gender, disability or other status will not be determinative of their socio-economic status - we must, it is the only reason why this work is worthwhile. Thus, in this chapter, I conclude the thesis by asking whether there *should* be a 'sunset' to affirmative action in South Africa. I explore some of the difficulties that arise in determining the extent to which we have achieved affirmative action's goals. I argue that finding the endpoint for affirmative action will be a difficult task. I suggest that the best approach, one aligned with the commitment to substantive equality and transformation, is a contextual analysis of whether and to what extent the different forms of disadvantage have been redressed.

Further, I argue that as the nature of disadvantage and the needs of our society changes, the purposes of and beneficiaries of affirmative action should be responsive to this – requiring openness and flexibility that cannot be achieved by hard fast rules. Thus, in reality, the need for s 9(2) and the Equality Statutes will likely be with us for a long time. However, the meaning of these provisions and what they require of the state, the courts and the people will change. Substantive equality's concern with context and real inequality is perfectly suited for these changes. Lastly, going with the theme of conclusions, I then

---

[1292] *Barnard CC* (n 13) [81] (Cameron et al. JJ).

summarise the arguments made in the whole of the thesis – all in pursuit of a transformative approach to affirmative action.

1. For How Long: Sunsets and New Horizons

1.1. Under international law and comparative jurisdictions

While s 9 of the Constitution and the Equality Statutes are silent on whether and how affirmative action will cease, international law provides a logical, if not vague guideline. Article 1.4 of the CERD and Article 4.1 of CEDAW provide that affirmative action measures based on race and gender should cease once the objectives for which the measures were taken have been achieved. These are very logical provisions. However, because of the breadth of substantive equality as an objective under both treaties, it remains unclear what criteria should be used to assess that its goals have been achieved.

From the comparative perspective, the inclusion of a sunset clause has been important in India and the US. For example, Articles 330 – 342 of the Indian Constitution provide special reservations in central and state government. This was for an initial period of 10 years but has been extended since. In relation to the OBC classification, the Indian Supreme Court has been clear that once a class is no longer backward, it should be excluded as a beneficiary. In *Minor A*, the court held that only the classes that are really socially and educationally backwards should be allowed to benefit from reservations. 'Reservation of seats should not be allowed to become a vested interest'.[1293] In *Ashoka Kumar*, the Indian Supreme Court affirmed the Constitutionality of an amendment which extended reservations for OBC. One of the challenges brought against the amendment was that it was

[1293] *Minor A Peeriakaruppan and Sobha v State of Tamil Nadu* 1971 1 SCC 38 49.

unconstitutional for not including a sunset clause. Dismissing this argument, the court held that it was sufficient to review reservations after ten years.[1294]

In the US, the inclusion of a sunset clause and periodic review is considered indispensable to showing that a measure is 'narrowly-tailored' to achieve its purpose. In *Grutter,* O'Connor J argued that affirmative action measures must have a 'logical end', and 'race-conscious admissions policies must be limited in time'.[1295] Optimistically, in *Grutter,* O'Connor J opined that in light of the increase in 'minority' applicants with high grades and high test scores since that court's decision in *Bakke* – an indication of some socio-economic progress on the part of racial minority groups in the US – the court expected that within 25 years, 2028, the use of racial preferences would no longer be necessary to further the interest' of educational diversity.[1296] However, in the recent *Fair Admissions* case, a US District Court held that while it was always intended that affirmative action measures would be for a limited duration, the effects of entrenched racism and unequal opportunity remained. Thus, the 25-year goal set in *Grutter* was optimistic and may need to change.[1297]

From the above, there is a clear consensus that affirmative action measures should not be a permanent feature of society. To believe in substantive equality, in a world transformed by the commitments made today, is to believe that these measures will cease to be necessary. However, under international law and in the comparative jurisdictions, there is not much clarity on the criteria used for this purpose. The South African courts have equally not provided much clarity. There is, however, an emerging approach under the EEA.

[1294] *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1 522.

[1295] *Grutter* (n 438) 342.

[1296] ibid 343.

[1297] *Fair Admissions* (n 994) 130.

1.2. The position under the EEA

Thus far, the lower courts have accepted a narrow benchmark for achieving affirmative action goals under the EEA. In *Alexandre*, the affirmative action measure provided that once the numerical targets had been achieved, the employer could no longer take employment equity considerations into account - employment would be based solely on merit.[1298] While not challenged in the matter, the Labour Court seemed to doubt the constitutionality of such a provision, noting that it may be contrary to 'the spirit and purpose of employment equity and the notion of substantive equality'.[1299] However, it did not make a definitive finding on this question.

In *Reynhardt*, the Labour Appeal Court affirmed the validity of a clause that treated the EEA's numerical targets as a ceiling. In this case, a white male, Mr Reynhardt, applied for a position and was not appointed.[1300] A Black male was appointed instead.[1301] Mr Reynhardt argued that he was more qualified than the appointed candidate and thus, the failure to appoint him unfairly discriminated against him on the grounds of his race. The employer argued that the Black male was appointed to give effect to the affirmative action provisions in its EEP.[1302] However, the employer's EEP had a clause that provided that once the numerical targets had been reached, the employer could not give preferential treatment to the beneficiaries in the plan.[1303] Further, once achieved, there was no obligation to maintain numerical targets.

[1298] *Alexandre v Provincial Administration of the Western Cape Department of Health* (n 370) [33].

[1299] ibid.

[1300] *Reynhardt v University of South Africa* [2007] ZALC 96 [1]-[6].

[1301] ibid [6].

[1302] ibid [7].

[1303] ibid [75]-[6].

The core of Mr Reynhardt's argument was that the employer had already reached the numerical targets in its EEP. Thus, there was no basis to rely on it for the appointment.[1304] The Labour Court accepted this argument. The court reasoned that the failure to appoint Mr Reynhardt in circumstances where the numerical targets for Black persons had been reached was a form of unfair discrimination based on race.[1305] This finding was confirmed in the Labour Appeal Court.[1306] However, the Labour Appeal Court made it clear that their finding was based on the failure to comply with the EEP's provisions in this case. The case was not a challenge of the EEP's constitutionality as a whole or the sunset clause.[1307] Thus, it distanced itself from the finding that numerical targets create a ceiling for the beneficiaries of affirmative action under the EEA.

Commenting on *Reynhardt*, Mushariwa argues that once employers reach their numerical targets, they should use merit for making appointments.[1308] According to Mushariwa, it would be contrary to the commitment to substantive equality to continue to give preference to disadvantaged groups when the employer has already reached the numerical targets.[1309] Mushariwa's argument appears to be the Court's approach in the *Barnard* and *Correctional Services* cases. In both judgements, the Constitutional Court accepted that numerical targets created both a floor and a ceiling for affirmative action beneficiaries. As I explored in Chapter Four, the judges in *Barnard* took very different approaches to the standard of review, the weight it gave to dignity, and how it treated the evidence (or lack

[1304] *Reynhardt* (n 1296) [6].

[1305] ibid [125]-[133].

[1306] *UNISA v Reynhardt* (n 1236) [33].

[1307] ibid.

[1308] Mushariwa (n 1236).

[1309] ibid; See also Louw (n 1140) 351.

thereof) in the case. However, a unifying factor in finding that Ms Barnard had not been unfairly discriminated against was the extent of the overrepresentation of white women for the position for which she applied – she could not be promoted because the numerical target for white women had hit and exceeded the ceiling. In *Correctional Service*s, Zondo J confirmed this principle and extended it to all beneficiary groups under the EEA.[1310] While beyond the scope of this thesis, the Constitutionality of this approach, in effect making it impossible for persons belonging to disadvantaged groups to compete with non-beneficiaries if the ceiling has been reached for their representation may be inconsistent with the commitment to substantive equality. I plan to grapple with this question in future work.

The basis for the argument in favour of a sunset clause once numerical targets have been reached is two-fold. First, the courts focus on the goal of achieving demographic representation. The second rationale seems to be that it would place an undue burden on non-beneficiaries if these measures were applied past meeting the numerical targets. In *Reynhardt*, for example, the Labour Appeal Court referred to the third leg of the *Van Heerden* test as proof of the validity of the argument that numerical targets created a ceiling. It will be recalled that the third leg of *Van Heerden* requires affirmative action measures to promote the achievement of equality and 'not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits'.[1311] Overall, it appears that thus far, under the EEA, the achievement of demographic representation operates as a sunset clause to a specific affirmative action measure. The problem with this approach is that while representation may tell us something about the participation dimension, it tells us very little

[1310] *Correctional Services CC* (n 677) [40]. The Constitutionality of this approach, in effect making it impossible for persons belonging to disadvantaged groups to compete with non-beneficiaries if the ceiling has been reached is open to question and I hope to grapple with this question in future work.

[1311] *UNISA v Reynhardt* (n 1236) [27].

about the other dimensions of substantive equality. Thus, the focus on numerical targets is a very narrow approach.

2. A Multi-Dimensional Sunset

Moving beyond the focus on demographic representation, the better approach to the 'how long' question depends on the context. In the cases where the numerical targets have been reached, the obligation to promote equal employment opportunity under the EEA should not cease – it should still be possible to take race, gender and disability into account in relation to the employer's other obligations under the EEA. In particular, ensuring that there are skills development and training and that necessary reasonable accommodation is provided. Moreover, once representation has been attained, it must be maintained.

In addition, there needs to be a contextual appraisal of whether the different harms that substantive equality seeks to eradicate have been addressed. It should be asked whether material disadvantage has been redressed; there is no longer stigma, stereotyping, prejudice or violence; there is sufficient representation in the sense of voice, and structural inequalities have been addressed. This will require constant monitoring and revision, it will not be easy, but the bar must be set higher than the focus on representation.

Further, as the nature of disadvantage changes, the purposes and beneficiaries of affirmative action will too change, so that there cannot be a general sunset to affirmative action. Thus, under s 9(2) and the Equality Act, finding an endpoint for an affirmative action provision should also entail looking at the specific goals of that affirmative action measure, through the lens of the multiple-dimensions of substantive equality and finding an endpoint suitable to it. However, as is the case in India and as held by Madlanga J in his dissent in *SARIPA,* that a measure does not have a pre-determined end-date should not be used to invalidate it.[1312]

[1312] *SARIPA CC* (n 13) [89].

3. Conclusion

The core of the approach I advance in this thesis is that a transformative approach to affirmative action will require the courts at every instance, to seek to optimise the multiple dimensions of substantive equality. I came to this thesis following the story of Ms Barnard, a seven-year struggle to have the courts recognise that she should have been promoted and that the failure to do so had violated her right to equality and dignity. Represented by the conservative trade union Solidarity, a Union that comes up many times in this thesis, Ms Barnard clearly believed, as a dedicated, qualified and competent member serving the public service, that she should have been promoted. While much could be said about Solidarity's motives, how it uses cases like Ms Barnard's and the Coloured claimant's in *Correctional Services* to further a more sinister purpose – preserving white privilege – I cannot deny that Ms Barnard had the right to bring her case to the court, to feel what she felt and fight to vindicate what she believed she was entitled to.

The *Barnard* case, spanning four different courts and four different judgements before the Constitutional Court, highlighted the continued tension between the prohibition of unfair discrimination and affirmative action measures that prevailed after the Court's landmark *Van Heerden* decision. In every chapter of this thesis, I have been trying to speak to Ms Barnard, to show her why it is that though she is an equal member of South African society, and that she has the right to equality and dignity, it was correct that she lost this case. In the Court's judgements in the case, she was not provided with clarity as to why she was not appointed. In arguing for a transformative approach to affirmative action, this thesis will hopefully provide clarity to Ms Barnard and others in her position. More than Ms Barnard, the thesis was my attempt to articulate what the law cannot capture but those of us who read it understand. Affirmative action is a very limited tool in the struggle to achieve equality in South Africa. While some would argue it be abandoned, in this thesis, I sought to salvage

the bones and imagine a transformative affirmative action regime – one that would at least undermine inequality.

In Chapter Two, I explored the concept of transformative constitutionalism and its critiques. I argued that even in the context of the limits of law, and the limits of rights, there is a possibility that the law can be used as a tool to transform society. I argued that a transformative approach to affirmative action could help undermine existing inequality. In Chapter Three of the thesis, I looked closely at the equality provision in s 9 of the Constitution, noting the courts' commitment to substantive equality. I argued that some of the problems in the Constitutional Court's affirmative action jurisprudence are rooted in the lack of clarity about the demands that substantive equality places. I noted the risk of an affirmative action jurisprudence driven by the court's current individualistic dignity-centric approach. Instead, I adopted the multi-dimensional approach to substantive equality.

Having set up the framework of what transformative constitutionalism means and the best way to understand substantive equality, Chapter Four of the thesis tackled the first problem – finding an appropriate role for the courts in their judicial review of affirmative action. In this regard, I argued in favour of a proportionality approach embedded in the multiple dimensions of substantive equality. I argued that this is the best way to understand the *Van Heerden* test. This approach will allow the courts to balance competing rights that arise in affirmative action cases but with an eye on preserving these measures and fulfilling the rights to equality and dignity of the intended beneficiaries of affirmative action without disproportionately limiting the rights of non-beneficiaries.

In Chapter Five, I explored the question of whether, under s 9 of the Constitution and under the EEA and Equality Act, there could be an obligation to implement affirmative action. I explored the difficulty in imposing an obligation to take affirmative action. However, I made the argument that s 7(2) and s 9 of the Constitution could be interpreted in a manner that imposed a positive duty to fulfil the right to equality, failing which a claim

that the right to equality has been violated could arise. I argued that one way to vindicate the right to equality in these cases is through affirmative action - a remedy that the court can grant when exercising its wide remedial powers, a remedy that will in some cases not only pass the 'appropriate' and 'just and equitable' thresholds, but will be the most effective remedy to vindicate the right to equality. This approach should apply to the Equality Act as well. Under the EEA, I argued that a holistic reading of the provisions in that statute would allow the courts to escape the bifurcation between Chapters Two and Three, allowing for justiciable claims in cases where employers have not taken or have failed to implement affirmative action.

In Chapter Six, I explored the 'for what?' and 'for whom?' questions that arise in affirmative action cases. As with the approach to the judicial review of affirmative action, I showed how the multiple dimensions of substantive equality and the commitment to transformation should be used to answer these questions. In Chapter Seven, I explored the question of form and design. Focussing on the question of whether s 9(2) prohibits the use of quotas, I argued that under the approach in this thesis, the strongest argument against the use of quotas falls apart. That is the argument that quotas violate the dignity of those adversely affected by these measures. Instead, I argued that in some cases, the use of quotas could pass the s 9(2) threshold. Based on the analysis in that chapter, the absolute prohibition of 'quotas' under the EEA should be declared unconstitutional. In this chapter, I concluded the thesis by considering the 'for how long?' question. In this regard, I argued that there could be no clear date, nor is the criteria for how to determine when affirmative action should end clear. However, the multiple dimensions of substantive equality provide a broad framework in which individual affirmative action measures should be analysed.

With humility about the limits of affirmative action as a tool to eliminate inequality in South Africa, I assert that it does make a difference. My story is a testament to that. I am the first to go beyond completing high school, a beneficiary of many state welfare

programmes, a beneficiary of the EEA. I have never suffered from the illusion that my race, gender and class was irrelevant to getting this far. I was sharing my story when I wrote about role models, about representation, about the material resources made available through jobs, about affirmative action's impact in supporting love, care and solidarity by giving its beneficiaries the ability to send money home. When I refuted the stigma argument, I fought the urge to use my experience and was excited when I found US and Indian empirical research supporting what I felt. It was a healing and life affirming process to find theory that gave substance to my experience. Nevertheless, I must emphasise that to realise the egalitarian vision in the Constitution, affirmative action measures will have to work alongside other redistributive measures, and the realisation of other socio-economic rights. Alone, they have no power against the structures on which prevailing inequality rests.

BIBLIOGRAPHY

Books

Ackermann L, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2013)

Anderson E, *The Imperative of Integration* (Princeton University Press 2010)

Baker J, Lynch K and Cantillon S, *Equality: From Theory to Action* (Palgrave Macmillan 2004)

Barak A, *Constitutional Rights and Their Limitations* (CUP 2012)

Bhatia G, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins 2019)

Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment (Second, Routledge 2000)

Bowen W and Bok D, *The Shape of the River: Long-Term Consequences of Considering Race and in College and University Admissions* (Princeton University Press 1998)

Carter S, *Reflections of an Affirmative Action Baby* (Basic Books 1991)

Cohen C and Sterba J, *Affirmative Action and Racial Preference: A Debate* (OUP 2003)

Collins H and Khaitan T (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

Cornell D and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (Fordham University Press 2013)

Currie I and De Waal J, *The Bill of Rights Handbook* (Juta 2013)

De Vos P and Freedman W (eds), *South African Constitutional Law in Context* (OUP 2014)

Delgado R and Stefancic J, *Critical Race Theory: An Introduction* (New York University Press 2001)

——, *Critical Race Theory: The Cutting Edge* (3rd edn, Temple University Press 2013)

Deshpande A, *Oxford India Short Introductions: Affirmative Action in India* (OUP 2013)

Everatt D, *The Origins of Non-Racialism* (Wits University Press 2009)

Fiscus R, *The Constitutional Logic of Affirmative Action* (Duke University Press 1992)

Fraser N and Honneth A, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso 2003)

Fredman S, *Women and the Law* (Clarendon 1997)

——, *Human Rights Transformed* (OUP 2008)

——, *Discrimination Law* (Second, OUP 2011)

——, *Comparative Human Rights Law* (OUP 2018)

Galanter M, *Competing Inequalities* (OUP 1984)

Goffman E, *Stigma: Notes on the Management of Spoiled Identity* (Prentice Hall Inc 1963)

Grimm D, *Constitutionalism:Past, Present and Future* (OUP 2016)

Gross B, *Reverse Discriminaation* (Prometheus Books 1977)

Hancock A-M, *Intersectionality: An Intellectual History* (OUP 2016)

Hassan Z, *Politics of Inclusion: Castes, Minorities, and Affirmative Action* (OUP 2011)

Jonathan W and Avner de-S, *Disadvantage* (OUP 2007)

Katiyatiya-Moyo L, *Substnative Equality, Affirmative ACtion and Alleviation of Poverty* (Lambert Academic Publishing 2017)

Kellough E, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press)

Kennedy R, *For Discrimination: Race, Affirmative Action, and the Law* (Vintage Books 2013)

King J, *Judging Social Rights* (CUP 2012)

Liebenberg S, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010)

Loury G, *The Anatomy of Racial Inequality* (Harvard University Press 2002)

Maldonaldo DB (ed), *Constitutionalism of the Global South The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013)

Moses MS, *Living with Moral Disagreement: The Enduring Controversy about Affirmative Action* (The University of Chicago Press 2016)

Nash JC, *Black Feminism Reimagined: After Intersectionality* (Duke University Press 2019)

Nussbaum M, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Havard University Press 2011)

Olsaretti S, *The Oxford Handbook of Distributive Justice* (OUP 2018)

Patricia Hill C and Sirma B, *Intersectionality* (Polity Press 2016)

Praeg L and Magadla S (eds), *Ubuntu: Curating the Archive* (University of KwaZulu-Natal Press 2014)

Roemer J, *Equality of Opportunity* (Havard University Press 2000)

Roux T, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013)

Seekings J and Nattrass N, *Class, Race, and Inequality in South Africa* (Yale University Press 2005)

——, *Policy, Politics and Poverty in South Africa* (Palgrave Macmillan 2015)

Sen A, *Inequality Reexamined* (Harvard University Press 1992)

——, *Development as Freedom* (OUP 2001)

Shue H, *Basic Rights* (Princeton University Press 1980)

Sowell T, *Affirmative Action Around the World: An Empirical Study* (Yale University Press 2004)

Steele S, *The Content of Our Character: A New Vision of Race in America* (Harper Perrenial 1998)

Sterba J, *Affirmative Action for the Future* (Cornell University Press 2009)

Terreblanche S, *A History of Inequality in South Africa:1652-2002* (University of KwaZulu-Natal Press 2003)

Verma V, *Non-Discrimination and Equality in India: Contesting Boundaries of Social Justice* (Routledge 2012)

Vihena Viera O, Baxi U and Vijoen F (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013)

Young IM, *Justice and the Politics of Difference* (Princeton University Press 1990)

——, *Inclusion and Democracy* (OUP 2002)

Contributions to Edited Collections

Albertyn C, 'Constitutional Equality in South Africa' in Dupper Ockert and Christoph Garbers (eds), *Equality in the workplace: reflections from South Africa and beyond* (Juta 2009)

Albertyn C and Goldblatt B, 'Equality' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, 2008)

Baer S, 'Equality' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012)

Bentley K and Habib A, 'An Alternative Framework for Redress and Citizenship' in Kristina Bentley and Adam Habib (eds), *Racial Redress and Citizenship in South Africa* (Human Science Research Council 2008)

Bilchitz D, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014)

Bishop M, 'Remedies' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, 2008)

Deshpande A, 'Stigma or Redtape? Roadblocks in the Use of Affirmative Action' in Zoya Hassan and others (eds), *The Empire of Disgust: Prejudice, Discrimination and Policy in India and the US* (OUP 2018)

Du Toit D, 'The Prohibition of Unfair Discrimination:Applying s 3(d) of the Employment Equity Act 55 of 1998' in Ockert Dupper and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Dworkin R, 'DeFunis v Sweatt' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977)

Dyzenhaus D, 'What Is a "Democratic Culture of Justification"?' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015)

Fiss O, 'Groups and the Equal Protection Clause' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977)

Fredman S, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013)

——, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015)

Hellman D and Moreau S, 'Introduction' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)

Jackson V, 'Proportionality and Equality' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017)

Jarvis Thomson J, 'Preferential Hiring' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977)

Khaitan T, 'Equality: Legislative Review under Article 14' in Sujit Choudry, Madhav Khosla and Pratab Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)

Lourens DP, 'Interpretation' in S Woolman and others, *Constitutional Law of South Africa* (Second, OS 2012)

Nagel T, 'Equal Treatment and Compensatory Discrimination' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment: A Philosophy and Public Affairs Reader* (Princeton University Press 1977)

Ramose MB, 'Ubuntu: Affirming a Right and Seeking Remedies in South Africa' in Leornard Praeg and Siphokazi Magadla (eds), *Ubuntu: Curating the Archive* (University of KwaZulu-Natal Press 121AD)

Robert A, 'Proportionality and Rationality' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers New Challenges* (CUP 2017)

Rycroft A, 'Transfromative Failure:The Adjudication of Affirmative Action Appointment Disputes' in Dupper Ockert and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Seedorf S and Sibanda S, 'Separation of Powers' in S Woolman and others (eds), *Constitutional Law of South Africa* (Second, OS 2012)

Sher G, 'Justifying Reverse Discrimination in Employment' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment* (Princeton University Press 1977)

Simon R, 'Preferential Hiring: A Reply to Judith Jarvis Thomson', *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton University Press 1977)

Sitapati V, 'Reservations' in Sujit Choudry, Madhav Khosla and Pratab Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)

Williams B, 'The Idea of Equality' in P Laslett and WG Runciman (eds), *Philosophy, Politics and Society* (Blackwell 1962)

Woolman S, 'Dignity' in S Woolman, T Roux and M Chaskalson (eds), *Constitutional Law of South Africa* (2nd edn, 2008)

Woolman S and Botha H, 'Limitations' in S Woolman and M Bishop (eds), *Constitutional Law of South Africa* (2nd edn, 2008)

Journal Articles

Ackermann L, 'The Legal Nature of the South African Constitutional Revolution' (2004) 20014 NZ Law Review 633

——, 'Equality and Non-Discrimination: Some Analytical Thoughts' [2006] SAJHR 597

Albertyn C, 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253

——, 'Gendered Transformation In South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 Stell LR 591

——, 'Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act - An Opportunity Missed - South African Police Service v. Solidarity OBO Barnard' [2015] SALJ 711

——, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity' [2018] SALJ 403

Albertyn C and Fredman S, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' [2015] Acta Juridica 430

Albertyn C and Goldblatt B, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' [1998] SAJHR 248

Albertyn C and Kentridge J, 'Introducing the Right to Equality in the Interim Constitution' [1994] SAJHR 149

Balagopal K, 'Justice for Dalits among Dalits: All the Ghosts Resurface' [2005] Economic and Political Weekly 3128

Banatar D, 'Justice, Diversity and Racial Preference: A Critique of Affirmative Action' [2008] SALJ 274

Barrie G, 'The Application of the Doctrine of Proportionality in South African Courts' [2013] SAPL 40

Beatty DM, 'The Canadian Conception of Equality' [1996] The University of Toronto Law Journal 349

Bishop M, 'Rationality Is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 SAPL 312

Botha H, 'Equality, Plurality and Structural Power' [2009] SAJHR 1

Brassey M, 'The Employment Equity Act: Bad for Employment and Bad for Equity' [1998] ILJ 1359

——, 'The More Things Change: Multiracialism in Contemporary South Africa' [2019] CCR 443

Brickhill J and Van Leeve Y, 'Transformative Constitutionaslism - Guiding Light or Empty Slogan?' [2015] Acta Juridica 141

Cachalia F, 'Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal' [2018] SAJHR 375

Carbado DW, 'Colourblind Intersectionality' [2013] 38 Signs: Journal of Women In Culture and Society 1

Carbado DW and Crenshaw K, 'An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection' [2019] The Yale Journal Law Forum 108

Carbado DW and Harris CI, 'Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality and Dominance Theory' [2019] Harv. L. Rev. 2193

Chaskalson A, 'Human Dignity as a Foundational Value of Our Constitutional Order' [2000] SAJHR 193

Coetzer N, 'Affirmative Action: The Sword versus Shield Debate Continues: Analyses' (2009) 21 SAMLJ 92

Collins H, 'Discrimination, Equality and Social Inclusion' [2003] Mod. L. Rev. 16

Cowen S, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' [2001] SAJHR 34

Craig P, 'Proportionality, Rationality and Review' [2010] NZ Law Review 265

Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi. Legal F. 139

——, 'Playing Race Cards: Constructing a Proactive Defence of Affirmative Action' [1998] National Black Law Journal 16

Davis D, 'Equality: The Majesty of Legoland Jurisprudence' [1999] SALJ 398

——, 'Transformation: The Constitutional Promise and Reality' [2010] SAJHR 85

——, 'Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?' [2018] SAJHR 359

Davis D and Klare K, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 SAJHR 403

De Vos P, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' [2001] SAJHR 258

——, 'Same-Sex Sexual Desire and the Re-Imagining of the South African Family' [2004] SAJHR 179

——, 'The Past Is Unpredictable: Race, Redress and Remembrance in the South African Constitution' SALJ 73

Delgado R, 'Ten Arguments Against Affirmative Action: How Valid?' [1998] Alabama Law Review 135

Deshpande A, 'Double Jeopardy? Stigma of Identity and Affirmative Action' [2019] The Review of Black Political Economy 38

Dladla N, 'The Liberation of History and the End of South Africa: Some Notes towards an Azanian Historiography in Africa, South' [2018] SAJHR 415

Du Plessis L, ""Subsidiarity"": What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 Stell LR 207

Dugard J, 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' [2006] SAJHR 261

——, 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' [2008] SAJHR 214

——, 'Closing the Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access, 1995-2013' [2015] SAJHR 112

Dugard J and Seme N, 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act Re Restitution and Expropriation' SAJHR 33

Dupper O, 'In Defence of Affirmative Action in South Africa' [2004] SALJ 187

——, 'Affirmative Action: Who, How and How Long?' (2008) 24 SAJHR 425

Eastland T, 'The Case Against Affirmative Action' [1992] WM & Mary L Rev 33

Edwards H and Zaretsky B, 'Preferential Remedies for Employment Discrimination' [1975] Michigan Law Review 1

Everatt D, 'Non-Racialism in South Africa:Status and Prospects' [2012] Politikon 5

Fallon R, 'To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination' [1990] BU L Rev 815

Frankel C, 'Equality of Opportunity' [1971] Ethics 191

Fredman S, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law' [2015] I.C.L.Q 631

——, 'Substantive Equality Revisited' (2016) 14 ICON 712

——, 'Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action' [2017] Acta Juridica 124

Fuller L, 'The Forms and Limits of Adjudication' 92 Harv. L. Rev. 353

Garbers C, 'The Right of a Job Candidate to Affirmative Action Selection : A Landmark Case?' Contemporary Labour Law

Grimm D, 'Proportionality in Canadian and German Constitutional Jurisprudence' [2007] The University of Toronto Law Journal 383

Hailbronner M, 'Transformative Constitutionalism: Not Only in the Global South' [2017] The American Journal of Comparative Law 527

Halaby A and McAllister S, 'An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases' [1997] Michigan Journal of Race and Law 235

Harris CI, 'Whiteness as Property' [1993] Harv. L. Rev. 1707

Hassim S, 'Decolonising Equality: The Radical Roots of the Gender Equality Clause in the South African Constitution' [2018] SAJHR 342

Hibbett A, 'The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education' [2005] Harvard BlackLetter Law Journal 75

Hill R, 'Compensatory Justice: Over Time and Between Groups' [2002] The Journal of Political Philosophy 392

Hodgson TF, 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers :Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution' [2018] SAJHR 57

Hoexter C, 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 SALJ 207

Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin Law Review 83

Jackson V, 'Constitutional Law in an Age of Proportionality' [2015] The Yale Law Journal 3094

Joseph L, 'Some Ways of Thinking about Equality of Opportunity' [1980] The Western Political Quarterly 393

Kay R, 'The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law' Constitutional Commentary 329

Kennedy D, 'Intersectionality and Critical Race Theory: A Genealogical Note from a CLS Point of View'

Klare K, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146

——, 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach' 26 Stell LR 445

Kohn L, 'The Burgeoning Constitutional Requirement of Rationality & the Separation of Powers: Has Rationality Review Gone Too Far?' [2013] SALJ 810

Kohn L and Cachalia R, 'Restitutionary Measures Properly Understood and the Extension of the Quota Ban - Locating SARIPA in the s 9(2) Van Heerden Framework' [2017] Acta Juridica 146

Langa JP, 'Transformative Constitutionalism' (2006) 3 Stell LR 351

Leckey R, 'Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights' [2009] Colum. Hum. Rts. L. Rev. 425

Lenhardt RA, 'Understanding the Mark: Race, Stigma, and Equality in Context' [2004] New York Law Review 803

Lenta P, 'Judicial Restraint and Overreach' [2004] SAJHR 544

L'Heureux-Dube C, 'It Takes A Vision: The Constitutionalization of Equality in Canada' [2002] Yale Journal of Law and Feminism 363

Liebenberg S, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1

Liebenberg S and Goldblatt B, 'The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 SAJHR 335

Louw AM, 'Extrapolating "Equality" from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998' [2006] SAMLJ 336

——, 'The Employment Equity Act, 1998 (and Other Myths about the Pursuit of "Equity", and "Dignity" in Post-Apartheid South Africa (Part 1)' [2015] PELJ 594

——, 'The Employment Equity Act, 1998 (and Other Myths about the Pursuit of "Equity" and "Dignity" in Post-Apartheid South Africa (Part 2)' [2015] PELJ 669

Lurie G, 'Proportionality and the Right to Equality' [2020] German Law Journal 174

MacKinnon C, 'Substantive Equality: A Perspective' [2011] Minnesota Law Review 1

MacKinnon C and Crenshaw K, 'Reconstituting the Future: An Equality Amendment' [2019] The Yale Journal Law Forum 343

Madlingozi T, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 1 Stell Law. Rev. 123

McConnachie C, 'Human Dignity, Unfair Discrimination and Guidance' [2014] OJLS 609

——, 'Affirmative Action and Intensity of Review : South African Police Service v Solidarity Obo Barnard - Affirmative Action' [2015] CCR 163

McCrudden C, 'Merit Principles' [1998] OJLS

——, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] EJIL 655

McGill J, 'Section 15(2), Ameliorative Programs and Proportionality Review' [2013] The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 521

McGregor M, 'The Nature of Affirmative Action: A Defence or a Right?' [2003] SAMLJ 421

——, 'Actual Past Discrimination or Group Membership as a Requirement to Benefit from Affirmative Action : A Comparison between South African and American Case Law' [2004] Journal for Juridical Science 122

——, 'Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures' [2013] SALJ 650

——, 'Blowing the Whistle on Affirmative Action: The Future of Affirmative Action in South Africa (Part 2)' [2014] SAMLJ 282

——, 'Blowing the Whistle?: The Future of Affirmative Action in South Africa (Part 1)' [2014] SAMLJ 60

——, 'Categorisation to Determine Beneficiaries of Affirmative Action: Advantages and Deficiencies' Codicillus 1

McLachlin BPC, 'Equality: The Most Difficult Right' [2000] The Supreme Court Law Review 17

Modiri JM, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' [2018] SAJHR 300

——, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post) Apartheid South Africa' [2012] SAJHR 405

——, 'Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education' [2013] Stell LR 455

——, 'The Crises in Legal Education' (2014) 46 Acta Academia 1

——, 'Law's Poverty' (2015) 18 P.E.R 224

Moseneke D, 'Transformative Adjudication' [2002] SAJHR 309

Moses MS, 'Moral and Instrumental Rationales for Affirmative Action in Five National Contexts' [2010] Educational Researcher 211

Mureinik E, 'A Bridge to Where? Introducing the Interim Bill of Rights' [1994] SAJHR 31

Mushariwa M, 'Who Are the True Beneficiaries of Affirmative Action? - Solidarity Obo Barnard v SAPS 2010 5 BLLR 561 (LC)' (2011) 32 Obiter 439

——, 'UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?' [2012] PELJ 66

Nickel J, 'Strong Affirmative Action' [1990] Journal of Ethnic and Migration Studies 49

Onwuachi-Willig A, Hough E and Campbell M, 'Cracking the Egg: Which Came First: Stigma or Affirmative Action?' [2008] California Law Review 1299

Papacostantis H and Mushariwa M, '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 PELJ 1

Paul E, 'Set-Asides, Reparaations, and Compensatory Justice' [1991] Nomos 97

Pieterse M, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' [2004] SAJHR 383

——, 'What Do We Mean When We Talk about Transformative Constitutionalism?' [2005] SAPL 155

Posel D, 'Whither "Non-Racialism": The "New" South Africa Turns Twenty-One' [2015] Ethical and Racial Studies 2167

Posner R, 'The Supreme Court 2004 Foreword: A Political Court' [2005] Harv. L. Rev.

Pretorius J, 'Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview' (2001) 61 Heidelberg Journal of International Law 403

——, 'Legal Evaluation of Affirmative Action in South Africa' (2001) 26 Journal for Juridical Science 12

——, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence' [2010] SAJHR 536

——, 'Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: Solidarity Obo Barnard v South African Police Services' (2013) 130 SALJ 32

——, 'The Limitations of Definitional Reasoning Regarding "Quotas" and "Absolute Barriers" in Affirmative Action Jurisprudence as Illustrated by Solidarity v Department of Correctional Services' [2017] Stell LR 269

Price A, 'Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt.' (2010) 127 SALJ 580

Ramalekana N, 'What's So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution' [2020] CCR 252

Ramose MB, 'Transforming Education in South Africa: Paradigm Shift or Change?' [2003] SAJHE 137

——, 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996' (2018) 34 SAJHR 326

Reaume D, 'Discrimination and Dignity' [2003] Louisiana Law Review 645

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge L.J. 174

Robert A, 'Constitutional Rights and Proportionality' [2014] Journal for Constitutional Theory and Philosophy of Law 51

Roux T, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' [2003] Democratization 92

——, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 Stell LR 258

Rycroft A, 'Obstacles to Employment Equity The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies' (1999) 20 ILJ 1411

Scalia A, 'Foreign Legal Authority in the Federal Courts' [2004] ASIL Proceedings of Annual Meeting

Schnapper E, 'Affirmative Action and the Legislative History of the Fourteenth Amendment' [1985] Virginia Law Review 753

Sergiu B, 'Formal and Substantive Equality of Opportunity' [2012] Cogito: Multidisciplinary Res J 85

Sibanda N, 'Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership' [2019] SAJHR

Sibanda S, 'Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman's "Liberal Constitutionalism, Property Rights and the Assault on Poverty"' [2013] Stell LR 329

——, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' 22 Stell LR 482

Siegal RB, 'Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification' [2000] California Law Review 77

——, 'Equality Divided' [2013] Harvard Law Review 1

Stone A and Mathews J, 'Proportionality Balancing and Global Constitutionalism' [2008] Columbia Journal of Transnational Law 73

Strauss DA, 'The Illusory Distinction between Equality of Opportunity and Equality of Result' (1992) 34 WM & Mary L Rev 171

Suttner R, 'Understanding Non-Racialism as an Emancipatory Concept in South Africa' [2012] Theoria: A Journal of Social and Political Theory 22

Taylor R, 'Deepening Non-Racialism in South Africa' Politikon 41

Thompson D and Van der Walt A, 'Affirmative Action: Only a Shield? Or Also a Sword? Harmse v City of Cape Town (2003) 24 ILJ 1130 and Dudley v City of Cape Town (2004) 25 ILJ 305 (LC)' (2007) 28 Obiter 636

Tussman J and tenBroek J, 'The Equal Protection of Laws' [1949] The Carlifornia Law Review 341

Van der Walt A, 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 Fundamina 1

Van Huyssteen E, 'The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism' [2000] African Studies 2

Van Marle K, 'Transformative Constitutionalism As/And Critique' (2009) 20 Stell LR 286

Watson Hamilton J and Koshan J, 'Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp' [2009] Alta. L. Rev. 927

Westen P, 'The Empty Idea of Equality' (1982) 95 Harv. L. Rev. 537

Thesis

Sibanda S, *"Not Yet Uhuru" - The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy* (University of the Witwatersrand), PhD thesis on file with author 2018

Internet Sources

Bhatia G, 'Is the 103rd Amendment Unconstitutional?' (*Indian Constitutional Law and Philosophy*, 13 January 2019) <

https://indconlawphil.wordpress.com/2019/01/13/is- the-103rd-amendment-unconstitutional/ accessed 20 November 2020

——, 'The Supreme Court's (New) Reservation s Judgment and Its Discontents' (*Indian Constitutional Law and Philosophy*, 9 February 2020) <https://indconlawphil.wordpress.com/page/2/> accessed 10 March 2020

Commission for Employment Equity, 'Annual Report 2019-2020' < http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employme nt%20Equity/2019%20-2020/20thCEE_Report_.pdf> accessed 8 November 2020

Lahiri K, 'Does Article 16 Impose a "Power Coupled with a Duty" Upon the State? - I' (*Indian Constitutional Law and Philosophy*, 13 March 2015) < https://indconlawphil.wordpress.com/2015/11/13/guest-post-does-article-16-impose-a-power-coupled-with-a-duty-upon-the-state-i/> accessed 9 March 2020

Organization of African Unity, '(OAU), African Charter on Human and Peoples' Rights' (1981) <https://www.refworld.org/docid/3ae6b3630.html> accessed 10 July 2019

'Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015' (Statistics South Africa 2017) <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> accessed 4 October 2020

Smuts M, 'State-Sponsored Virginity: South Africa's Maiden's Bursary Scheme' (*Oxford Human Rights Hub Blog*, 11 February 2016) <http://ohrh.law.ox.ac.uk/sstate-sponsored-virginity-south-africas-maidens-bursary-scheme/> accessed 10 August 2019

Sulla V and Zikhali P, 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (World Bank Group 2018) <http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities> accessed 12 July 2019

Surendranath A, 'The Ambiguity of Reservations for the Poor' (*The Hindu*, 22 January 2019) <https://www.thehindu.com/opinion/lead/the-ambiguity-of-reservations-for-the-poor/article26053843.ece> accessed 20 November 2020