

Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry

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*Dissertation presented for the degree of Doctor of laws in the
Faculty of Law at
Stellenbosch University*



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April 2014

TABLE OF CONTENTS

DECLARATION	iv
ACKNOWLEDGEMENTS	vii
ABSTRACT	viii

CHAPTER ONE: INTRODUCTION

1.1 Research theme and issues	1
1.2 Context and background	3
1.3 Affirmative action	9
1.4 Research motivation	10
1.5 The objectives of the research project	11
1.6 The research questions	11
1.7 The research procedure and methodology	12

CHAPTER TWO: WHAT IS POVERTY?

2.1 Introduction	16
2.2 The meaning of poverty	17
2.2.1 Different concepts related to poverty	17
2.2.2 Types of poverty	19
2.2.2.1 <i>Chronic poverty and transient poverty</i>	19
2.2.2.2 <i>Absolute poverty and relative poverty</i>	20
2.2.3 Moving towards a definition of poverty	21
2.2.3.1 <i>Introduction</i>	21
2.2.3.2 <i>Income approach</i>	21
2.2.3.3 <i>Human needs approach</i>	22
2.2.3.4 <i>Capabilities approach</i>	24
2.2.3.5 <i>Participatory approach/consensual approach</i>	25
2.3 Measuring poverty	29
2.3.1 Introduction	29
2.3.2 Monetary dimension	29
2.3.3 Non-monetary dimension	33
2.4 The nature and scale of poverty in South Africa	36
2.4.1 Introduction	36
2.4.2 Determinates of poverty in South Africa	36
2.4.2.1 <i>Population growth</i>	36
2.4.2.2 <i>Lack of mobility/rural location</i>	37
2.4.2.3 <i>Unemployment</i>	37
2.4.2.4 <i>Shrinking economic growth</i>	39
2.4.2.5 <i>HIV/AIDS pandemic</i>	39
2.4.3 Who are the poor?	41
2.4.3.1 <i>Race and poverty</i>	41
2.4.3.2 <i>Gender and poverty</i>	42
2.4.3.3 <i>Children and poverty</i>	42
2.4.3.4 <i>Education and poverty</i>	43

2.4.3.5 <i>Class and poverty</i>	44
2.4.4 Where are the poor?	44
2.4.4.1 <i>Poverty in rural and urban areas</i>	44
2.4.4.2 <i>Poverty in the nine provinces of South Africa</i>	45
2.5 Conclusion	45

CHAPTER THREE: INEQUALITY AND ITS LINK WITH POVERTY

3.1 Introduction	47
3.2 Social systems within which inequality is generated	48
3.3 Dimensions of inequality	51
3.3.1 Introduction	51
3.3.2 Recognition inequality	52
3.3.3 Redistribution inequality	53
3.4 Measuring inequality	55
3.5 Inequality in South Africa	59
3.5.1 Introduction	59
3.5.2 Determinants of inequality	59
3.5.2.1 <i>Income levels and inequality</i>	59
3.5.2.2 <i>Race and inequality</i>	61
3.5.2.3 <i>Class and inequality</i>	62
3.5.2.4 <i>Gender and inequality</i>	64
3.5.2.5 <i>Unemployment and inequality</i>	64
3.6 The link between poverty and inequality	66
3.7 Conclusion	70

CHAPTER FOUR: THE SUBSTANTIVE CONCEPTION OF EQUALITY AND ITS RELATIONSHIP WITH SOCIO-ECONOMIC DISADVANTAGE

4.1 Introduction	72
4.2 What is equality?	72
4.3 Constitutional view of equality	81
4.4 The interrelationship between substantive equality and socio-economic disadvantage: analyses of the implications	86
4.4.1 Introduction	87
4.4.2 The possible link between aims of substantive equality and socio-economic Disadvantage	87
4.4.2.1 <i>Breaking the cycle of disadvantage</i>	87
4.4.2.2 <i>Promoting respect for equal dignity</i>	92
4.4.2.3 <i>Affirmation of identity within community</i>	97
4.4.2.4 <i>Facilitation of full social participation</i>	101
4.4.3 Evaluation of the implications of the aims (of substantive equality) on socio-economic disadvantage	107
4.5 Conclusion	110

CHAPTER 5: AFFIRMATIVE ACTION AND THE THEORY OF SUBSTANTIVE EQUALITY

5.1 Introduction	112
5.2 What is affirmative action?	113

5.3 Justifications and goals of affirmative action	117
5.3.1 Introduction	117
5.3.2 Compensatory justice	117
5.3.3 Distributive justice	119
5.4 Affirmative action and the theory of substantive equality	120
5.4.1 Introduction	120
5.4.2 Affirmative action and the aims of substantive equality	122
5.4.2.1 <i>Affirmative action and breaking the cycle of disadvantage</i>	122
5.4.2.2 <i>Affirmative action and promoting equal respect for dignity</i>	125
5.4.2.3 <i>Affirmative action and affirmation of identity</i>	127
5.4.2.4 <i>Affirmative action and full social participation</i>	132
5.4.3 Evaluation	133
5.5 Conclusion	136

CHAPTER 6: THE IMPLEMENTATION AND IMPACT OF AFFIRMATIVE ACTION ON POVERTY AND SOCIO-ECONOMIC INEQUALITY: CASE STUDIES

6.1 Introduction	138
6.2 United States	140
6.2.1 Aims and purpose of affirmative action in the United States	140
6.2.2 Beneficiaries and types of benefits	141
6.2.3 Mechanisms to ensure benefits reach the targets	148
6.2.4 Some observations	149
6.3 Canada	150
6.3.1 Aims and purpose of affirmative action in Canada	151
6.3.2 Beneficiaries and types of benefits	155
6.3.3 Mechanisms to ensure benefits reach the targets	160
6.3.4 Some observations	165
6.4 India	166
6.4.1 Aims and purpose of affirmative action in India	166
6.4.2 Beneficiaries and types of benefits	168
6.4.3 Mechanisms to ensure benefits reach the targets	174
6.4.4 Some observations	176
6.5 Conclusion	177

CHAPTER SEVEN: AFFIRMATIVE ACTION IN SOUTH AFRICA

7.1 Introduction	179
7.2 Aims and purpose of affirmative action in South Africa	180
7.3 The legal defence of affirmative action in South Africa	181
7.4 Beneficiaries of affirmative action and types of benefits	188
7.4.1 Employment	188
7.4.2 Education	195
7.4.3 Race vs. class criterion debate: some current arguments	199
7.5 Conclusion	206

CHAPTER 8: A RECONCEPTUALISATION OF AFFIRMATIVE ACTION WITHIN THE REALM OF SUBSTANTIVE EQUALITY

8.1 Introduction	208
8.2 The terrain	209
8.2.1 Causes vs. effects	209
8.2.2 Considering the causalities	210
8.3 Reconceptualising affirmative action: facets to consider within the realm of Substantive equality	212
8.3.1 Introduction	212
8.3.2 Expansive view of affirmative action	212
8.3.3 Class as a plus factor	219
8.4 Some observations	223
8.5 Conclusion	225

CHAPTER 9: CONCLUSION AND THE WAY FORWARD

9.1 Summary of the study	227
9.2 The way forward	239

BIBLIOGRAPHY	245
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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Luyando Martha Katiyatiya, February 2014

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ACKNOWLEDGEMENTS

First and foremost, I am deeply thankful to God Almighty for His unconditional love, kindness and mercy and most importantly the strength and ability to pursue this study. I am grateful to the Faculty of Law, Stellenbosch University and the National Research Fund for according me the opportunity to participate in the *Strategic Research and Outreach Initiative: Combating Poverty, Homelessness and Socio-economic disadvantage under the South African Constitution program*. My gratitude goes to my Promoter Professor Ockert Dupper for his patience, academic guidance and expertise throughout the entire study.

I am also wholly thankful to the love of my life Solomon Simbarashe Moyo – you inspire me to succeed. Dr Khulekhani Moyo, Advocate Harriet Mutenga, Dr Tapiwa Shumba, Charlene Ncube, Charlene Kunaka, thank you for encouraging me.

Special appreciation goes to my family for always being there for me. My mother Patience and father Charles Katiyatiya, my young sisters Chenai, Luse and Luumuno, the whole Katiyatiya crew, the Ndoros, my cousin brothers Mish and Enerst. I would not have made it without you. I love you all. May you be richly blessed.

To those I did not acknowledge by name friends, relatives and colleagues I am also indebted to you.

ABSTRACT

Substantive equality is a constitutional imperative, hence the need for strategies that attempt to realise it for the sake of genuine social reconstruction. The principle of equality runs through all other rights in the South African Constitution. Be that as it may, equality is an elusive concept, which makes its achievement an ambitious task. Nonetheless, there are strategies that attempt to bring to the fore the ‘substance’ of the concept in order to ensure the actual realisation of socio-economic benefits. Such strategies include, among others: social security, education, economic empowerment, skills development and affirmative action. This study will focus on the latter of these strategies, namely affirmative action.

Although affirmative action is practised around the world, one of the (many) criticisms of the policy is that it fails to bring about substantive or structural change. In other words, it may change the racial and gender composition of the classroom or the workplace, but does not address the challenges that cause the disadvantages of marginalised groups in the first place. It is arguable that affirmative action has increased inequality in South Africa by benefiting the apex of the class structure and not the majority of the population living in abject poverty.

This study develops a theoretical analysis of the link between status (race, sex and ethnicity) and socio-economic disadvantage, and the central question that the study addresses is the following: How can the policy of affirmative action be redesigned to ensure that it benefits the socio-economically disadvantaged? A secondary question that is investigated is whether affirmative action can contribute to the development of human capacities in the context of poverty alleviation.

It is arguable that substantive equality facilitates the adoption of strategies (such as affirmative action) to address socio-economic inequality, poverty and social exclusion. The research suggests that a paradigm shift is necessary in order to reconceive of affirmative action as a policy that does not only focus on ensuring ‘equitable representation’ of disadvantaged groups in the workforce or the classroom, but also provides for the development of human capacities. This can be achieved if one adopts an expansive view of affirmative action and if one utilises class as one of the numerous criteria for determining the beneficiaries of the policy.

ABSTRAK

Substantiewe gelykheid is 'n grondwetlike vereiste, vandaar die behoefte om strategieë te ontwikkel wat poog om dit te realiser in die belang van daadwerklike sosiale rekonstruksie. Die beginsel van gelykheid is vervleg met alle ander regte in die Suid-Afrikaanse Grondwet. Gelykheid is nietemin 'n ontwykende konsep, en dit maak die bereiking daarvan 'n ambisieuse taak. Daar is egter strategieë wat gemik is daarop om sosio-ekonomiese voordele te bereik. Voorbeelde van sodanige strategieë sluit in sosiale sekuriteit, opvoeding, ekonomiese bemagtiging, die ontwikkeling van vaardighede, en regstellende aksie. Hierdie studie fokus op laasgenoemde strategie, naamlik regstellende aksie.

Ten spyte van die feit dat regstellende aksie regoor die wêreld toegepas word, word die beleid nietmin gekritiseer as sou dit nie werklik wesenlike of strukturele verandering teweeg bring nie. Met ander woorde, dit bring moontlik 'n verandering teweeg in die rasse-en geslagsamestelling van die klaskamer of die werkplek, maar spreek nie die uitdagings aan wat in die eerste plek lei tot die posisie van relatiewe benadeling waarin gemarginaliseerde groepe hulself bevind nie. Sommige argumenteer dat regstellende aksie bydra tot ongelykheid in Suid-Afrika deur voordele te beperk tot diegene wat hulself aan die toppunt van die klasstruktuur bevind terwyl dit die meerderheid van die bevolking wat in armoede leef ignoreer.

Hierdie studie ontwikkel 'n teoretiese ontleding van die verband tussen status (ras, geslag en etnisiteit) en sosio-ekonomiese benadeling. Die sentrale vraag van die studie is die volgende: Hoe kan die beleid van regstellende aksie herontwerp word om te verseker dat dit lei tot die bevoordeling van die sosio-ekonomiese benadeeldes? 'n Sekondêre vraag wat in die studie onder die loep kom is of regstellende aksie 'n bydrae kan maak tot die ontwikkeling van menslike vermoë in die konteks van armoedeverligting.

Daar kan geragumenteer word dat die strewe na substantiewe gelykheid strategieë (soos regstellende aksie) na vore bring om sosio-ekonomiese ongelykheid, armoede en sosiale uitsluiting aan te spreek. Die navorsing dui daarop dat 'n paradigmaskuif nodig is om regstellende aksie te herkonseptualiseer as 'n beleid wat nie net fokus op die bereiking van 'billike verteenwoordiging' van benadeelde groepe in die werkplek of klaskamer nie, maar ook voorsiening maak vir die ontwikkeling van menslike vermoë. Dit kan bereik word deur die aanvaarding van 'n uitgebreide siening van regstellende aksie en deur die benutting van

klas as een van menige faktore wat in ag geneem word om die bevoordeeldes van die beleid te identifiseer.

CHAPTER ONE: INTRODUCTION

1.1 Research theme and issues

Transforming South African society lies at the heart of the South African Constitution. The Constitution provides a platform for change by addressing the injustices of the past and legitimising the advent of democracy in the post-apartheid era. The adoption of a new Constitution was a momentous step towards addressing discrimination and inequality. The right to equality holds a central position in the Constitution. This right is an “overarching, straddling and underlying constitutional value and a human rights and freedoms concept which is distinct and at the same time runs in the veins of all other rights and freedoms: civil, political, economic, social and cultural.”¹ The Constitutional Court has made it clear that the right to equality has to be understood in the context of South Africa’s own history. The primary purpose of the right to equality is to redress the past patterns of disadvantage and thereby promote substantive equality.²

One of the central premise substantive equality holds is the connection between status and disadvantage. Status refers to race, gender, disability or other prohibited grounds and the disadvantage it is concerned with is socio-economic disadvantage.³ Furthermore, the concept of substantive equality elucidates the fact that it is not status *per se* that is problematic, but the disadvantage that attaches to status.⁴ Achieving substantive equality in South Africa involves attending to the structural disadvantages that many people experience and making provision for opportunities which will allow them to realise their full human potential.⁵

¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 26.

¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 26.
²lity in *South Africa 1652 – 2002* (2002) 26.

⁹S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 9.

¹⁰J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 340.

¹¹J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 340.

¹²S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) xv.

¹³Dairiam “Equality and non-discrimination: The two essential principles for the promotion and protection of the Human Rights of Women”. Keynote speech given at a conference organised by Centre for Comparative and Public Law and the Women Studies Research Centre, University of Hong Kong, 20 April 2002. The subsequent paragraph is in reference to this source.

¹⁴The following paragraph draws heavily from A Sachs “Affirmative Action and Good Government” in P Hugo (ed) *Redistribution and Affirmative Action: Working on the South African Political Economy* (1992) 203 - 205.

Action: Working on the South African Political Economy (1992) 203 - 205.

ce, and inequality in South Africa (2005) 343.

of Poverty and the Struggle against Exclusion: A New Challenge for Social Security in Europe?” (1997) 50 (1) *International Social Security Review* 4 – 6.

The prevalence of socio-economic inequalities and poverty highlights the significance of a substantive conception of equality in South Africa. According to Fredman, the attainment of substantive equality involves a number of strategic elements which include, among others, affirmative action, economic empowerment, establishing poverty as a ground of discrimination, and social security.⁶ This research project will focus on one of these elements, namely affirmative action. It will examine to what extent this element may impact on poverty and socio-economic inequality. This will necessitate an analysis of substantive equality from two perspectives.

The first perspective will examine to what extent the notion of substantive equality facilitates the adoption of strategies (such as affirmative action) to address patterns of disadvantage, socio-economic inequality and social exclusion. In this regard, the research will examine the manner in which affirmative action was (or is) conceptualised, justified and implemented, and whether the aims it seeks to achieve (among others, socio-economic equality and poverty reduction) can be realised. This part of the research will include referencing and contrasting the policy of affirmative action in South Africa with its design, implementation and justification in three other countries, namely India, Canada and the United States of America. Affirmative action provisions and programmes have been implemented in these three countries for a significantly longer period than in South Africa. The comparative analysis will be useful because experiences in one country may – if treated with circumspection – assist the development and implementation of similar policies in another country. It is suggested that South Africa has been and will be enriched by looking beyond its own borders. However, though looking at the experience of other countries is important, the dissertation seeks to emphasise that South Africa must not adopt the approach of other jurisdictions without consideration of its own specific history and its own unique Constitution.

The second perspective will consider the extent to which substantive equality facilitates the adoption of affirmative action as a weapon in the fight against poverty and inequality and, if so, whether this has the potential to advance socio-economic equality, non-discrimination and social inclusion. In analysing substantive equality from both these perspectives, the research project seeks to offer a more nuanced understanding of the potential of substantive equality to impact on redress, poverty reduction and overall social inclusion through affirmative action.

livier “The concept of Social Security” in *Social Security: A Legal Analysis* (2003) 42 – 43.

Furthermore, the dissertation contends that substantive equality should be understood as a process and a medium for transformation rather than merely a legal norm. It depicts awareness of the ways in which the equality premise can help facilitate social order through redress, social inclusion and poverty alleviation.

1.2 Context and background

Poverty and inequality characterise post-apartheid South Africa. Both poverty and inequality have an irrefutable structural or systematic character, and have been shaped and created over a long period by the power structures on which the systems of colonialism, segregation and apartheid were based.⁷ Terreblanche emphasises that although “the misery and poverty of the poorer half of the population cannot be blamed exclusively on colonialism, segregation, and apartheid, the negative effects of ‘these systems’ on the socio-economic conditions of the majority of blacks should not be underestimated.”⁸ During the 350 years that these systems were in place in South Africa, “rightful citizens with political, legal, social and economic rights and entitlements found themselves being reduced to semi-citizens and non-citizens, with hardly any meaningful political, legal, social and economic rights and entitlements.”⁹ Despite the new democratically elected government’s commitment towards addressing poverty and reducing overall levels of inequality since 1994, levels of income inequalities have continued to increase and growing unemployment has underpinned persistently deepening poverty, especially in rural areas.¹⁰ This can be partly ascribed to the fact that the post-apartheid government inherited policies which affected inequality by “rewarding existing advantages and penalising the already disadvantaged.”¹¹ It is arguable that there was no guarantee of equal opportunities under the new dispensation. The fact remains that despite these constraints, the transition to an inclusive democracy has not only perpetuated old forms of inequality, but has simultaneously entrenched some more deeply than before.¹²

However, attempts should be made to disentangle the destructive structural and dynamic process of discrimination that fortifies the diverse manifestations of inequality which include

¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 26.

¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 26.

¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 26.

⁹S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 9.

¹⁰J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 340.

¹¹J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 340.

¹²S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) xv.

poverty, among others.¹³ There is a tendency to label people when they need assistance with terms such as ‘assetless’, ‘landless’, ‘illiterate’ or ‘jobless’ without consideration of the underlying reason(s) for their situation. One needs to probe these reasons to ascertain the cause of the disadvantage. These manifestations are often associated with how an individual/subordinate group integrates into society economically, socially, politically and culturally (multiple integrations), and these integrations together with their manifestations need to be addressed at the same time as they interact and highlight this web of discrimination. The substantive conception of equality facilitates an examination of these issues.

South Africa is currently encumbered with a long legacy of generations who experienced structural advantage and disadvantage.¹⁴ The injustices and inequalities produced by past discrimination do not just go away simply because the laws which enforced the discrimination have been abolished. To make matters worse, these inequalities replicate themselves from generation to generation. Illiteracy, ill health and poverty are passed on as a harsh reality from parents who would love to do right by their families but do not have the capability to do so. Land, wealth, skills and confidence are confined to communities and families that have always enjoyed them. Inequality continues as before. Only now it is regarded as natural or, worse still, as the fault of the disadvantaged. It has been reduced between races, but increased within classes thus increasing interclass inequality. For instance, studies indicate that the process of black economic empowerment has massively enriched a few black companies and black people, and has therefore increased the inequality between rich blacks and poor blacks.

Some studies indicate that the differences between and within provinces in South Africa play themselves out in terms of class. According to Seekings and Natrass, these differences give weight to the thesis of former President Thabo Mbeki who, borrowing from the work of the 19th century British Prime Minister Benjamin Disraeli, has observed that South Africa is made up of ‘two nations’: one that is rich predominantly middle class and urban based, and

¹³Dairiam “Equality and non-discrimination: The two essential principles for the promotion and protection of the Human Rights of Women”. Keynote speech given at a conference organised by Centre for Comparative and Public Law and the Women Studies Research Centre, University of Hong Kong, 20 April 2002. The subsequent paragraph is in reference to this source.

¹⁴The following paragraph draws heavily from A Sachs “Affirmative Action and Good Government” in P Hugo (ed) *Redistribution and Affirmative Action: Working on the South African Political Economy* (1992) 203 - 205.

one that is poor and rural-based.¹⁵ While this seems to indicate a polarised society, it masks certain other differences within the ‘two nations’ such as serious challenges to equality of access to services and resources. Though efforts have been made to reduce poverty and inequality, painfully little has changed. To ignore the realities of these inequalities would be a case of total blindness, especially in South Africa where socio-economic inequality is heavily coupled with poverty.

As challenges, poverty and inequality are not incidental or temporary in nature.¹⁶ Not only are they closely interlinked, they are not natural: they have been historically constructed and sustained. Economic poverty in particular has a way of undermining the ability and capacity to understand, pursue and enjoy most rights and freedoms, including the right of access to good education; the right to health and wellbeing; the right of access to justice in courts of law; the right to social security, and so forth. In other words, it places a limitation on capacity and choices.¹⁷ This is an apt description of the lives of the poor in South Africa who, as a result, are socially excluded.

There is a close link between poverty and social exclusion.¹⁸ Those who emphasise the notion of social exclusion argue that the use of income indicators in measuring, conceptualising, understanding and responding to poverty overlooks an integral component of the whole picture. Olivier affirms that social exclusion “concerns inequality in many dimensions – economic, social, political and cultural”¹⁹ and this further supports Berghman’s description of social exclusion as a “multi-faceted deprivation”.²⁰ According to Berghman, social exclusion should be understood in terms of the failure of one or more of the following systems:

- the democratic and the legal system;
- the labour market system;
- the welfare state system, and
- the family and community system.

¹⁵J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 343.

¹⁶J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 343.

¹⁷S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 237.

¹⁸J Berghman “The Resurgence of Poverty and the Struggle against Exclusion: A New Challenge for Social Security in Europe?” (1997) 50 (1) *International Social Security Review* 4 – 6.

¹⁹M Olivier “The concept of Social Security” in *Social Security: A Legal Analysis* (2003) 42 – 43.

²⁰J Berghman “The Resurgence of Poverty and the Struggle against Exclusion: A New Challenge for Social Security in Europe?” (1997) 50 (1) *International Social Security Review* 6.

These systems promote multiple integration: civic integration; economic integration; social integration and interpersonal integration respectively. In other words, promoting such integration counters social exclusion. This dissertation will utilise Berghman's idea of social exclusion as multifaceted deprivation and examine how the absence of multiple integration leads to a process of impoverishment and disadvantage.²¹ The 'multifaceted deprivation approach' to poverty together with the notion of social exclusion allows an analysis of the status-based discrimination alongside the disadvantage attached to it. The analysis supports the key insights of substantive equality alluded to earlier. The dissertation will bring to fore the link between a substantive conception of equality and alleviation of poverty as represented through multi-faceted deprivation.

Poverty and inequality are traditionally measured in terms of (lack of) income. However, it has been pointed out that poverty is not just about money.²² The same goes for inequality. Poverty is not just a disadvantage. It is a state of deprivation and an insecure economic condition which poses a threat to social relations and social justice which is "complex and multifaceted"²³ and ultimately leads to social exclusion and discrimination. Poverty – irrespective of how it is measured – can be better understood by adopting a multifaceted approach.²⁴ The multifaceted or multi-dimensional approach to poverty and inequality was inspired by the work of Amartya Sen. He conceptualises poverty as a lack of 'capabilities' to attain 'functionings'.²⁵ Borrowing from Sen, Ruth Lister describes 'functionings' as "what a person actually manages to do or be".²⁶ The 'functionings' range from obtaining elementary nourishment to more sophisticated levels such as participation in the life of the community

²¹This research supports the idea of linking poverty to social exclusion to illustrate how social justice (redress and restitution) is fundamental in poverty reduction in South Africa. Research on poverty alleviation often seeks to explain poverty and inequality with reference to income or the use of monetary indicators. This research emphasises the multifaceted deprivations or multidimensional nature of poverty and focuses on the need to incorporate indicators related to dimensions other than income. In support of the multifaceted approach to poverty, the European Union has adopted a set of indicators to monitor social inclusion, including not only measures of income poverty and income inequality but also educational disadvantage, health inequalities, unemployment and worklessness. Such a multifaceted approach has been adopted by many EU member states and other developed countries (See T Atkinson, B Cantillon, E Marlier, & B Nolan *Social Indicators: The EU and Social Inclusion* (2002). The Millennium Development Goals, which now dominate the development agenda, have prioritised the multidimensional approach in measuring progress in alleviation of poverty in developing countries.

²²B Nolan & C Whelan "On the Multidimensionality of Poverty and Social Exclusion" in S Jenkins & J Micklewright (eds) *Inequality and Poverty Re-examined* (2007) 146.

²³S Liebenberg & B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *SAJHR* 335.

²⁴B Nolan & C Whelan "On the Multidimensional Nature of Poverty and Social Exclusion" in S Jenkins & J Micklewright (eds) *Inequality and Poverty Re-examined* (2007) 146.

²⁵A Sen *Resources, Values and Development* (1984) 307 – 324; see also R Lister *Poverty* (2004) 15 – 16.

²⁶R Lister *Poverty* (2004) 15 – 16.

and the achievement of self-respect.²⁷ Lister further illustrates that ‘capabilities’, on the other hand, “denote what a person can do or be, that is the range of choices that are open to her”.²⁸ In addition, Sen argues that money is a means to an end and the goods and services it buys are ways of attaining ‘functioning’. The link between money and ‘capabilities’ or ‘functionings’ partly depends on how individuals change the former into the latter.²⁹ This change of ‘capabilities’ into ‘functionings’ differs according to personal factors, which include age, sex, pregnancy, health, disability or body size. These factors affect the extent of the individual’s need. For example, Lister argues:

“The capability to function of a disabled person may be lower than that of a non-disabled person even if the former’s income is higher than the latter’s. This is because of the costs associated with the additional needs disabled people may have to meet in order to achieve similar ‘functionings’ to non-disabled.”³⁰

In other words, the degree of an individual’s wellbeing is reflected in the absence or lack of ‘capabilities’ and ‘functionings’. Poverty should therefore be understood as capability failure and not simply lack of income and low standard of living.³¹ Also, an individual’s ability to participate in society and afford a decent life is reiterated in terms of number of key ‘functionings’, and poverty is conceptualised as an absence of ‘capabilities’ to attain these ‘functionings’.³² This conceptualisation places more emphasis on an individual or subordinate group, giving more visibility to inequalities, disadvantages or socio-economic deprivations.

In South Africa poverty levels based on income levels lie at 49 per cent.³³ In 2000 it was estimated that 18 million people out of a population of roughly 42 million lived in absolute poverty.³⁴ In rural areas levels of poverty are higher (71 per cent) than in urban areas (27 per cent) and these levels are higher among blacks³⁵ (61 per cent) than among whites (1 per cent).

²⁷R Lister *Poverty* (2004) 15 – 16.

²⁸R Lister *Poverty* (2004) 15 – 16.

²⁹R Lister *Poverty* (2004) 15 – 16.

³⁰R Lister *Poverty* (2004) 15 – 16.

³¹A Sen *Inequality Re-examined* (1992) 109.

³²S Jenkins & J Micklewright “Introduction inequality and poverty: new directions” in S Jenkins & J Micklewright (eds) (2007) *Inequality and Poverty Re-examined* 9.

³³See UNDP Transformation for Human Development (Pretoria 2000); The Presidency Development Indicator (2010) 23; available at:

<http://www.presidency.gov.co.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010-pdf>(accessed 27/05/13).

³⁴UNDP Transformation for Human Development (Pretoria 2000).

³⁵The term “blacks” refers to Africans, Coloureds and Asians for the purpose of this study.

Poverty also has a clear gender dimension, with 60 per cent of female-headed households compared to 30 per cent of other households living in absolute poverty.³⁶ The 2012 General Household survey indicates that in the space of only 10 years the percentage of people dependant on social grants has more than doubled from 12.7 percent to 29.6 percent in 2012.³⁷ Liebenberg and Goldblatt argue that poverty is a consequence of choices about how we organise our society and the economy, and about the deeply inscribed patterns of group discrimination.³⁸ In this regard, if the organisation of the society and economy accentuates socio-economic inequality and disadvantages, then the failure to address this can be considered an act of discrimination against those who suffer as a result – the poor.

This study will further emphasise that for a substantive conception of equality to have an impact on the poor (who constitute the vast majority of those who suffered as a result of apartheid) the aim should be social inclusion. Social inclusion shares with the striving for equality a concern with the distributive allocations of resources to groups and individuals in a society. Social inclusion is described as a theory of how society can be integrated and harmonious. The theory embraces the idea that full participation in society reduces alienation from the community and increases conformity to social rules and laws, which in turn creates a platform for order.³⁹ Social inclusion promotes solidarity, among other things.⁴⁰ Interestingly, one of South Africa's foundational values is group solidarity – *ubuntu*.⁴¹ Can we affirm that substantive equality has the potential to reduce socio-economic disadvantages if social inclusion is the goal in South Africa?

³⁶UNDP Transformation for Human Development (Pretoria 2000).

³⁷General Household Survey Statistical Release PO318 available at <http://www.statssa.gov.za/publications/P0318August2012pdf>.

³⁸S Liebenberg & B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *SAJHR* 340.

³⁹See H Collins "Discrimination, Equality and Social Inclusion" (2003) *The Modern Law Review Limited* Vol 66 61 21- 26.

⁴⁰H Collins "Discrimination, Equality and Social Inclusion" *The Modern Law Review Limited* Vol 66 (2003) 61 21- 26.

⁴¹Justice Mokgoro of the Constitutional Court explains group solidarity or *ubuntu* as follows:

"Generally, *ubuntu* translates into humaneness. In its most fundamental sense it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality." (See *S v Makwanyane* 995 (3) SA 391 (CC) at para 308.)

In South Africa *ubuntu* has become a nation's pride with particular resonance in the building of democracy and pursuit of social justice. But can we say that redress strategies and the adoption of poverty as a ground of discrimination upholds the spirit of *ubuntu*?

1.3 Affirmative action

Affirmative action was implemented after 1994 to benefit those previously disadvantaged under apartheid. The current affirmative action policy in South Africa is primarily race-based with the goal of increasing the participation of the African population in the labour market.⁴²

Although affirmative action has contributed to the deracialisation of the public service in South Africa, critics point out that affirmative action has increased inequality within the African population by benefiting the apex of the class structure and not the masses who live in abject poverty.⁴³ Some commentators acknowledge this limitation and argue that affirmative action is not meant to be an anti-poverty strategy.⁴⁴ On the other hand, affirmative action has poverty-alleviating benefits in the form of jobs and admissions to education institutions. The essential goal of the policy is to advance the disadvantaged. In light of this sentiment, it has become arguable that poverty is a synonym for socio-economic disadvantage. This gives somewhat more weight to the view that the poor should benefit from affirmative action.

Can the design of affirmative action be reshaped to specifically address the legacy of poverty and inequality in South Africa? This study identifies affirmative action as a strategic element of substantive equality, because of its express focus on the disadvantaged and its potential to transform institutions. As pointed by Justice Zak Yacoob, the Constitution acknowledges that equality has not yet been achieved, that the achievement of equality is really a long and

⁴² This dissertation will focus on affirmative action in employment, and will not address other redress measures such as Broad Based Black Economic Empowerment (BBBEE), which promotes the advancement of black people within the economy as a whole. BBBEE can be defined as an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities. While the BBBEE process includes "employment equity" as one of the seven measurable elements, it also includes human resource development, enterprise development, preferential procurement, as well as investment, ownership and control of enterprises and economic assets. As such, it falls beyond the (narrow) scope of this dissertation. For more detail, see Broad Based Black Economic Empowerment, Act 53 of 2003.

⁴³ J Seekings & N Natrass *Class, race, and inequality in South Africa* (2005) 307- 8. Also see K Bentley & A Habib "Racial, redress, national identity and citizenship in post-apartheid South Africa" in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 21 and O Dupper "Affirmative Action: Who, How and How Long?" (2008) 24 *South African Journal of Human Rights* 426.

⁴⁴ See "Is affirmative action any use anymore? A look to the future." 6 July 2004, Breakwater lodge, Cape Town Institute for Justice and Reconciliation, available at: www.ijr.org.za/pastevents/AA%20debate%20report.pdf.download (accessed 11/05/13).

complex process, and that process is one of transformation of society.⁴⁵ This study will argue that if transformation is the agenda, remedial measures such as affirmative action have the potential to be substantively corrective because of their focus on the disadvantaged. A remedial measure presupposes an existing or previously discriminatory or disadvantaged setting. It is designed to redress imbalances occasioned by that setting.

Furthermore, the study will provide a reflection on how substantive equality, focusing on affirmative action, can contribute to the struggle to address poverty and inequality in South Africa. In addition, it aims to establish how the substantive conception of equality can advance the process of social inclusion. Most importantly, the study suggests that a paradigm shift is necessary in order to re-conceive of affirmative action as a policy that does not only focus on advancing equitable representation, but also on processes that provide for the development of human capacities.

1.4 Research motivation

Poverty in South Africa is characterised by acute physical deprivation as well as interclass inequality and disempowerment resulting from the oppressive structures of the legacy of apartheid. Much discussion on poverty and inequality deals with either macro-economic issues relating to underdevelopment and stagnation or household-level characteristics such as landlessness, lack of income and or lack of marketable skills. Sufficient attention to the mediating structures of class and race is lacking. Even the recent literature on social mobilisation and participatory approaches to poverty alleviation pays inadequate attention to issues of discrimination and social exclusion as factors inhibiting broad-based participation of the poor in government development strategies and programmes (such as affirmative action). In addition, there is recognition of the limitations of the traditional grounds of direct and indirect discrimination.⁴⁶ This has resulted in the increasing imposition of the positive duty to promote equality rather than just merely refraining from discrimination.⁴⁷ This provides the motivation for the research project. Moreover, the major political challenge for the post-apartheid government is the reduction of socio-economic disadvantage, since it has fallen far

⁴⁵Z Yacoob "Some Perspectives on the Movement Towards and the Struggle for Equality in our Context" in E Kalula & S Jagwanth *Equality Law: Reflections from South Africa and elsewhere* (2001) 2.

⁴⁶S Fredman "Achieving substantive equality in foreign and International law" in E Kalula and S Jagwanth (eds) in *Equality Law: Reflections from South Africa and elsewhere* (2001) 234 – 239.

⁴⁷S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214.

short of expectations in this regard.⁴⁸ The social security system that the government often portrays as a major weapon in the fight against poverty is over-stretched.⁴⁹

The research will contribute to the field of knowledge in non-discrimination law, equality law, labour law and social policy by analysing the strategic elements of substantive equality, particularly affirmative action. The analysis is driven by the need to set out a pragmatic approach to reducing poverty and ensuring social inclusion through the vehicle of substantive equality. In addition, it will explore how a restructured and refocused policy of affirmative action can ensure a more-broad based form of redress in South Africa. This study is a socio-legal inquiry and will be valuable to the debates around legal and social transformation in South Africa. Justice Yacoob affirms this approach in the following terms:

“We are lawyers, and quite naturally focus on the legal processes that are likely to bring the required change with great speed. But legal transformation by itself can never be enough; indeed an over-concentration on the legislative and judicial aspects can be counter-productive if they are totally out of step with the current social milieu and not accompanied by appropriate social transformation. Though legal transformation is essential it can in appropriate circumstances, be an impetus to limited societal change, the limitations and dangers of an exclusively legal struggle cannot be ignored. There must be both legal and social transformation.”⁵⁰

1.5 The objectives of the research project

Broad objectives:

- To critically assess the role that a substantive approach to equality can play in reducing poverty and socio-economic inequality in South Africa;
- To develop proposals on how to reconstruct the current approach to redress (primarily the role of affirmative action) in order to more effectively contribute to the struggle for socio-economic equality in South Africa.

Specific aims:

- To identify the deficiencies in the current approaches to redress;

⁴⁸J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 300.

⁴⁹T Bramble & F Barchiesi “Social Citizenship and the Decline of Waged Labour” in T Bramble & F Barchiesi (eds) *Rethinking the Labour Movement in the “new South Africa”* (2003) 125.

⁵⁰Z Yacoob “Some Perspectives on the Movement Towards and the Struggle for Equality in our Context” in E Kalula & S Jagwanth (eds) *Equality Law: Reflections from South Africa and elsewhere* (2001) Acta Juridica 3.

- To assess the impact that current redress strategies (in particular affirmative action) have had on the position of the poor in South Africa;
- To establish explore the interrelationship between affirmative action and the theory of substantive equality;
- To stimulate future debate on the topic of the relevance of affirmative action in the fight against poverty and inequality.

1.6 The research questions

Q.1) Is there a link between inequality and poverty? If so, how relevant is the link in the fight against poverty?

Q.2) Does social exclusion lead to poverty and socio-economic inequality?

Q.3) How should equality be conceptualised for the purpose of developing a framework that promotes effective redress and restitution in post-apartheid South Africa? Is the current approach to equality effective enough?

Q.4) If the reduction of socio-economic inequality is one of the goals of substantive equality, how can such a notion best be framed and steered by the state in order to achieve the stated goal?

Q.5) What can be done? Can a restructured and refocused policy of affirmative action ensure more broad-based forms of redress in South Africa to ensure coherence with the aims of substantive equality? And consequently, can substantive equality contribute to the strengthening of social inclusion in South Africa?

1.7 The research procedure and methodology

The research is literature based and makes use of the qualitative method of research, drawing from equality/anti-discrimination law and labour law. In addition, the study is not a strict legal study but a socio-legal investigation. As a result, I inevitably make use of research from other fields, including economics, sociology and political science (among others). Qualitative research is a well-established academic tradition in anthropology, sociology, history and geography. The researcher has chosen the qualitative method mainly because there is a greater emphasis on the respective researcher's understanding of the subject matter. This makes it possible to ask more probing questions which people might not wish to answer in a public forum. Furthermore, qualitative methods are also often necessary to investigate more complex and sensitive issues which are not easy to quantify, or where quantification would

be extremely time consuming and costly. In addition, qualitative methods can help to ‘smooth out’ contradictions and are in themselves a mysterious combination of strategies and collection of images of reality which allows the researcher to assess and explore different theoretical frameworks.

The study involves a collection of relevant information, analysis of relevant legislative provisions in texts, statutes, hard and electronic sources accessed on the internet, law journals (local and foreign), reports and working papers.

The study is divided into nine chapters. Chapter 1 focuses on a general background of the study. This is followed by the theoretical debate on the definition and conceptualisation of poverty and of (in)equality in Chapters 2 and 3. This was done to establish an understanding of the concepts of poverty and (in)equality, as these are the major concepts anchoring this study.

Chapter 2 explores the question: What is poverty? Poverty is a multidimensional phenomenon. In an attempt to explore its phenomenal nature, the chapter brings to the fore the different concepts that are related to poverty, such as social exclusion, vulnerability and inequality. The chapter further moves to highlight the different types of poverty: chronic poverty, transient poverty, absolute poverty and relative poverty. Each of these types of poverty reinforces the dynamic and multidimensional nature of poverty.

In addition, moving towards the definition of poverty requires different approaches: income-based approach; human needs approach; capabilities approach; and a participatory or consensual approach.⁵¹ It is arguable each of these approaches allows the proper targeting and sequencing of poverty-alleviation programmes. Once a definition of poverty has been ‘calculated’, measuring it is facilitated. In this regard, there are two main dimensions in which poverty is measured. Firstly, the monetary dimension measures poverty primarily in income terms.⁵² Secondly, the non- monetary dimension utilises a more-broad based approach not solely based on income.⁵³

An important aspect of Chapter 2 is the attempt to bring out the nature and scale of poverty in South Africa. As poverty has many ‘faces’, there are various determinants of poverty in

⁵¹P Townsend *The International Analysis of Poverty* (1993) 36.

⁵²See B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend, *Breadline Europe: The Measurement of Poverty* (2000) 165 - 166; R Lister *Poverty* (2004) 15 - 17; “Poverty in the Human Development Perspective: Concept and Measurement.” Human Development Report (1997) 16.

⁵³E Thorbecke “Multidimensional Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2007) 4.

South Africa, including, among others: population growth lack of mobility/rural location, unemployment, shrinking economic growth and the HIV/AIDS pandemic. Subsequently, a question is posed: Who are the poor? The chapter will attempt to answer the question by exploring the relationship between various status indicators (race, gender, children, education and class) and poverty. Another question is posed by the study: Where are the poor? Here Chapter 2 describes the poverty status in urban and rural areas, and the levels of poverty in South Africa's nine provinces.

Chapter 3 focuses mainly on providing an understanding of the conceptualisation of (in)equality and its link to poverty. In South Africa a significant reduction in overall inequality has been (still is) expected, yet overall inequality is not changing and may in fact have worsened since the end of apartheid. The chapter will examine the different types of inequality and the different societal systems within which inequality is generated. The chapter further reveals the main dimensions within which inequality occurs. These dimensions are drawn from the work of Nancy Fraser and Sandra Fredman. While redistributive equality could be a greater influence on poverty reduction and advancing equality in society, it cannot be achieved without recognition equality.⁵⁴ Fredman argues that constructing a concept of socio-economic equality or redistributive equality without considering the implications for status-based inequality or recognition inequality can be damaging and ineffective.⁵⁵

In Chapter 4 the research explores how a substantive conception of equality can contribute towards the alleviation of socio-economic disadvantage in South Africa. This includes a description of the aims of substantive equality (which I list as (i) breaking the cycles of disadvantage, (ii) affirmation of identity, (iii) equal respect for dignity and (iv) full social participation) and subjecting them to critical examination, specifically exploring the possible links they have with poverty and socio-economic inequality. These aims are drawn from the work of Sandra Fredman.⁵⁶

Chapter 5 focuses on affirmative action and the theory of substantive equality. The chapter focuses on the manner in which affirmative action is conceptualised, justified and implemented, and on whether the aims it seeks to achieve (among others, reducing socio-

⁵⁴S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214.

⁵⁵S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214.

⁵⁶S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214.

economic inequality and poverty) can be realised. The focus also shifts to a critical examination of affirmative action and the aims of substantive equality. The examination seeks to establish whether the aims of substantive equality can be realised through the policy of affirmative action so as to render the policy relevant in alleviating poverty.

The dissertation provides a comparative study in Chapter 6. The Chapter explores the implementation and impact of affirmative action in the United States, Canada and India. Specific attention is given only on those aspects of affirmative action policies in these countries that ‘speak’ to socio-economic disadvantage (and hence substantive equality.) Comparative analyses of policies are inevitably impeded by the vast differences that exist across jurisdictions and societal systems. However, the value of the comparative analysis lies in the fact that experiences in one country may inform the development and implementation of similar policies in another country.

An overview of the implementation of affirmative action in South Africa will be given in Chapter 7. The overview will highlight the impact of the policy with regard to the beneficiaries of the policy and types of benefits. The chapter will further explore the race vs. class criterion debate. The affirmative action debate has been exclusively focused on race. Various authors are of the view that such exclusivity refuses acknowledgement of the fact that (socio-economic) disadvantage does not only follow the axis of race, but that it intersects with other status indicators such as class, gender and cultural divides.

Chapter 8 will pursue the quest for a reconceptualisation of affirmative action within the realm of substantive equality. The pursuit is based on exploring how the policy can be redesigned to be more effective in contributing to the reduction of poverty and inequality in the workplace (and South African society). The chapter will attempt to create a platform for a possible reconceptualisation of the affirmative action policy. This will be done by focusing on some ‘facets’ that can be considered to trigger a reconceptualisation of affirmative action as a policy that can be utilised to enhance human capacities.

The dissertation ends with Chapter 9 which attempts an overall evaluation of the study. This chapter also highlights key legal, policy and other recommendations in order to ensure affirmative action becomes a more effective tool in the fight against poverty and inequality in South Africa.

CHAPTER TWO: WHAT IS POVERTY?

“Poverty is not knowing where your next meal is going to come from, and always wondering when the council is going to put your furniture out and always praying that your husband must not lose his job. To me that is poverty.”⁵⁷

“My child broke his leg and had to go to hospital. I sold my three cows to pay for transport and treatment. Now I have nothing.”⁵⁸

2.1 Introduction

Various studies have attempted to describe the phenomenon of poverty. Research on the definition and measurement of poverty can be traced back to the codification of poor laws in medieval England through to empirical research by Seebohm Rowntree and beyond. In 1901 Rowntree was the first to publish a study on the poverty standard for individual families based on estimates of nutrition and other requirements.⁵⁹ In South Africa, as well as around the world, defining and measuring poverty are contentious topics. The literature indicates that the way that poverty is defined or measured is an inherent part of political, policy and academic debates. However, the absence of universally acknowledged data makes it problematic for the state to develop strategies that are able to address the causes and effects of poverty. In addition, the insufficiency of data hampers an understanding of the phenomenon. This in turn affects the appropriateness of state interventions. Nonetheless, poverty is one of the most urgent socio-economic factors that needs to be addressed. South Africa is an upper-middle-class country with most of its households experiencing abject poverty or continuing vulnerability to being poor. The legacy of apartheid has left South Africa with a divided society with extensive social and economic inequalities.

The aim of this chapter is consequently to contribute to the theoretical debate on the definition and conceptualisation of poverty. Most specifically, the chapter seeks to establish an understanding of the nature of poverty in South Africa as it is one of the major concepts anchoring this study. The first part of the chapter explores some of the concepts related to poverty, including social exclusion, vulnerability and inequality. Following on from that, the

⁵⁷Mrs Witbooi, Philipstown, Karoo. Quoted in F Wilson & R Ramphela *Uprooting Poverty: The South African Challenge* (1989)14.

⁵⁸Farmworker foreman, Eastern Cape. Quoted in South African Poverty Participatory Assessment (SA-PPA) Report (1997) 75.

⁵⁹See S Rowntree *Poverty: A Study of Town Life* (1901).

focus will shift to different types of poverty. This is followed by the discussion on the definition of poverty with a focus on proposing a working definition. The chapter will then give an outline of the issues around measuring poverty with reference to the conventional monetary and non-monetary dimensions of measuring poverty. An overview of how poverty manifests itself in South Africa will be provided in section four, where various determinants of poverty in South Africa will be described. In addition, section four will attempt to answer questions such as: who and where are the poor? The chapter will end with some concluding remarks on the findings which have emerged from the discussion so far.

2.2 The meaning of poverty

2.2.1 Different concepts related to poverty

a) Poverty and social exclusion

“An individual is socially excluded if he or she does not participate in key activities of the society in which he or she lives.”⁶⁰ This includes groups of people who are subject to different patterns of disadvantage, including poverty. In European political and academic debates the concept of social exclusion has somewhat overshadowed that of poverty.⁶¹ This term was adopted by the European Commission in the late 1980s partly to accommodate the reluctance of some member governments to use the word ‘poverty’.⁶² Lister argues that social exclusion can be understood and used as a lens that brings to the fore aspects of poverty, provided it is not used politically to camouflage poverty and inequality.⁶³ She adds that it indicates a way of looking at the concept of poverty rather than an alternative to it. It should be noted that an individual can be socially excluded without being poor.

b) Poverty and vulnerability

In most development studies vulnerability is often used as a proxy for poverty. This is attributed to the fact that certain incarnations of vulnerability share links with poverty. These incarnations expose people to risks and in particular to the threat of failing to meet minimum

⁶⁰T Burchardt, J Le Grand & D Piachaud “Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure” in Hills *et al Understanding Social Exclusion* (2002) 30.

⁶¹The concept of social exclusion is more political than sociological in origin. It was first utilised in France in the 1970s and early 1980s referring to marginalised groups who had fallen through the net of the French social insurance system. In Italy social exclusion is a legal concept, *esclusione sociale*, which is defined by statute n.328 (11-8-2000) as poverty combined with social alienation. This statute allowed the institution of a state investigation commission called *Commissione di indagine sull’Esclusione Sociale* (CIES) to make an annual report to the government on legally expected issues of social exclusion.

⁶²J Berghman “The Resurgence of Poverty and the Struggle against Social Exclusion” *International Social Security Review* (1997) 50 (1) 3-21.

⁶³R Lister *Poverty* (2004) 74.

standards of living. This would include aspects such as educational attainment; household expenditures; living in remote and marginalised areas; disability; people infected and affected by HIV/AIDS and lack access to proper health care and nutrition; members of disadvantaged groups such as illegal immigrants; seasonal employees and the unemployed. Such threats, or incarnations rather, cause forms of affliction which are hardships in their own right. Furthermore, individuals in abject poverty experience most of the above incarnations of vulnerability – and at times all of them.⁶⁴ The inclusion of a category of people termed ‘extremely vulnerable’ enhances the notion of poverty considerably.⁶⁵

A number of households and population groups, while not currently ‘in poverty’ are vulnerable to situations that could easily lead them into poverty: a bad harvest, a lost job, an unexpected expense, an illness or an economic downturn.⁶⁶ It is the poor who experience the greatest level of adversity from natural or social shocks. They are situated in the ‘most disaster-prone areas’, vulnerable shelters, at great risk of crop and employment loss in times of crisis, and lack means of social protection which they can resort to when affected.⁶⁷ These categories of people are victims of inherent vulnerabilities, which include factors such as discrimination based on status (race, class or gender). In this regard vulnerability is the present probability of risk of being in poverty or falling into deeper poverty in the future. It should be noted, however, that vulnerability is not the same as poverty though the meaning of the notions ‘vulnerability to being poor’ and ‘being in a state of poverty’ remains elusive.⁶⁸

c) Poverty and inequality⁶⁹

According to Lister, what distinguishes poverty from inequality is the experience of deprivation in both its material and social forms.⁷⁰ The depth and nature of this deprivation

⁶⁴C Calvo & S Dercon “Risk and Vulnerability to Poverty” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 217 – 226.

⁶⁵M Qizilbash “A note on the Measurement of Poverty and Vulnerability in the South African Context.” (2002) *Journal of International Development* Vol. 14 757 – 772.

⁶⁶The world economic recession after 2008 saw the loss of thousands of jobs worldwide as companies retrenched and laid off labour.

⁶⁷See “Sustainable Social Development in a Period of Rapid Globalisation: Challenges, Opportunities and Policy Options” research carried out by the Economic and Social Commission for Asia and the Pacific for United Nations (2002) 14. See also C Moser “Confronting Crisis: A Comparative Study of Household Responses to Vulnerability in Four Poor Urban Communities” (1996) *Environmentally Sustainable Development Studies and Monographs Series* No. 8. Washington: The World Bank; C Rakodi “Poverty Lines or Household Strategies: A Review of Conceptual Issues in the Study of Urban Poverty” (1995) *Habitat International* Vol. 19(4) 407- 26 and J Swift “Why are Rural People Vulnerable to Famine?” (1989) *IDS Bulletin* 20 (2) 8-15.

⁶⁸G Kamanou & J Morduch “Measuring Vulnerability to Poverty” (2002) Discussion Paper No. 2002/58 United Nations University, World Institute for Development Economic Research.

⁶⁹The link between poverty and inequality will be explored further in Chapter 3 of this study.

will depend on the length of any spell of poverty and whether it is a once-off or recurrent phenomenon.⁷¹ Countries with the lowest levels of poverty tend to be more equal overall than countries with higher levels.⁷² Ravallion argues that “poor people in high inequality countries face a double handicap: such countries will tend to experience lower growth rates and the growth that does occur will have to impact on poverty.”⁷³ Several poverty analysts have concluded that poverty cannot be effectively tackled unless there is a reduction of inequality, which reinforces the correlation between the two. Poverty is not just one aspect of inequality – it is the unacceptable face of extreme inequality.⁷⁴ As affirmed in the recommendations by the World Summit for Social Development 2003, it is crucial for poverty reduction policies and programmes to include socio-economic strategies with redistributive dimensions that will reduce inequality. Addressing inequality requires that a balance be achieved between many complex countervailing socio-economic forces that influence the level of inequality, the rate of economic growth and the impact of poverty-reduction efforts. Although economic growth is necessary, relying on growth alone to reduce poverty is clearly insufficient. Serious attention must also be directed to the many other factors contributing to inequality. The next section will discuss the different types of poverty.

2.2.2 Types of poverty

2.2.2.1 *Chronic poverty and transient poverty*

Poverty or being poor is a dynamic state. Individuals or subordinate groups or even nations can have their poverty conditions change over time and they are then referred to as transient poor entities.⁷⁵ They experience poverty temporarily. On the other hand, chronically poor entities experience poverty at each successive observation; this is the situation with most African countries, including South Africa. A household or individual is understood to be in chronic poverty when the condition of poverty endures over a period of time. Different researchers propose various time periods as characteristics of chronic poverty (e.g. 6 months, 10 years), usually taken to mean that the household or individual remains beneath the poverty threshold. Alternatively, and perhaps more meaningfully, chronic poverty can be understood

⁷⁰R Lister *Poverty* (2004) Chapter 1.

⁷¹R Lister *Poverty* (2004) Chapter 1.

⁷²UNICEF 2000: *A league table of child poverty in rich nations*. Report card1. Florence: Innocenti Research Centre.

⁷³M Ravallion “Inequality is Bad for the Poor” in S Jenkins and J Micklewright (eds) *Inequality and Poverty Re-examined* (2007) 50.

⁷⁴P Alcock *Understanding Poverty* (2006) 7.

⁷⁵The rest of this paragraph heavily draws from the *Labour Market Review* September 2003, Department of Labour, South Africa.

as a household's or individual's inability to improve its circumstances over time or to sustain itself through difficult periods. As such, chronic poverty can be a function of the individual's characteristics (e.g. elderly, disabled), or of the environment (e.g. sustained periods of high unemployment, landlessness), or both. Many households experience chronic poverty in South Africa but its extent is not known with certainty. At policy level, differentiating chronic and transient poverty is imperative in poverty research as this ensures that poverty-alleviation measures are targeted and sequenced appropriately.

2.2.2.2 *Absolute poverty and relative poverty*

Booth and Rowntree utilised definitions in the late nineteenth and twentieth century which were supposedly absolute. In their research poverty was defined in terms of survival linked to a basic standard of physical capacity necessary for production and reproduction.⁷⁶ The poor, in absolute terms, are those who do not have enough money or means of consumption to put them above adequate minimum standard of living. This type of poverty is viewed largely in monetary terms. According to Woolard and Leibbrandt, absolute poverty is an objective and scientific determinant as it places a focus on the minimum requirement needed to sustain life.⁷⁷ Absolute poverty is defined in terms of survival, with reference to the actual needs of the poor.⁷⁸ In other words, absolute poverty is a minimalist condition and based on the notion of subsistence and attainment of minimal physical efficiency.⁷⁹ Alternatively, poverty can be regarded as relative deprivation. Townsend rejects the notion of subsistence under conditions of absolute poverty. He argues that absolute poverty does not take into account the social context upon which absolute poverty is based. He describes poverty relatively in the following terms:

“Individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities and have the living conditions and amenities which are customary, or are at least widely encouraged or approved, in the societies to which they belong. Their resources are so seriously below those commanded by the average individual or family that they are, in effect, excluded from ordinary living patterns and activities”.⁸⁰

⁷⁶S Rowntree *Poverty: A Study of Town Life* (1901).

⁷⁷I Woolard & M Leibbrandt (1999) “Measuring poverty in South Africa” Development Policy Research Unit (DPRU) Working Paper 99/33 University of Cape Town 9.

⁷⁸I Woolard & M Leibbrandt (1999) “Measuring poverty in South Africa” Development Policy Research Unit (DPRU) Working Paper 99/33 University of Cape Town 9.

⁷⁹R Lister *Poverty* (2004) 21.

⁸⁰P Townsend *Poverty in the United Kingdom* (1979) 31.

From Townsend's definition it is evident that the concept of relative poverty places the emphasis on social exclusion, non-involvement and non-participation. Ravallion points out that relative poverty is based upon comparison of conditions of prevailing living standards in the community being researched.⁸¹ Townsend identifies some of these conditions of life as involving diet, amenities, standards and services.⁸² These conditions reflect the multidimensional nature of poverty. It is imperative to note that the understanding of human needs is essential to distinguishing between absolute versus relative poverty.⁸³ Human beings are social as well as physical beings, whose needs are reflected in a range of social expectations and responsibilities.⁸⁴

2.2.3 Moving towards the definition of poverty

2.2.3.1 Introduction

Any definition of poverty has to be understood in relation to particular social, cultural and historical contexts.⁸⁵ This has implications for studies which require comparative perspectives on poverty. According to the 1997 Human Development Report, the general consensus is that poverty has been mainly defined according to three approaches: income approach; basic human needs approach; and capability approach. However, there is another approach emerging from research termed participatory approach. All four approaches will be discussed in this section.

2.2.3.2 Income approach

This indicates whether an individual or household is poor if their income is below the country's living standard.⁸⁶ The income perspective defines poverty simply in terms of lack of income. It may also be taken to refer to a limited possession of money or marketable resources that can be used to obtain necessities. Put simply, the definition of poverty as lack of income focuses on the flow of material goods and services.⁸⁷ In addition, under the income approach, "a person is poor if and only if her income level is below the defined poverty

⁸¹M Ravallion "Poverty lines in Theory and Practice" (1998) LSMS Working Paper No. 133.

⁸²P Townsend *The International Analysis of Poverty* (1993) 36.

⁸³R Lister *Poverty* (2004) 24.

⁸⁴R Lister *Poverty* (2004) 24.

⁸⁵R Lister *Poverty* (2004) 24.

⁸⁶A living standard is also termed poverty line referring to a monetary threshold which is used determine the poor and non-poor. More is discussed on the poverty line in the next section on measurement of poverty.

⁸⁷S Maxwell "The Meaning and Measurement of Poverty". Overseas Development Institute (ODI) Poverty Briefing February (1999) 3 available at <http://www.odi.org.uk/resources/download/2277.pdf> (accessed on 02/02/10).

line.”⁸⁸ The cut-off poverty line is defined in terms of having enough income for a specified quantity of food. It is now well known that disposable income and direct indicators of economic standard, such as consumption or being dependent on social assistance and so on, are very low in general. This could be attributed to several factors including fluctuations in income and the average long-term ability to consume and accumulate resources. Halleröd states that to say that those with an income below 50% of the median equivalent disposable income are poor is not a definition of poverty (as suggested by the income approach).⁸⁹ He further argues that this approach is simply an “empirical operationalisation aimed at dividing the population into two subgroups, the poor and the non-poor”, revealing very little about what it means to be poor.⁹⁰ He further points out that living standard costs differ per individual and that health problems can, for example, increase needs, resulting in different levels of economic standard among people with the same amount of economic resources.⁹¹ Should poverty therefore be defined according to needs?

2.2.3.3 Human needs approach

The human needs approach has been used by international organisations such as the International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Bank in their discussions about poverty in third-world countries. It includes the need for provision of social services to prevent individuals from falling into poverty. Veit-Wilson defines human needs as:

“The full range of intangible and material resources that are required over time to achieve the production, maintenance and reproduction of the fully autonomous, fully participating adult human in the particular society to which he or she belongs.”⁹²

This approach was pioneered by Townsend, who defined poverty not simply as lack of income but also as exclusion from the customary conditions and amenities of society.⁹³ Mack and Lansley further developed the human needs approach by defining poverty as a condition

⁸⁸“*Poverty in the Human Development Perspective: Concept and Measurement.*” Human Development Report 1997 16.

⁸⁹B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend *Breadline Europe: The Measurement of Poverty* (2000) 165- 166.

⁹⁰B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend *Breadline Europe: The Measurement of Poverty* (2000) 165- 166.

⁹¹B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend *Breadline Europe: The Measurement of Poverty* (2000) 165- 166.

⁹²J Veit –Wilson “Poverty and the adequacy of social security” in J Ditch (ed) *Introduction to Social Security* (1999) 85.

⁹³P Townsend *The International Analysis of Poverty* (1993) 36.

in which people have to live without the things which society as a whole regards as necessities.⁹⁴ These necessities, according to Townsend, included personal consumption items and social services. The nature of society has an effect on certain needs. Hence Townsend point out that needs cannot be separated from social, historical and cultural contexts.⁹⁵ Accordingly, the history and current conditions of a society have an effect on what a particular society perceives as basic needs. The provision of proper service delivery by the state is thus vital to prevent individuals and households from becoming poor. The human needs approach embraces two important elements: i) sufficient income to maintain a required standard of living (which involves enough food, shelter, clothing and certain household goods); and ii) sufficient vital services such as health services, security services education, safe drinking water and sanitation.⁹⁶ Put simply, the human needs perspective defines poverty as the deprivation of the services and material requirements to satisfy an acceptable standard of basic needs.

According to Thorbecke, needs or necessities are not so clear cut and determining a threshold is almost impossible.⁹⁷ For instance, different kinds of freedoms (from oppression, of religion, of expression), security, and the degree of discrimination and social exclusion which an individual maybe considered to be experiencing are difficult to measure. In addition, setting minimum levels for a basic need such as shelter (number of square meters per person, quality of roof and floor) is difficult. Nolan and Whelan argue that the needs perspective is also problematic in that needs differ across households.⁹⁸ They further elaborate that the difficulties surface at both the conceptual and empirical level.⁹⁹ However, Thorbecke states that basic needs cannot be ignored, as being deprived of these needs has the potential to deepen or push an individual into a state of poverty.¹⁰⁰

⁹⁴J Mack & S Lansley *Poor Britain* (1985) 45.

⁹⁵P Townsend *The International Analysis of Poverty* (1993) 31.

⁹⁶P Townsend *The International Analysis of Poverty* (1993) 31.

⁹⁷E Thorbecke "Multidimensional Poverty: Conceptual and Measurement Issues" in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2007) 152.

⁹⁸B Nolan & C Whelan "Multidimensionality of Poverty and Social Exclusion" in S Jenkins & J Micklewright (eds) *Inequality and Poverty re-examined* (2007) 152.

⁹⁹B Nolan & C Whelan "Multidimensionality of Poverty and Social Exclusion" in S Jenkins & J Micklewright (eds) *Inequality and Poverty re-examined* (2007) 152.

¹⁰⁰E Thorbecke "Multidimensionality Poverty: Conceptual and Measurement Issues" in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2007) 152.

2.2.3.4 Capabilities approach

The approach views poverty as capability deprivation. The capability approach to defining poverty was pioneered by Amartya Sen. His work on ‘functionings’ and ‘capabilities’ has been influential in defining poverty within a multidimensional framework. At the heart of his approach is an understanding of living as involving ‘being and doing’ and he uses the terms ‘functionings’ and ‘capabilities’ as expressions of the approach. According to the capability approach, a functioning is an achievement and a capability is the ability to achieve. On the other hand, capability is used broadly to refer to “the alternative combination of functionings the person can achieve from which he/she can choose one collection”.¹⁰¹ The capability approach reconciles the notions of absolute and relative poverty, since relative deprivation in incomes and commodities can lead to an absolute deprivation in minimum capabilities.¹⁰² Moreover, the capability approach carries the presumption that individuals have the ability and freedom to choose an appropriate non-poor functioning. Poverty is then defined as the absence of some basic capabilities to function, where basic capabilities are “the ability to satisfy certain crucial important functionings up to certain minimally adequate levels”.¹⁰³

Alkire argues that the effectiveness of the capability approach can be attributed to, among other factors, its flexibility and exposition of “internal pluralism” at a substantial level. He further points out that this allows the approach to be developed and applied in different ways.¹⁰⁴ Part of the development of the capability approach has been through criticism. The most extensive criticism is related to the issue of how far capability can be operationalised.¹⁰⁵ Some commentators have criticised Sen in this regard for not providing a coherent list of important capabilities. He simply insists that certain capabilities are valuable.¹⁰⁶ According to Clark, this line of attack “misrepresents Sen’s actual position and conflicts with the available evidence on value formation”.¹⁰⁷ In an attempt to complete the capability approach, Nussbaum develops a specific list of basic human capabilities, which includes: i) life; ii)

¹⁰¹ A Sen *Inequality Examined* (1992) 40; and A Sen “Capability and Well-being” in M Nussbaum & A Sen (eds) *The Quality of Life* (1993) 31.

¹⁰² Human Resource Development Canada, Annual Report (2007).

¹⁰³ A Sen *Inequality Examined* (1992) 40; and A Sen “Capability and Well-being” in Nussbaum & Sen (eds) *The Quality of Life* (1993) 31.

¹⁰⁴ S Alkire *Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction* (2002) 8- 11; 28-31.

¹⁰⁵ R Sugden “Welfare Resources and Capabilities; A Review of Inequality Reexamined by Amartya Sen” (1993) *Journal of Economics Literature* Vol. 31 1947- 1962 1953.

¹⁰⁶ M Nussbaum “Nature, Function and Capability: Aristotle on Political Distribution” (1988) *Oxford Studies in Ancient Philosophy* (1988) Suppl. Vol. 145 – 84.

¹⁰⁷ D Clark “The Capability Approach: Its Development, Critiques and Recent Advances” (2005) Global Poverty Research Group (GPRG) Paper GPRG WPS-032 6.

bodily health; iii) bodily integrity; iv) senses, imagination and thought; v) emotions; vi) practical reason; vii) affiliation; viii) other species; ix) play; and x) political and material control over one's environment.¹⁰⁸ She further points out that the list makes provision for basic political principles that should be embodied in constitutional guarantees, human rights legislation and development policy.¹⁰⁹ However, Sen emphasises that listing important capabilities is not the issue. The problem is an insistence on one predetermined canonical list of capabilities chosen by theorists.¹¹⁰ He argues that there is a need for "social discussions or public reasoning". Having a fixed list based on theory is denying the possibility of productive public participation on what should be included and the reasons for this.¹¹¹ A public discussion strengthens the constructive role of democracy. "It is the people directly involved who must have the opportunity to participate in deciding what should be chosen".¹¹²

2.2.3.5 Participatory approach/Consensual approach

Recent years have seen the invention, evolution and spread of participatory approaches and methods and their contributions to the understanding of poverty. Participatory poverty assessment is "an instrument for including poor people's views in analysis of poverty".¹¹³ The participatory approach aims to elicit poor people's own conceptions of poverty and to articulate their own priorities.¹¹⁴ This approach was pioneered by Mack and Lansley in their *Breadline Britain Survey*.¹¹⁵ In this approach a survey is conducted among the general

¹⁰⁸See M Nussbaum *Creating Capabilities: The Human Development Approach* (2011) 33-34; M Nussbaum "Well-being, Contracts and Capabilities" in L Manderson (ed) *Rethinking Well-being* (2005) 27- 44; M Nussbaum "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) *Feminist Economics* 9(2-3) 33 – 59 41 – 43.

¹⁰⁹M Nussbaum "Human Capabilities, Female Human Beings" in M Nussbaum & J Glover (eds) *Women, Culture and Development* (1995) 87; M Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 74 – 75.

¹¹⁰A Sen "Capabilities, lists and Public Reason: Continuing the Conversation"(2004) *Feminist Economics* Vol.10 (3) 77 – 80 71.

¹¹¹A Sen "Capabilities, lists and Public Reason: Continuing the Conversation"(2004) *Feminist Economics* 10(3) 77 – 80 71.

¹¹²A Sen *Development As Freedom* (1999) 31 – 32.

¹¹³R Chambers "Participation, Pluralism and Perception of Poverty" in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2008) 142.

¹¹⁴R Chambers "Participation, Pluralism and Perception of Poverty" in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2008) 142.

¹¹⁵J Mack & S Lansley *Poor Britain* (1985) 45. In addition, 'Poverty First Hand' project is an example in the UK of trying to use participatory research processes to explore poverty at a national level. The authors describe it as a 'pilot project'. It grew out of a meeting in York held in 1990 to discuss the participation of people living in poverty in actions to tackle poverty. The researchers described the project as adopting an 'inclusive approach'. (see P Beresford, D Green, R Lister & K Woodard *Poverty First Hand: Poor People Speak for Themselves* (1999)).

Freideres asserts that the concept of participatory research emerged in the 1970s from development work in low-income countries. ('Participatory Research: An illusionary Perspective' in J Frideres (ed) *A World of Communities: Participatory Research Perspectives* (1992) 3 – 4).

populace to determine what they deem as necessities in life. These include goods and activities which are regarded as essentials for participation in society. The participatory approach inherently assumes that all groups in society aspire to the same lifestyle and thus share the same perceptions as to what kinds of thing constitute necessities.¹¹⁶ Various tools are used such as:

- role playing;
- public meetings;
- wealth ranking and social mapping;
- participatory diagramming livelihood analysis.

The participatory approach facilitates a derivation of perceptions of poverty from the poor themselves. This allows for an appropriate notion of poverty to be defined through subjective indicators. One of the outstanding South African studies that used this methodology was that carried out by the South African Participatory Poverty Assessment (SA-PPA) team.¹¹⁷ From this study, which was based on a set of interviews across the country, specific descriptions of poverty emerged. The essential features of being poor that came to light were:¹¹⁸

- Alienation from the community. The poor are isolated from the institutions of kinship and community. The elderly without care from younger family members were seen as “poor”, even if they had a state pension, which provided an income that is relatively high by local standards. Similarly, young single mothers without the support of older kin or the fathers of their children were perceived to be “poor”;

The literature indicates that the participatory research technique was first brought to international recognition in 1972, when Paolo Freire, within the context of his work with adult literacy programmes, coined the term “conscientisation”. Freire believes that people who have lived their lives in marginalised and deprived conditions need to develop a critical insight into the structures and ideas in society and themselves that place and maintain them in positions of inequality.

¹¹⁶M Noble, A Ratcliffe & G Wright *Conceptualizing, Defining and Measuring Poverty in South Africa: An Argument for a Consensual Approach* (2004) 8.

¹¹⁷The transition into a post-apartheid era witnessed renewed interest in poverty and inequality heralded by the national survey on living standards undertaken by SALDRU IN 1993. This study provided the first data on the extent and distribution of poverty across South Africa. This quantitative survey was followed by the SA-PPA. The SA-PPA was carried out in connection with World Bank’s Country Poverty Assessment exercises in a number of other countries in Africa. The purpose of the exercises is to provide a fuller and more integrated understanding of poverty from the perspective of those who are poor and to fill the gaps which the quantitative study could not readily explain. In particular, the multidimensional experience of being poor and the perceptions of the poor of the causes and relief of their poverty could not be assessed. This need initiated a process which eventually led to the SA-PPA exercise, which was carried out between December 1994 and February 1997.

¹¹⁸See SA-PPA (1998) “The Experience and Perceptions of Poverty: The South African Participatory Poverty Assessment”. Data Research Africa, Durban. See also the 1996 Poverty Hearings which were co-ordinated by the South African NGO Coalition (SANGOCO), the South African Council of Churches (SACC), the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE).

- Food insecurity. Participants saw the inability to provide sufficient or good food for the family as an outcome of poverty. Households where children went hungry or were malnourished were seen as living in poverty;
- Crowded homes. The poor were perceived to live in overcrowded conditions and in homes in need of maintenance. Having too many children was seen as a cause of poverty – not only by parents, but by grandparents and other family members who had to assume responsibility for the care of children;
- Usage of basic forms of energy. The poor lack access to safe and efficient sources of energy. In rural communities the poor, particularly women, walk long distances to gather firewood. The time required for this constrains their ability to engage in more productive activities. In addition, women reported that wood collection increases their vulnerability to physical attack and sexual assault;
- Lack of adequate and well-paid secure jobs. The poor perceived lack of employment opportunities, low wages and lack of job security as major contributing factors to their poverty;
- Fragmentation of the family. Many poor households are characterised by absent fathers or children living apart from their parents. Households may be split over a number of sites as a survival strategy.

In contrast, wealth was perceived to be characterised by good housing, the use of gas or electricity, and ownership of major durable household assets, such as a television or fridge. Wealth means knowing that there is enough food for your children and owning an electric stove on which to cook it.

The above indices relate closely to the meaning ascribed to overall poverty in the declaration adopted in 1995 at the World Summit on Social Development, Copenhagen. ‘Overall poverty’ was described as:

“Lack of income and productive resources to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments and social discrimination and exclusion. It is also characterised by lack of participation in decision making and in civil, social and cultural life. It occurs in all countries: as mass poverty in many developing countries, pockets of poverty amid wealth in developed countries, loss of livelihoods as a result of economic recession, sudden poverty as a result of disaster or conflict, the poverty of low-wage workers, and

the utter destitution of people who fall outside family support systems, social institutions and safety nets.”¹¹⁹

The approaches to defining poverty discussed above demonstrate its multifaceted nature. The concept of poverty clearly extends beyond its economic domain. While many of the indicators or attributes for a definition of poverty are related to lack of sufficient income, the non-material aspects of the experience of poverty cannot be ignored. Noble *et al* pointed out that a consensual or democratic definition of poverty in South Africa is the most appropriate approach.¹²⁰ They further argue that it will help the country overcome the deep social divisions that are apartheid’s legacy and become a more equal and unified society.¹²¹

Accordingly, defining poverty broadly might seem to be an alternative. But Nolan and Whelan argue for a definition which is narrow. They base their argument on the view that a broad definition tends to lose sight of the distinctive “core notion of poverty”.¹²² An income perspective definition would be useful in defining an absolute standard under which no individual should fall. Alternatively, human needs and participatory definitions would be effectual indicators of people’s individual experiences. One would envision a basic needs or participatory definition constructive in the development of strategies that seek to advance social inclusion and reduce socio-economic disadvantage. This study will define poverty in line with the definition given in the 1998 Poverty and Inequality Report. The report defines poverty as “*inability of individuals, households or entire communities to command sufficient resources to satisfy a socially acceptable minimum standard of living*”. The definition is loaded with key words that reflect the importance of each of the above approaches: ‘*inability*’ and ‘*command*’ – the capability approach; ‘*sufficient resources*’ – basic needs perspective; ‘*socially acceptable*’ – participatory approach; and ‘*minimum standard*’ – income perspective. The contention is that such a definition of poverty could be an effective barometer of development strategies which to seek to promote social inclusion. The following section will examine the methods used to measure or estimate the degree of poverty.

¹¹⁹United Nations 1995.

¹²⁰M Noble, A Ratcliffe & G Wright *Conceptualising, Defining and Measuring Poverty in South Africa: An Argument for a Consensual Approach* (2004) 4.

¹²¹M Noble, A Ratcliffe & G Wright *Conceptualising, Defining and Measuring Poverty in South Africa: An Argument for a Consensual Approach* (2004) 8.

¹²²B Nolan & C Whelan *Resources, Deprivation and Poverty* (1996) 193.

2.3 Measuring poverty

2.3.1 Introduction

According to Alcock, attempts by politicians, academics and most researchers to define poverty entails being able to measure it. There are two schools of thought that have surfaced in regard to the measurement of poverty. One has defined and measured poverty primarily in income terms and the other has utilised a more-broad based approach not solely based on income. The latter has been influenced by seminal work by Rawls, Sen and others in order to emphasise that research on poverty should extend to a consideration of lack of basic needs and capabilities. Just like defining poverty, there is no faultless or accurate way of measuring the level of poverty in a society. This study will nonetheless examine the measurements of poverty in relation to the definition proposed in section 2.2.3. As a result, both the conventional monetary indicators and non-monetary indicators such as human development and human poverty indicators will be discussed.

2.3.2 Monetary dimension

Most empirical research by economists in the developing world has been concerned with measuring poverty in terms of income and consumption. Chambers suggests that economists construct their own reality of poverty based on reported income or consumption.¹²³ The rationale of the monetary dimension is that those falling below average income or a given threshold are unlikely to be able to participate fully in society. This threshold is often termed the poverty line. In principle a non-poor person is above the poverty line and is “thought to possess the potential purchasing power to acquire the bundle of attributes yielding a level of wellbeing sufficient to function”.¹²⁴

Poverty line/Poverty datum line

Identifying and measuring poverty using the monetary dimension requires determining a poverty line.¹²⁵ In South Africa there is no formal poverty line and researchers use a variety of approaches. There is no unique way of defining a poverty line.¹²⁶ It represents a standard

¹²³R Chambers “Participation, Pluralism and Perception of Poverty” in N Kakwani & J Silber (eds) *The Many Dimensions of Poverty* (2008) 142.

¹²⁴E Thorbercke “Multidimensional Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 4.

¹²⁵N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) xiv.

¹²⁶“Some economists have suggested defining the poverty line on the basis of subjective questions on the level of satisfaction of individuals or households with their income or standard of living, and techniques have been proposed to translate such questions into an actual poverty line” (N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) xiv.

below which people are considered to be poor. One can take the relative approach where the poverty line is set in relation to changing standards of living. It is calculated as a set of household population in the mean or median income level wellbeing divided by the with rising prosperity level over time.¹²⁷ In contrast, there is the absolute approach where the poverty line is calculated by reference to a fixed basket of goods and services assumed to fulfil the basic needs of people in terms of food, shelter, clothing and so on.¹²⁸ It does not take into account shifts in the average threshold of living in society and it is a fixed money value that is only updated to take account of inflation.¹²⁹

In addition, poverty lines are used to estimate the ‘head count’ which is the number and composition of the poor.¹³⁰ Poverty lines are also used to reflect a ‘poverty gap’, which refers to the distance below the line of the incomes of those who are poor.¹³¹ The main examples of poverty lines are the minimum income levels set under social assistance schemes or a percentage of average incomes. The World Bank currently uses a figure of one US dollar a day as a marker of the poverty line. The usage of one US dollar as a measure of the poverty line has been criticised by many commentators. According to Chossudovsky, it implies that any individual who has access to more than one dollar a day is not poor.¹³² He further argues the usage of one US dollar as a measure of poverty line is challenging without an inquiry into the relationship between needs and what the equivalent of one dollar could buy. New research by World Bank researchers Ravallion, Chen and Sangraula indicates that the one US dollar poverty measure is too low for developing countries.¹³³ Their results suggest that relative poverty is a more important concern than was the case twenty years ago. They revisited the one dollar poverty line with a new set of national poverty lines for low- and middle-income countries. Drawing from the World Bank’s country-specific Poverty Assessments and the Poverty Reduction Strategy Papers they proposed a new international

¹²⁷N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) xiv.

¹²⁸N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) xiv.

¹²⁹N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) xiv.

¹³⁰P Alcock *Understanding Poverty* (2006) 85.

¹³¹P Alcock *Understanding Poverty* (2006) 85.

¹³²M Chossudovsky “Global Falsehoods: How the World Bank and the UNDP Distort the Figures on Global Poverty” Ottawa 1999 available at <http://www.adelinotorres.com/economia/TFF%20FEATURES2-%20Articles.htm> (accessed on 11/02/10).

¹³³S Chen & M Ravallion “The Developing World is Poorer than we Thought, but No Less Successful in the Fight against Poverty” (2008b) Policy Research Working Paper 4703 World Bank, Washington DC <http://econ.worldbank.org/docsearch> (accessed on 10/02/10).

poverty line of \$1.25 per day using 2005 US share prices.¹³⁴ They also point out that poverty lines in developing countries range between \$1 and \$3 per day according to US 2005 share prices.

The international poverty line is useful only as an indicator of global progress. It does not reflect the progress at country level and certainly does not (and should not) guide domestic policy and strategy formulation. Domestic poverty lines are usually higher than international poverty lines. In South Africa the 2003 Human Development Report used a national poverty line of R354 per month. Statistics South Africa, using the 2000 Income and Expenditure Survey data, estimated that consumption among low-income South Africans costs R211 per person every month to satisfy a daily required calorific intake of 2261. The cost of other essential non-food items amounts to R111 per capita per month, giving a poverty line of R322 per capita per month in 2000 share prices. In 2006 the poverty line increased to R431.¹³⁵ However, South Africa does not have an official poverty line. The report of the Taylor Committee of Inquiry into a Comprehensive System of Social Security for South Africa called for a nationally agreed poverty line in South Africa.¹³⁶ The report of the Committee identified the need to include measures of poverty which draw from absolute concepts as well as indicators of social exclusion, which implies addressing issues concerning relative poverty. The Committee states that “a conceptually sound and an empirically based understanding of poverty indicators and measures of well-being is critical”.¹³⁷

*Methods of setting the poverty line*¹³⁸

a) Cost of Basic Needs (CBN)

¹³⁴M Ravallion, S Chen & P Sangraula (2008) “Dollar a Day Revisited” Policy Research Working Paper 4620 available at econ.worldbank.org.

¹³⁵“The poverty datum line was introduced in South Africa by Batson at the University of Cape Town during the Second World War to help measure the extent of poverty in the rapidly growing slums and townships of Western Cape. It was subsequently refined and modified, at the beginning of the 1970s, as the trade unions re-emerged as a force for change and guidelines were needed in the debate with management about minimum wages. Nel later developed the minimum living level (MLL) and the supplementary living level (SLL) which are used by the Bureau of Market Research at the University of South Africa. The MLL and SLL poverty lines were discontinued in 2002. In addition Potgieter developed the household subsistence level (HSL) and the household effective level (HEL) and monitored them at the University of Port Elisabeth’ (now the Nelson Mandela Metropolitan) All these measures have been criticised. Beckerman argues that it does not make sense to define poverty at some minimum living level when the people continue to survive below it (F Wilson & R Ramphela *Uprooting Poverty: The South African Challenge* (1989) 16).

¹³⁶Taylor Committee, 2002 56.

¹³⁷Taylor Committee, 2002 56.

¹³⁸E Thorbercke “Multidimensional Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 4.

The CBN involves the quantification of basic needs into income values. This approach involves: a) the stipulation of a consumption bundle that is deemed to be adequate for food and non-food consumption; and b) the estimation of the cost of the bundle for each subgroup whether urban/rural or provincial. According to Thorbecke, the CBN approach has the advantage of treating individuals with the same living standards equally which ensures ‘consistency’. Rowntree used this approach in his pioneering study on poverty¹³⁹

b) Food-Energy Intake (FEI)

The FEI is the second approach to setting the poverty line. It focuses on actual food consumption patterns based on a strict calorific count.¹⁴⁰ The FEI has the advantage of ‘specificity’ which reflects the “actual food consumption behaviour of individuals around the calorific threshold given tastes, preferences and relative prices”.¹⁴¹

Halleröd argues that ranking of people’s economic standard will always have a measurement error.¹⁴² Under the monetary dimension the problem with the poverty line itself is that it says very little about what poverty is really about, what it means to be poor.¹⁴³ In addition, usage of poverty lines always misclassifies a number of individuals. Thorbecke, among others, has identified other flaws with the monetary dimension:¹⁴⁴

- It does not provide price signals in cases of goods and services for which there are no markets, for example, a market for freedom;
- The prevalence of imperfect markets and government intervention which often results in artificial prices that do not reflect scarcity value;
- Market prices are essentially efficiency prices and do not reflect distributional considerations.

¹³⁹S Rowntree *Poverty and Progress: A Second Social Survey of York* (1941) 4.

¹⁴⁰E Thorbercke “Multidimensionality Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 6.

¹⁴¹E Thorbercke “Multidimensionality Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 6 . There is a considerable dispute internationally as to whether it is even theoretically possible to determine a minimum level of calorie intake to ensure subsistence of the human body. Furthermore, depending on food intake, some studies indicate that the human body can sustain itself for long periods of time at different weight equilibrium. (see Timmer ‘Nutrition’1987 689 as referenced by F Wilson & R Ramphele (1989) *Uprooting Poverty: The South African Challenge* (1989) 16).

¹⁴²B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend *Breadline Europe: The Measurement of Poverty* (2000) 165- 166 171.

¹⁴³B Halleröd “Poverty, Inequality and Health” in D Gordon & P Townsend *Breadline Europe: The Measurement of Poverty* (2000) 165- 166 171.

¹⁴⁴E Thorbercke “On the Multidimensionality of Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 7.

Lister also points out drawbacks of the monetary dimension:¹⁴⁵

- People may have a low standard of living for reasons other than current low income;
- Low-income people may avoid deprivation by other means such as depleting savings; getting into debt; getting help from donations; begging or stealing;
- When income rises after a spell of poverty, living standards may not rise commensurately when that income is needed to pay off debts.

In spite of the above-mentioned flaws, Lister argues that one danger of downplaying income is that doing so can be used to justify a policy stance opposed to raising the incomes of those in poverty.¹⁴⁶ May *et al* hold the view that money/income is the means of purchasing some direct means to wellbeing such as food etc., which makes the money-metric measure of poverty useful but imperfect.¹⁴⁷ Furthermore, May *et al* argue that it is practicable and easily replicated,¹⁴⁸ which may explain why the majority of research on poverty in South Africa follows the monetary approach to the measurement of poverty.

2.3.3 Non-monetary dimension

The preceding section placed the emphasis on the numeric approach, which most economists use in gauging poverty. However, this approach may conceal the real experiences of South African society in terms of human development. The monetary dimension, although objective, should be supplemented by other non-monetary indices reflected in the real experiences of poor people. Such experiences are revealed in measures of poverty that reflect the constituents of wellbeing and human development. These include access to basic services; availability of shelter; health care; education facilities; life expectancy; provision of goods; security and freedom. This approach allows an exposition of other key dimensions of poverty that are usually overlooked by monetary indicators. The most inclusive way to measure and capture poverty under the non-monetary dimension is to utilise Sen's 'capabilities and functionings' framework. The capability approach has dominated the policy debate as a paradigm in human development and non-monetary poverty indicators. It inspired the creation of the United Nation's development indicators. In 1997 the Human Development Report by the United Nations Development Programme introduced the Human Poverty Index

¹⁴⁵R Lister *Poverty* (2008) 39 – 40.

¹⁴⁶R Lister *Poverty* (2008) 39 – 40.

¹⁴⁷J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) 21.

¹⁴⁸J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) 21.

and the Human Development Index as instruments to give a broad-based picture of poverty. However, only a sample of indicators is covered by these instruments as many aspects of human life are difficult to quantify. This section gives account of the development instruments in the non-monetary dimension.

a) Human Poverty Index (HPI).

The HPI for developing countries concentrates on deprivation on three fundamental levels of human life.¹⁴⁹ According to 2007/2008 Human Development Report, they include i) a long and healthy life measured by life expectancy at birth; ii) knowledge as measured by the adult literacy rate and the combined primary, secondary and tertiary gross enrolment; and iii) a decent standard of living as measured by gross domestic product (GDP) per capita in purchasing power parity (PPP)¹⁵⁰ terms in US dollars. These levels of human life are measured using P_1 P_2 P_3 and a .

P_1 = probability at birth of not surviving to age 40 (times 100);

P_2 = adult illiteracy

P_3 = unweighted average of population not using and improved water sources and children under weight-for-age.

$a = 3$

Then the HPI = $[\frac{1}{3} (P_1^a + P_2^a + P_3^a)]^{1/a}$.

b) Human Development Index (HDI)

The Human Development Index is an attempt to quantify quality of life. There are three measures that are used to create a single development score of human development: i) health indicator using life expectancy; ii) education indicator using adult literacy; and iii) wealth using GDP per capita. These indicators are measured using L E and ILI .

L = Life expectancy;

E = Education index and

ILI = income level index.

¹⁴⁹Technical note 1 Calculating the Human Development Indices available at http://hdr.undp.org/en/media/HDR_20072008_Tech_Note_1.pdf (accessed on 11/06/13).

¹⁵⁰Power purchasing parity is a theory of exchange rate determination and a way to compare the average costs of goods and services between countries. In addition, PPP suggests that transactions on a country's current account affect the value of the exchange on the foreign exchange market.

Once the measurement indicators have been calculated, the HDI is determined by averaging the three indicators as follows:

$$\frac{L + E + ILI}{3} = HDI$$

There are three ways in which both HPI and HDI can be used:¹⁵¹

- As tools for advocacy. They can help in summarising the extent of poverty along several dimensions, the distance to go and the progress made;
- As planning tools for identifying areas of concentrated poverty within a country; and
- As a research tool. They can give a composite measure of poverty, especially when other indicators of poverty and deprivation are added such as unemployment.

Nevertheless, the non-monetary dimension has drawbacks as well.¹⁵² The most serious difficulty with the non-monetary or non-numeric dimension is the estimation of connections between indicators. They can either be substitutes or complements. If the indicators of poverty are substitutes, the implication is that an individual can trade off one indicator for another and remain at the same level of wellbeing. For instance, one can trade off more food for less shelter. On the other hand, if indicators are complements, an increase in one elevates ‘the marginal utility’ of the other. For example, an increase in education levels increases the ‘present discounted value of the future stream of income’. Moreover, the fact that indicators of wellbeing can be substitutes in the short run, while being complementary and reinforcing in the long run, is because of the path dependence between the form poverty takes today and future poverty outcomes.’ This has implications for strategies on how to tackle poverty and determine what is the area of poverty frontier over which we can be sure that poverty is lower for person X than for person Y. Having explored the measurements of poverty in this section and the issues around defining poverty in the section before, how does poverty manifest itself in South Africa? The next section will explore the nature and extent of poverty in South Africa.

¹⁵¹E Thorbercke “On the Multidimensionality of Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 19.

¹⁵²The following paragraph draws heavily from E Thorbercke “On the Multidimensionality of Poverty: Conceptual and Measurement Issues” in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 19.

2.4 The nature and scale of poverty in South Africa

2.4.1 Introduction

A great proportion of the South African population lives in poverty. Using the Bureau of Marketing Research's estimates, in 2003 a household of 4,7 people had a minimum living level of R1 489 per month. According to Van der Berg and Louw, this suggests that 40% of South Africans live in poverty, which amounted to 20,5 million people in 2000.¹⁵³ This compares well with Terreblanche's estimate of about 18 million people, which is about 40% of the South African population in 2002.¹⁵⁴ However, poverty research in South Africa highlights the multidimensional nature of the phenomenon. It is apparent in various studies that poverty in South Africa has rural, provincial, race, gender, education, disability and unemployment dimensions.¹⁵⁵ In addition, there are several determinants of poverty which have an effect on how poverty manifests in South Africa.

2.4.2 Determinants of poverty in South Africa

2.4.2.1 Population growth

If resources are available or an increase in resources is a possibility, population growth *per se* is not a problem in catering for the needs of additional people (housing, employment, public services). For South Africa, however, an increase in population is a serious challenge. The country is working on a stretched budget and this makes it harder for the government to address poverty effectively. Economically, a rapid growth of population increases the unavailability of labour in the economy.¹⁵⁶ This results in a relative decrease in labour wages, especially those of unskilled labour, if they are members of a large mass.¹⁵⁷ This is likely to worsen inequality and hurt the poor, who are more reliant on labour income.¹⁵⁸ De Dios *et al* identified a population increase as one of the reasons for poverty in the Philippines. They argue that a large population increases and aggravates poverty, as it disproportionately affects

¹⁵³S Van der Berg & M Louw (2003) *Changing patterns of SA income distribution: Towards time series estimates of distribution and poverty*. Paper delivered to the Conference of the Economic Society of SA17 – 19 September 2003, Stellenbosch.

¹⁵⁴S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 46.

¹⁵⁵J May (ed) (2000), *Poverty and Inequality in South Africa: Meeting the Challenge* 21; See F Wilson & R Ramphole *Uprooting Poverty: The South African Challenge* (1989) 14; C Barberton, M Blake & H Kotze (eds) *Creating Action Space: The Challenge of Poverty and Democracy in South Africa* (1998).

¹⁵⁶H Bhorat & M Oosthuizen "Evolution of the labour market:1995 – 2002" in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) Human Sciences Research Council 143 – 191.

¹⁵⁷H Bhorat & M Oosthuizen "Evolution of the labour market:1995 – 2002" in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 143 – 191.

¹⁵⁸H Bhorat & M Oosthuizen "Evolution of the labour market:1995 – 2002" in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 143 – 191.

the poor, who tend to have larger families.¹⁵⁹ High fertility not only retards economic growth but also skews the distribution of income unfavourably for the poor.¹⁶⁰

2.4.2.2 *Lack of mobility/rural location*

A close look at the poverty profile of South Africa shows that most of the disadvantaged poor live in rural areas. This is a trend in most developing countries and it is likely to prevail for a long time.¹⁶¹ There are factors contributing to low income and poverty in rural areas, including: i) lack of resources and technology – rural people depend on agricultural production which in developing countries is characterised by low productivity and low aggregate earnings are usually the result; ii) vulnerability to natural disasters; and iii) lack of access to basic services. The rural populace is physically or figuratively on the periphery often associated with limited access to most of the basic opportunities and services needed for survival. In addition, lack of income and markets in remote areas curtails business opportunities and gives rise to a vicious cycle of poverty.

2.4.2.3 *Unemployment*

Unemployment is associated with poverty and inequality. According to the South African Survey 2008 – 2009 by the South African Institute of Race Relations (SAIRR) (using the expanded definition of employment):¹⁶²

- In the second quarter of 2009 there were 4 125 000 unemployed people. This equated to an unemployment rate of 23.6 per cent. At the same time there were 1 517 000 discouraged work-seekers in the country; they are no longer classified as being unemployed but are now officially regarded as not economically active;

¹⁵⁹E De Dios & Associates (1993), *Poverty, growth and the fiscal crisis*. Phillipines Institute for Development Studies (PIDS) and International Development Research Center (IDRC).

¹⁶⁰See R Eastwood & M Lipton “Demographic transition and poverty: Effects via economic growth, distribution and conversion” in N Birdsall & S Sinding (eds) *Population matters: demographic change economic growth and poverty in the developing world* (2001) 213 - 259.

¹⁶¹See M Ravallion & B Bidani “How robust is a poverty profile?” (1994)*World Bank Economic Review* 8 (1) 75- 102; M Ravallion “Can high inequality in developing countries escape absolute poverty?”(1997) *Economic letters* Vol.56 51 – 57.

¹⁶²The official rate of unemployment is calculated on the basis of those persons who are unemployed and who a) did not work during the seven days prior to being interviewed; b) want to work and are available to start work within a week of the interview; and c) have taken active steps to look for work or start some form of self-employment in the four weeks prior to the interview. The expanded definition of unemployment excludes factor (c) and therefore includes ‘discouraged’ work-seekers who are excluded from the narrower definition.

- Of the 4 125 000 unemployed people in South Africa, some 3 587 000 (87%) were African. The number of unemployed coloured people was 379 000, while 59 000 Indians did not have work. Some 100 000 whites were unemployed;
- Some 27.9% of Africans were unemployed. Coloured people had an unemployment rate of 19.5%, while 12.7% of Indians were unemployed. The unemployment rate among whites was 4.6%;
- Of the 1 517 000 discouraged work-seekers in South Africa in 2009, the majority were African, accounting for 1 422 000 (93.7%). Some 46 000 discouraged work-seekers were coloured. Indians and whites each accounted for 15 000 discouraged work-seekers;
- The labour market participation rate in the second quarter of 2009 was 56.3%. In 2001 it was 60.8%.

The informal sector¹⁶³ has increased. This could be attributed to a number of elements, including privatisation, which has been associated with retrenchments and labour lay-offs and the recent world recession. Unemployment in South Africa is a structural not a cyclical problem, requiring addressing the type of unemployment prevalent in the labour market.¹⁶⁴ However, the South African economy today faces some important challenges. The most important is the challenge of generating job opportunities in numbers high enough to first halt the rise in unemployment and then reduce it.¹⁶⁵ The high number of new entrants who have to join the labour force has intensified the problem. Labour force participation rates are rising

¹⁶³There is no uniform definition of the informal sector. Statistics South Africa defines informal sector as “those businesses that are not registered (for tax purposes). They are generally small in nature, and are seldom run from business premises. Instead, they are run from homes, streets pavements or other inform arrangements” (SNR PO317 (31 July 2000) xviii).

The International Labour Organisation (ILO) defines informal sector with reference to internationally accepted nomenclature. The ILO states “In 1993 the Fifteenth International Conference of Labour Statisticians (ICLS) adopted an international statistical definition of the informal sector; it defined the informal sector in terms of characteristics of enterprises (production units) in which the activities take place, rather than in terms of the characteristics of the persons involved or of their jobs. Accordingly, persons employed in the informal sector were defined as comprising all persons who during a given reference period, are employed in at least one production unit of the informal sector, irrespective of their status in employment and whether it is their main or a secondary job. Production units of the informal sector were defined by the Fifteenth ICLS as a subset of unincorporated enterprises owned by the household, that is, production units which are not constituted as separate legal entities independently of the household or household members that own them” (Measuring Informality: A Statistical Manual on the Informal Sector and Informal Employment available at www.ilo.org/wcmsp5/groups/public/---dgreports/---dgreports/---stat/documents/publication/wcms_182300pdf. (accessed 02/09/2013))

¹⁶⁴J Triegaardt, Reflections on poverty and inequality in South Africa: Policy considerations in an emerging democracy available at http://sarpn.org/documents/d0002618/Ppverty_Inequality_SA_Sept2006.pdf 9 (accessed 20/02/2014).

¹⁶⁵H Bhorat & M Oosthuizen “Evolution of the labour market: 1995 – 2002” in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 143 – 191.

across the board, yet the actual labour force absorption has been far lower than the rates required to keep unemployment levels constant.¹⁶⁶ The South African economy's performance in terms of employment growth has been far from satisfactory. It is a long way from making any real impression on unemployment and, by extension, poverty and inequality.¹⁶⁷

2.4.2.4 Shrinking economic growth

It can be generally assumed that a decrease in economic growth affects poverty through two channels: output reduction and domestic price increases or a higher inflation rate.¹⁶⁸ The first one is called the unemployment effect of an economic crisis. A fall in output reduces employment opportunities or creates a higher unemployment rate, and thus increases the poverty rate. An increase in domestic prices and decline in real income leads to a rise in the poverty rate; this is supported by the empirical research on the impact of shrinking economic growth on poverty in developing countries. During a downturn a drop in output affects poverty unevenly. A number of arguments affirm why this is usually the case. The most imperative arguments to take note of include: i) the poor often lack the means to protect themselves when the economy experiences a recession; ii) because of a lack of education and skills, the poor tend to be less mobile (across sectors and regions) than better educated workers, and are often unable to switch jobs and capitalise on available employment opportunities; and iii) indirect sources of income and public transfers may decline during crises, because during such episodes the ability of relatives or communities to engage in income redistribution may be reduced and governments may be forced to drastically adjust its fiscal accounts with cuts in expenditure across the board.

2.4.2.5 HIV/AIDS pandemic

Diseases and limited access to health care characterise the situation of the poor in South Africa, who are intensely vulnerable to the impact of an epidemic. Additional resources and health care are needed.¹⁶⁹ The impact of HIV/AIDS is unbalanced, especially on those who

¹⁶⁶H Bhorat & M Oosthuizen "Evolution of the labour market:1995 – 2002" in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 143 – 191.

¹⁶⁷H Bhorat & M Oosthuizen "Evolution of the labour market:1995 – 2002" in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 143 – 191.

¹⁶⁸The following paragraph draws heavily from M Neri & M Thomas *Household educational responses to labor-market shocks in Brazil: 1982-99* (2000) available at <http://www/lacea.org/meeting2000/MarkThomas.PDF> (accessed 20/02/2014).

¹⁶⁹This paragraph draws heavily from the "HIV/AIDS & Human Development South Africa" 1998 – Annual Human Development Report.

are traditionally the most economically productive household members. This increases the burden on young and old, who are generally themselves in need of care. Moreover, the epidemic reduces the time available for women to take on economically productive activities, imposing a powerful new threat to gender equity. The impact of the HIV/AIDS epidemic often leads to stigmatisation, discrimination and isolation from traditional social systems. Rural women in poor communities are vulnerable because of the lack of information and the power to protect themselves in practising safe sex with their migrant partners. The migrant population in urban areas is rising in the face of poverty and lack of opportunities. It is present in rural, peri-urban and urban populations, and it is the situation in all regions of the country and across all socio-economic categories. It is not confined to the unskilled or those with access to few resources. HIV infection has intensified discrimination greatly. For many it constitutes a new form of apartheid, unfairly robbing them of the chance to participate as equals in the reconstruction and development of South Africa.

Reviewing studies on the impact of HIV/AIDS at the household level, Whiteside and Casale conclude that the final effect of the disease is clearly dependent on the availability of resources in the community and the broader resources available to households.¹⁷⁰ With much less financial stability, the poor lack the capability to cope with the unexpected increase in expenditure and reduction in income caused by HIV/AIDS. Efforts have been made to address this in South Africa, but Steinberg and others point out that home-based assistance from the government rarely reaches the poorest segments of society.¹⁷¹ In addition, Booysen indicates that in South Africa the incidence, depth and extent of poverty are higher among households affected by HIV/AIDS, and their members are more likely to experience chronic poverty and income variation.¹⁷² One of the ways in which HIV/AIDS affects overall poverty levels is its effect on economic growth. As the disease claims lives primarily from the working-age segments of the population, the affected countries experience major reductions in their workforces, palpably lowering gross domestic product (GDP) growth rates.¹⁷³ This in

¹⁷⁰M Casale & A Whiteside (2006) "The impact of HIV/AIDS on poverty, inequality and economic growth". International Development Research Centre (IDRC) Working Papers on Globalisation, growth and poverty. Number 3.

¹⁷¹See M Steinberg, S Johnson, G Schierhout & D Ndegwa *Hitting home: How households cope with the impact of the HIV/AIDS epidemic* (2002) The Henry Kaiser Family Foundation.

¹⁷²F Le Roux Booysen "Poverty dynamic and HIV/AIDS related morbidity and mortality in South Africa" paper presented at an international conference on "Empirical evidence for the demographic and socio-economic impact of AIDS"(2003) Health economics and HIV/AIDS Research Division, University of KwaZulu-Natal, South Africa, March 26-28.

¹⁷³G Salinas & M Haacker "HIV/AIDS: The impact on poverty and inequality" (2006) IMF working paper, African Department 3.

turn affects the production which the country needs to generate more income to acquire resources needed to sponsor programmes that could alleviate poverty.

2.4.3 Who are the poor?

2.4.3.1 Race and poverty

Racial discrepancies are evident in the quality of life of people in South Africa. The patterns of poverty are distributed according to racial divides. The majority of those affected by poverty are black. The coloured community has a significant number of poor people when compared to the white and Indian populace, which have relatively low poverty rates.¹⁷⁴ According to the 1999 October Household Survey, 52 per cent of Africans and 17 per cent of coloureds are poor, compared with 5 per cent of Indians and whites.¹⁷⁵ Africans make up 78 per cent of the population and they account for 95 per cent of the poor.¹⁷⁶ The South African Survey 2008/9 by SAIRR indicates that the proportion of people living in relative poverty by race almost ten years later (1999 – 2008/9 is as follows: Africans 49.0%; Coloured 16.9%; Indians 6.4% and Whites 3.6%.

Africans experience poverty in greater depth and severity than the other racial groups.¹⁷⁷ However, there has been a shift in the racial poverty profile of South Africa. The gap between the rich and the poor within the African population is widening. There has been the rise of the black elite and a growing black middle class, who have access to opportunities, but the large mass of the Black populace remains uneducated and poor. In the 1970s and 1980s new employment opportunities opened up for black people. Black children who grew up in households headed by middle-class or white-collar employees were likely to follow them into such occupations themselves to a greater extent than black children who grew up in households headed by migrant workers or farm workers. In addition, post-apartheid South Africa has created a platform for growth within the (urban) public sector for blacks and the rural poor have not benefited. These factors, among

¹⁷⁴See I Woolards “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by Department for International Development South Africa (DFID (SA))1- 5.

¹⁷⁵I Woolards “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by DFID (SA) 4. See also M Leibbrandt *et al* “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” (2010) *OECD Social, Employment and Migration Working Papers No.101*, OECD Publishing.

¹⁷⁶See M Leibbrandt, I Woolard, A Finn & J Argent “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” (2010) *OECD Social, Employment and Migration Working Papers No.101*, OECD Publishing.

¹⁷⁷The following paragraph draws heavily from N Nattrass and J Seekings ““Two Nations”? Race and Economic Inequality in South Africa Today” (2001) *Daedalus* Winter 1301 ProQuest Direct Complete 45 55-56.

others, explain the widening poverty gap between the rich and the poor within the African population.¹⁷⁸

2.4.3.2 Gender and poverty

A household headed by a resident male has a 28 per cent probability of being poor, whereas a household with a *de jure* female head has a 40 per cent chance of being poor and a household with a *de facto* female head has a 53 per cent chance of being poor.¹⁷⁹ Female-headed households tend to be more reliant on remittances and state transfers (pensions and grants) than male-headed households. In the SA-PPA Report women were found to be expected to perform many household activities that restrict the amount of time available for income-earning activities. In addition, poverty for some black women is very extreme is at greater lengths. They experience marginalisation as a consequence of both gender inequality and race. African women struggle with the dual oppression of racism and sexism. This often leaves them susceptible to poverty. There may be many women who live in non-poor households, who should be counted as poor because of the inequalities in intra-household allocations.¹⁸⁰

2.4.3.3 Children and poverty

“The biggest problem is food. Sometimes we end up not getting any food at home. The other problem is to have school shoes.” (Boy, 15, Limpopo)¹⁸¹

“We need water. We get clean water once a month if the ... water ever comes.” (Boy, 17)¹⁸²

“I do not have parents. They are chasing us away where we are staying ... we do not have money for food or ... for rent.” (Girl, 10)¹⁸³

¹⁷⁸Intra-racial and inter-racial poverty and inequality will be discussed further in Chapter 3 of this study.

¹⁷⁹M Leibbrandt, I Woolard, A Finn & J Argent “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” (2010) *OECD Social, Employment and Migration Working Papers No.101*, OECD Publishing .

¹⁸⁰J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) 34.

¹⁸¹P Martin & S Rosa “Childhood Poverty in South Africa” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 2 (accessed 10/06/13).

¹⁸²P Martin & S Rosa “Childhood Poverty in South Africa” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 3 (accessed 10/06/13).

¹⁸³P Martin & S Rosa “Childhood Poverty in South Africa” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 3 (accessed 10/06/13).

Children are the major victims of poverty for several reasons including inter-generational poverty, death of parents and so forth. It was estimated in 2002 that about 11 million children between the ages of 0 and 18 are living in abject poverty in South Africa.¹⁸⁴ An additional 14.3 million children were living in poverty on less than R490 per capita per month (in 2002 share prices).¹⁸⁵ Only 15 per cent of these 14.3 million children had access to the child support grant.¹⁸⁶ Poverty hampers proper child development. It complicates the upbringing of children because of a lack of basic necessities such as food with the required nutritional value for their healthy psychological and physiological development. In addition, according to May:

“A child who experiences poverty is exposed to the risk of impaired physical and mental development. But even if the child suffers no permanent physical damage, he or she is clearly at a disadvantage ... If children are hungry, they cannot concentrate properly at school. If their homes have no electricity, they cannot easily study in the evenings. If girls have to assume domestic roles of cooking, cleaning and child care, this leaves less time for homework.”¹⁸⁷

Nowadays, children begging at malls and traffic lights are a common sight in the major cities. They also experiment with crime for the sake of survival.

2.4.3.4 Education and poverty

There is a close correlation between education and standard of living. “At individual level, a better education means a better income”.¹⁸⁸ The South African government has been advocating for the policy of free education to ensure that the poor are afforded a chance to education. Tertiary education is expensive for the majority of youths who have come out of high school, especially those coming from socio-economically disadvantaged background. Although the government has made efforts through loans, bursaries and scholarship programmes, more needs to be done. The 2003 UNDP Report indicates that “the sheer extent of the backlogs in apartheid education demands an investment far greater than existing levels

¹⁸⁴P Martin & S Rosa “Childhood Poverty in South Africa.” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 3 (accessed 10/06/13).

¹⁸⁵P Martin & S Rosa “Childhood Poverty in South Africa.” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 3 (accessed 10/06/13).

¹⁸⁶P Martin & S Rosa “Childhood Poverty in South Africa.” Alliance for Children’s Entitlement to Social Security (ACCESS) available at http://ci.org.za/depts/ci/pubs/pdf/rights/facts/ch_poverty_in_sa.pdf 3 (accessed 10/06/13).

¹⁸⁷J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) 33.

¹⁸⁸C Berberton, M Blake, H Kotze *Creating Action Space: The Challenge of Poverty and Democracy in South Africa* (1989) 30.

of budgetary allocation”.¹⁸⁹ Barberton *et al* argue that a better-educated population leads to higher economic growth and higher standard of living.¹⁹⁰ However, this is not so clear cut in South Africa as some poor and unemployed people are skilled and educated yet they struggle to make a living.

2.4.3.5 Class and poverty

The post-apartheid dispensation has seen the emerging of a sizeable black middle class as well as very wealthy black elite.¹⁹¹ This is attributed to the socio-economic and political transformation in South Africa. There is no agreement as to the size of the black middle class, but the consensus is that this group is relatively small compared to the larger population. In South Africa black workers are highly unionised, which has resulted in an increase of wages and improvement of working conditions. However, these benefits do not extend to the poor and unskilled blacks, who form the majority of the poor in South Africa. The black elite and the rising black middle class are benefiting from privatisation, the affirmative action policy, economic empowerment and preferred procurement. The black middle class is taking diffident steps toward achieving equivalence with the white middle class, while in contrast a large class of impoverished blacks continue to fall further behind.

2.4.4 Where are the poor?

2.4.4.1 Poverty in rural and urban areas

Rural poverty is more common than urban poverty as most of the poor live in rural areas. The poverty rate¹⁹² in rural areas is about 70 per cent compared with 30 per cent in urban areas.¹⁹³ The 1995 Income and Expenditure Survey indicates that 62 per cent of rural dwellers were poor compared to 32 per cent of people living in small towns, 25 per cent of those in secondary cities and 13 per cent in major metropolitan areas. Furthermore, 74 per cent of the poor live in rural areas, and only 7 per cent live in the metropolitan areas.¹⁹⁴ There is a bias towards the development of urban areas at the expense of rural areas. Urban areas have better infrastructure, provision of service delivery and availability of skilled professionals. This indicates why poverty affects the rural population the most. However, in urban areas the

¹⁸⁹UNDP Report (2003) 24.

¹⁹⁰UNDP Report (2003) 24.

¹⁹¹The following paragraph draws heavily from J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 340 – 345.

¹⁹²The percentage of individuals classified as poor.

¹⁹³J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) 30.

¹⁹⁴I Woolard “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by DFID (SA) 6.

market centres are surrounded by squatter camps, which are images of urban poverty. The squatter camps reflect the lives of those who have not been absorbed into the wealth of the city. These camps, together with townships, are remnants of the apartheid city which was created by the segregation laws and policies.

2.4.4.2 Poverty in the nine provinces of South Africa

According to the 1998 UNDP Report,

“Poverty is distributed unevenly among the nine provinces. Provincial poverty rates are highest for the Eastern Cape (71%), Free State (63%), North West (62%), Northern Province (59%), Mpumalanga (57%), and the lowest for Gauteng (17%) and the Western Cape (28%). Poverty is the deepest in the Eastern Cape, Free State and Northern Province, which together make up 36% of the population but account for 51% of the total poverty gap.”

Ten years later there has been some slight change in the provincial poverty profile. According to the South African Survey 2008/9 by the SAIRR, the proportion of people living in relative poverty by province is as follows: Eastern Cape 58.3%; Free State 46.2%; Gauteng 21.8%; KwaZulu-Natal 45.5%; Limpopo 55.5%; Mpumalanga 50.5%; North West 47.8%; Northern Cape 41.7% and Western Cape 13.5%. In addition, the Survey shows that 678 291 people were living on less than a dollar a day; 211 066 of these were from KwaZulu-Natal; 112 371 were from Eastern Cape; 69 560 were from Gauteng; 70 465 were from Limpopo and 26 875 of these poor people were from Western Cape. The poverty profile of South Africa still reflects an apartheid geography. Poverty is concentrated in former homelands.¹⁹⁵ This accounts for the fact that the provinces that are home to the poorest people are those that were the most densely inhabited former homeland areas.¹⁹⁶ These provinces include Eastern Cape, Limpopo and KwaZulu-Natal.¹⁹⁷

2.5 CONCLUSION

Poverty has many indicators and links including hunger, unemployment, race, education, and gender, access to clean water, housing and health care. It can also be about social exclusion, vulnerability to crisis, and inequality. Although these issues are clearly associated with not

¹⁹⁵I Woolard “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by DFID (SA) 6.

¹⁹⁶I Woolard “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by DFID (SA) 6.

¹⁹⁷I Woolard “An Overview of Poverty and Inequality in South Africa” (2002) Working Paper prepared by DFID (SA) 6.

having enough income, ignoring the non-monetary aspects of the phenomenon of poverty is simplistic. The victims of poverty are not absolutely concerned with having enough income. Having a sense of freedom, security and self-respect may be just as important as having money to afford goods and services. This is reflected in distinction between absolute and relative poverty. Karl Marx argues that money maybe influential, but it cannot be separated from the power it confers on the private person.¹⁹⁸ Defining poverty is not a clear-cut issue and neither is measuring it. An overview of how poverty manifests in South Africa indicates that measuring poverty using the monetary approach does not reflect the real nature of deprivation. Various determinants of poverty need to be explored as well as research on who and where the poor are. Poverty is a multidimensional phenomenon that is experienced by the greater part of the South African population. The next chapter will examine inequality and its link with poverty.

¹⁹⁸See K Marx "The Power of Money" Economic and Philosophic Manuscripts of 1844 available at <http://www.marxists.org/archive/marx/works/1844/manuscript/power.htm> (accessed on 20/02/2014)

CHAPTER THREE: INEQUALITY AND ITS LINK WITH POVERTY

“No government is legitimate that does not show equal concern for the fate of all citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community – without it government is only tyranny – and when a nation’s wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect.”¹⁹⁹

3.1 Introduction

From a global perspective massive inequalities exist between the rich and the poor. Milanovic notes that 1% of the richest have an income equal to that of 57% of the poorest, meaning that fewer than 50 million of the rich receive as much as 2.7 billion of the poor.²⁰⁰ According to a recent report by Save the Children, 1 in every 6 children die before their 5th birthday in Sub-Saharan Africa compared to 1 in 14 in the OECD.²⁰¹ South Africa remains one of the countries with high inequality levels alongside unequal Latin American countries (Brazil, Paraguay, Guatemala) and other African countries such as Lesotho and Zimbabwe.²⁰² The inequalities in South Africa manifest through unequal access to natural resources; a two-tiered educational system; a dual health system; unequal access to the labour market and several other socio-economic dimensions.²⁰³ Most importantly, inequality in South Africa is a product of systematic exclusion.²⁰⁴

According to Temkin, equality has served as one of the leading political ideals at least since the French Revolution.²⁰⁵ Equality and inequality, like poverty, are both concepts which are complex and multifaceted. They attract several implications which are unrelated to grasping their appropriate meaning. Several concepts related to (in)equality include, among others, justice, liberty, fairness, freedom, economic development and poverty. Inequality is an issue of concern to policy makers and social scientists and “there is no single notion of equality

¹⁹⁹R Dworkin (2000) *Sovereign Virtue: The Theory and Practice of Equality* (2000) 1.

²⁰⁰See B Milanovic “True World Income Distribution, 1998 and 1993: First Calculation based on Household Surveys alone” (2002) *The Economic Journal* Vol. 112 Issue 476.

²⁰¹See “State of the World’s Mothers 2008: Closing the Survival Gap for Children Under 5” at www.savethechildren.org/publications/mothers/2008/SOWM-2008-full-report.pdf (accessed 20/02/2014)

²⁰²J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2006) 3.

²⁰³J Triegaardt *Reflections on Poverty and Inequality in South Africa: Policy Considerations in an Emerging Democracy* (2006) available at http://sarpn.org/documents/d0002618/Ppverty_Inequality_SA_Sept2006.pdf 9. www.dbsa.org/.../Poverty%and%inequality%20in%20South%20Africa%20Policy%20 (accessed 12/06/13).

²⁰⁴See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 34 - 40 and also J Seekings & N Nattrass (2006) *Class, race, and inequality in South Africa* 3.

²⁰⁵See L Temkin *Inequality* (1993) Chapter 2.

that can sweep the field”.²⁰⁶ It is therefore the aim of this chapter to contribute to the theoretical understanding of socio-economic inequality. The chapter commences with a consideration of the social spheres within which inequality is generated. Dimensions of equality are explored in part 2. This is followed by part 3, in which different ways of measuring or determining inequality are discussed. Part 4 provides an overview of how inequality manifests itself in South Africa. Part 5 explores the link between poverty and inequality and in part 6 offers some concluding remarks.

3.2 Social spheres within which inequality is generated

“Social structures are embedded in and reproduced by social systems.”²⁰⁷ Baker *et al* state that a social system/sphere refers to a set of social relationships organised around certain set of social processes and outcomes.²⁰⁸ The social systems referred to include the economy as well as cultural political and affective systems. The economy is a system concerned with the production, distribution and exchange of goods and services. It also extends to the whole set of relationships, regulations, norms and values that govern the production, distribution, exchange and consumption of goods and services. There is an economic aspect to almost every social institution, allowing the economy to be at the centre of the processes through which capitalism generates inequality. Through capitalist economic structures there is a reproduction of privileges across generations and within certain social classes.²⁰⁹ It is within the economy that material inequalities in wealth and income are generated.²¹⁰

The second system is the cultural system which is practically part of every social institution. It is concerned with the production, transmission and legitimisation of cultural practices and products, including various forms of symbolic representation and communication.²¹¹ Cultural systems are operative in the generation and reinforcement of social structures that are fabricated around differences of appearance, values and preferences, such as those involved in racism, disability and religious oppression. Moreover, culture is the means of both

²⁰⁶D Rae *Equalities* (1981) 132.

²⁰⁷J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 57.

²⁰⁸This section of the chapter draws heavily from J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 57 – 72.

²⁰⁹See J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 3 and S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 34 – 40.

²¹⁰J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 3 and S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 34 – 40.

²¹¹See A Blumenthal “An Inductive Study of the Nature of Culture” (1954) *Social Forces* Vol. 33 (2) 113-121.

transforming and maintaining the social order.²¹² The educational system, the mass media and religions play a role in the cultural system. They pass dominant societal ideas from one generation to another in ways that legitimate and reinforce inequalities. On the other hand, they offer a platform where those ideas can be criticised and resisted. Allport points out that “culture is the work of man. It springs jointly from his own nature and from the materials and instruction already existing at his disposal.”²¹³ In this regard, one would argue such disposal is facilitated by the education system, mass media and religion, among other forms of cultural transmission.

The political system is the third system and it refers to the set of relationships involved in making and enforcing collectively binding decisions. There is the formal political system, which is the set of institutions involved in making binding and enforceable decisions embodied in law.²¹⁴ Additionally, there is also the wider conception of the political system under which every social institution has a political aspect. In the political system power is typically employed to back up and occasionally challenge unequal social structures. Dominant groups use it in pursuit of their own interest and subordinate groups exercise power available to them to resist the dominance. The state is the prominent institution affecting the political system. Other institutions include political parties, civil societies and other organisations.²¹⁵ Every social institution has a political dimension in terms of which collective decisions are made which can reinforce or curb inequalities. In addition, states have institutional frameworks that are administered by their respective political and regulatory authorities. These frameworks include: i) the policy regime framework, which

²¹²A Blumenthal “An Inductive Study of the Nature of Culture” (1954) *Social Forces* Vol. 33 (2) 113-121.

²¹³F Allport “Social Change: An Analysis of Professor Ogburn’s Culture Theory” (1924) *Social Forces* 2 (1924): 671 – 676 671.

²¹⁴See B. Scott “The Political Economy of Capitalism” Working Paper 07-037 December 2006 13 – 17.

²¹⁵In South Africa there are state institutions which support constitutional democracy and whose decisions have an effect on the political system in the Republic. They include the Public Protector, who has the power as regulated by national legislation to investigate any conduct in state affairs, or in the public administration in any sphere of government, which is alleged or suspected to be improper; the South African Human Rights Commission, whose responsibility is to protect and promote human rights; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which is responsible for the promotion of respect for the rights of cultural, religious and linguistic communities; the Commission for Gender Equality, which is responsible for promoting respect for gender equality and the protection, development and attainment of gender equality ; the Auditor General, whose function is to audit and report on the accounts, financial statements and financial management of all national, provincial and local state departments and any other institution that is authorised in terms of any law to receive money for a public purpose; and the Electoral Commission, which is responsible for managing elections of national, provincial and municipal legislative bodies in accordance with national legislation. These institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

involves broad policies that influence the macro economy; ii) the regulatory framework. There are number of regulatory regimes for the factor markets, for example, land, labour and capital; iii) the social infrastructure framework, which involves the provision of schools, public health and welfare organisations; and iv) the physical infrastructure framework, which involves the provision of infrastructures such as roads by the state.²¹⁶

The fourth system is the called the affective system. The recognition of this system began as feminist scholarship drew attention to the importance of care and love within the lives of women particularly.²¹⁷ The affective system is concerned with the provision of sustainable relationships of love, care and solidarity.²¹⁸ Inequality within this system surfaces as a result of unequal access to meaningful loving relationships and when there is inequality in the distribution of the emotional and other work that produces and sustains such relationships.

These four systems are distinct yet they also interact. The ‘privileged’ within the economic system are advantaged politically through their ability to fund political causes and control economic decisions. Their privileges extend to influential social networks, a form of social capital that arises from their influence with other powerful people. In general, they are also holders of valued occupational positions and roles that develop skills and experiences deemed necessary for other powerful offices and positions. Anderson argues that being part of social networks is vital as “who one knows is at least as important as what one knows in determining one’s access of opportunities.”²¹⁹ In addition, employers often advertise employment vacancies through informal social networks such as word of mouth. In this regard, those who are not part of the ‘social networks of communication’ are excluded from the information.²²⁰ Such exclusion exacerbates both economic inequalities and political inequalities. The way groups are treated in the cultural system can have profound implications for economic wellbeing. Groups that are ignored, misrepresented, trivialised or negatively portrayed as culturally inferior are generally not granted credence in political engagements. Groups that lack influence over the operation of cultural institutions are unlikely to have an equal status in the cultural system. Béteille points out that inequality in

²¹⁶See B. Scott “The Political Economy of Capitalism” Working Paper 07-37 December 2006 13 – 17.

²¹⁷See M. Nussbaum “Emotions and Women’s Capabilities” in M. Nussbaum & J. Glover (eds) *Women Culture and Development: A Study of Human Capabilities* (1995).

²¹⁸See J. Baker, K. Lynch, S. Cantillon & J. Walsh *Equality: From Theory to Action* (2004) 57 – 72.

²¹⁹E. Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* Vol.77 1195 3.

²²⁰E. Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* Vol 77 1195 3.

social contexts is not prearranged by nature, but is culturally amassed by particular people according to certain historical conditions.²²¹

The impact of the affective system on other societal systems surfaces in the way in which the unequal role of women in the affective system serves as a basis for their subordinate position in the economic, cultural and political systems. There is a gendered division of labour through which women are expected to provide for the caring and supporting of personal relationships (such as the rearing of children). This has an effect on the position and full participation of women in the economic, cultural and political systems. The gendered division of labour has also reinforced male power and dominance within family households and the workplace as well.²²² The interaction of the affective system with other systems is evident in the lives of refugees, asylum seekers, displaced persons and economic migrants. These groups may have experienced brutal treatment before escaping from oppressive conditions. Establishing a place in the economic, cultural and political systems in the countries in which they seek refuge is usually a burden affectively. The 2008 xenophobic attacks in South Africa²²³ evidently reflect the difficulties economic migrants face in attempting to establish a place within the societal systems prevailing in the countries where they seek refuge. The next section will discuss the main dimensions of inequality that are found within the above explored societal systems.

3.3 Dimensions of inequality

3.3.1 Introduction

The approach to inequality has developed on the basis of two key dimensions – status-based inequality and socio-economic inequality. These two dimensions are termed ‘recognition inequality’ and ‘redistributive inequality’ respectively.²²⁴ These are not only two dimensions within which people can be equal and an unequal in society, but most, importantly these dimensions represent the major conditions that enable people to maintain a decent living or

²²¹A Béteille “The idea of Natural Inequality” in G Berreman (ed) *Social Inequality: Comparative and Developmental Approaches* (1978) 60.

²²²See section 3.7.2 part (d) of this chapter for more on gender equality.

²²³See J P Misago, L Landau & T Monson (2009) “Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa.” Paper No.1/2009 available at www.wilsoncenter.org/publications (accessed 28/05/13).

²²⁴This section draws heavily from S Fredman “Redistribution and Recognition: Reconciling Inequalities” (2007) 23 *SAJHR* 214. Fredman uses the conceptual framework of recognition and redistribution developed by Nancy Fraser and others.

not. It should be noted, however, that these are not the only dimensions that can reflect poverty. According to Fraser, they are just lenses best suited to politicise issues.²²⁵

3.3.2 Recognition inequality

Recognition inequality is also referred to as status inequality or status-based discrimination. It developed from Hegel's seminal work on individual identity drawing from 'inter-subjective recognition' within the context of social relations.²²⁶ Fredman points that recognition is about social status and the relative standing of social actors within cultural value patterns.²²⁷ In this regard, misrecognition or status inequality arises when cultural value patterns constitute some inferior, excluded or invisible stigma. In other words, status inequality consists of the unequal ability to participate in social life. Recognition inequality is a recognition issue – recognition on the basis of race, class or gender, or being women, men, elderly, children and so forth. This is the field of anti-discrimination laws, where constitutional equality guarantees the right to address status claims based on misrecognition, mistreatment or lack of equal respect. Status claims are derived from group membership. The claims are also traditionally negative, requiring the state or private bodies to refrain from the detrimental treatment of individuals on prescribed grounds. In the Constitution such grounds are provided for in section 9 (3). They include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Claims based on these grounds are justiciable in the courts and also under the human rights model. These grounds of discrimination are significant as they extend to vital spheres of life in society. Baker *et al* argue that if we are committed to equality of recognition, we cannot cordon off these grounds from critical scrutiny.²²⁸ Criticisms involving cultural values require engagement in an open dialogical spirit.²²⁹ Such engagement recognises that the advantaged must make an effort to understand the voices of members of subordinate groups and be open to critical interrogation of their own views.²³⁰ It is imperative to note that a commitment to such dialogue does not of itself resolve all the difficult issues raised by cultural conflict, but it creates a space in which they can be addressed.²³¹

²²⁵ A remark made by Nancy Fraser while delivering a paper at a colloquium in Stellenbosch, May 2011.

²²⁶ S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214

²²⁷ S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214.

²²⁸ J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 22.

²²⁹ J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 22.

²³⁰ J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 22.

²³¹ J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 22.

3.3.3 Redistribution inequality

Redistribution equality is concerned with injustices rooted in the economic structure of society, highlighting the need to address socio-economic inequality.²³² Achieving socio-economic equality often requires redistribution as a corrective measure to increase access to resources by individuals and groups. Fredman argues that constructing a concept of socio-economic equality or redistributive equality without considering the implications for status-based inequality can be damaging and ineffective. This argument is based on the following considerations:-

- Some status-based inequalities include redistributive harm and require redistributive solutions. For instance, in affirmative action or positive actions programmes, it is apparent that status is used as the basis for redistribution.
- In practice, status-based considerations have been used to restrict redistributive outcomes. Incorporating redistribution constitutes a challenge to the familiar boundary (*justiciability*) between status-based equality and socio-economic equality. When faced with status claims with genuine redistributive consequences, the judiciary is reluctant to enter into redistributive decision making. Such reluctance imposes a restriction on possible redistributive outcomes.
- The disadvantage associated with status-based inequality is in many cases directly and positively addressed through socio-economic policy measures and the welfare state. The old, disabled people, children, women, minorities, race groups have benefited directly from socio-economic measures.

Fredman further points that a principle of equality which can “span both spheres can be shaped by a multi-dimensional conception of equality” (which merges recognition inequality and redistributive equality).²³³ Such a conception is facilitated by substantive equality through its distinct four aims, which include: breaking the cycle of disadvantage; promoting respect for equal dignity; affirming identity within community; and facilitating full social participation.²³⁴

²³²This section also draws from S Fredman “Redistribution and Recognition: Reconciling Inequalities” (2007) 23 *SAJHR* 214.

²³³S Fredman “Redistribution and Recognition: Reconciling Inequalities” (2007) 23 *SAJHR* 214.

²³⁴The four aims of substantive equality will be explored further in Chapter 4 of this study.

Redistribution is often used by welfare states as a way of focusing on addressing the needs of people.²³⁵ Socio-economic equality involves accessibility to socio-economic rights and benefits. On the other hand, lack of access to, and infringement of, some socio-economic rights drives socio-economic inequality. Redistribution inequalities are addressed as socio-economic claims which require positive action to make provision for individuals (suggesting equality of welfare). Such claims emerge in the light of unequal access to, and distribution of, basic needs, opportunities and material resources.²³⁶ These claims emphasise the need for economic inclusion. This involves allocation of resources and this brings to the fore the obligations of the state to give effect to socio-economic rights. The Constitutional Court has affirmed on several occasions the justiciability of socio-economic rights. Olivier *et al* point out that the critical question is how these rights can be effectively adjudicated.²³⁷ In *Minister of Health and Others v Treatment Action Campaign*²³⁸ the Constitutional Court held that if the state has failed to give effect to its constitutional obligations, the Court is obliged by the constitution to say so “in so far as that constitutes an intrusion mandated by the Constitution.” The Constitutional Court further held that courts can rather decide cases in which the state has the resources but has chosen not to make them available, or cases involving scarce resources by asking whether the state has made reasonable efforts to promote individual’s rights.

In *Soobramoney v Minister of Health (KwaZulu-Natal)*²³⁹ the Court, adopting a relatively cautious approach, held that the judiciary must be slow to interfere with rational decisions taken in good faith by the political organs and authorities whose responsibility this is. The Court made it clear that there will be instances where the greater needs of society as opposed to the specific needs of particular individuals may have to be given priority. In *Grootboom*²⁴⁰ the Court stated with regard to the right to access to adequate housing, among several other issues, that three principles²⁴¹ are significant in providing access to social security:

²³⁵South Africa is a welfare state. This description is given to states which assume primary responsibility for the welfare of their citizens in matters of health care, education, employment, and social security.

²³⁶C Albertyn “Contesting Democracy: HIV/AIDS and the Achievement of Gender Equality in South Africa.” (2003) *Feminist Studies* 29 (3) 604 76.

²³⁷M Oliver, J F Khoza, J van Rensburg & E Klinck “Constitutional issues” in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* Lexis Nexis, Butterworths 2003 54.

²³⁸2002 BCLR 1033 (CC).

²³⁹1998 (1) SA 765 (CC).

²⁴⁰*Government of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

²⁴¹The principles are sometimes referred to as internal limitations or qualifiers which can be applied to justify the basis of specific qualifications pertaining to a specific right. On the other hand, there are also principles contained in the general limitation clauses (s 36 of the Constitution) which are sometimes referred to as external

- The measures adopted must be reasonable;
- The measures must be within the state's available resources; and
- The measures must aim to ensure the progressive realisation of rights.

These principles are found in sections 26 (2) and 27 (2) of the Constitution. In *Minister of Health and Others v Treatment Action Campaign* the matter was based on whether the state is compelled to provide antiretroviral drugs (Nevirapine) to mothers who cannot afford them. The Court applied the principles laid down in *Grootboom* in interpreting section 27 (2) of the Constitution. It emphasised the adoption of the 'principles' when required to measure governmental policy and decision making against constitutional prerequisites. The Court upheld that socio-economic rights contained in the Constitution are justifiable and reiterated that a purposive reading of sections 26 and 27 of the Constitution is required. Government was ordered to remove without delay restrictions that prevented the distribution of these drugs.

Socio-economic rights (and inequalities) are more problematic because of the variability of their content. This sets redistribution as a question of majoritarian politics. Reformulation of socio-economic inequality as a status-based wrong has been rejected by the courts. For example, the United States Supreme Court has refused to shape the constitutional equality guarantee in the United States Constitution to cover groups defined only by their poverty. In *San Antonio Independent School v Rodriguez*²⁴² the Court found it difficult to accept that there could be justiciable criteria for what amounted to poverty. It was held that the Equal Protection Clause in the 14th Amendment does not require absolute equality or precisely equal advantage.²⁴³ In the light of the discussion above, is inequality measurable?

3.4 Measuring inequality

Measuring changes in inequality facilitates the verification of the effectiveness of policies aimed at addressing inequality. It also generates the information essential to employ inequality as a clarifying variable in policy analysis. To determine changes in redistributive

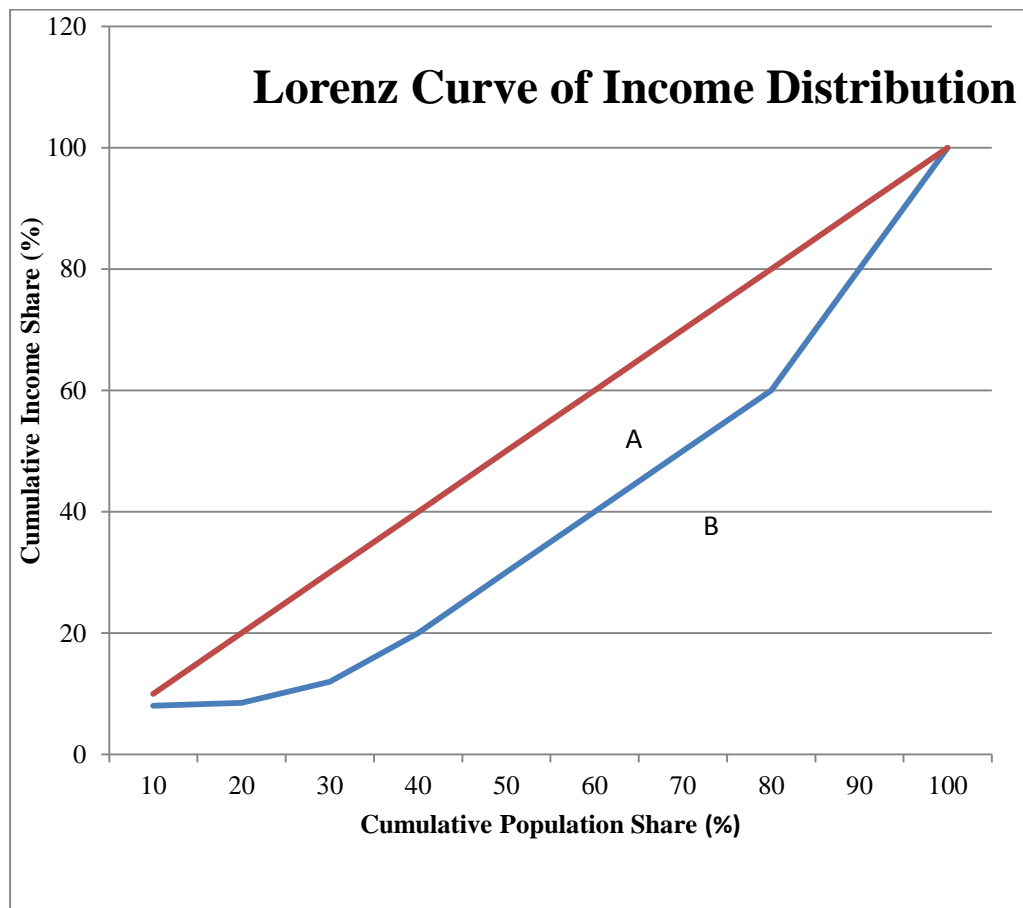
limitations. The principles are found in a three-fold test in terms of which the limitation of a fundamental right must be a) in terms of the law of general application ; b) reasonable; and c) justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including i) the nature of the right; ii) the importance of the purpose of the limitation; iii) the nature and extent of the limitation; iv) the relation between the limitation and its purpose; and v) less restrictive means to achieve the purpose.

²⁴² 411 US 959; 93 S. Ct. 1919; 1289.

²⁴³ *San Antonio Independent School v Rodriguez* 411 US 959; 93 S. Ct. 1919; 1289.

inequality and non-income inequality, income and human development indices are used respectively. The Gini coefficient is the most commonly used measure of inequality.²⁴⁴

The coefficient varies between 0 and 1, where 0 reflects complete equality and 1 indicates complete inequality (one person has all the income or consumption, all others have none). Graphically, the Gini coefficient can be easily represented by the area between the Lorenz curve and the line of equality.



On the above figure the Lorenz curve maps the cumulative income share on the vertical axis against the distribution of the population on the horizontal axis. In this example 40 per cent of the population obtains around 20 per cent of total income. If each individual had the same income, or total equality, the income distribution curve would be the red straight line in the graph, which is the line of total equality. The Gini coefficient is calculated as the area A

²⁴⁴World Bank extract "Measuring Inequality" available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/O,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html> (accessed 10/04/13). Other measures of inequality are: the Theil Index, the decile dispersion ratio and share of income/consumption of the poorest x%.

divided by the sum of areas A and B. If income is distributed completely equally, then the Lorenz curve (the blue line) and the line of total equality are merged and the Gini coefficient is zero. If one individual receives all the income, the Lorenz curve would pass through the points (0,0), (100,0) and (100,100), and the surfaces A and B would be similar, leading to a value of one for the Gini coefficient.

It is sometimes argued that one of the disadvantages of the Gini coefficient is that it is not additive across groups; i.e. the total Gini of a society is not equal to the sum of the Ginis for its sub-groups. The Gini coefficient rate of South Africa is very high, pointing to significant income inequalities largely driven by increased wage inequality and only partly mitigated by the government's social grants programme.²⁴⁵ South Africa's economic Gini coefficient rose from 0.64 in 1995 to 0.72 in 2005²⁴⁶ and it is currently 0.63.²⁴⁷

A disadvantage of the Gini coefficients is that they vary when the distribution varies, no matter if the change occurs at the top or at the bottom or in the middle.²⁴⁸ This means any transfer of income between two individuals has an impact on the indices, irrespective of whether it takes place among the rich, among the poor, or between the rich and the poor.²⁴⁹ If a society is most concerned about the share of income of the people at the bottom, a better indicator may be a direct measure, such as the share of income that goes to the poorest 10 or 20 per cent. Such a measure would not vary, for example, with changes in tax rates resulting

²⁴⁵H Bhorat, Van der Westhuizein & Jacobs "Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions" unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn "Constitutional Equality in South Africa" in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75. See also Statistics South Africa, 2008 *Income and Expenditure of Households 2005/2006: Analysis of Results* Report No 01 -00-01 3.

²⁴⁶H Bhorat, C Van der Westhuizein & T Jacobs "Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions" unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn "Constitutional Equality in South Africa" in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁴⁷See the 2013 Human Development Report released by the United Nations Development programme available at http://hdr.undp/en/media/HDR_2013_EN_Complete.pdf (accessed 29/09/2013).

²⁴⁸H Bhorat, C Van der Westhuizein & T Jacobs "Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions" unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn "Constitutional Equality in South Africa" in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁴⁹H Bhorat, C Van der Westhuizein & T Jacobs "Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions" unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn "Constitutional Equality in South Africa" in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

in less disposable income for the top 20 per cent to the advantage of the middle class rather than the poor.²⁵⁰ But how does inequality manifest in South Africa?

According to Bhorat *et al*, non-income inequality has decreased between 1993 and 2005.²⁵¹ The Gini coefficient for non-income inequality in South Africa in 1993 was 0.25 and it decreased to 0.19 in 2005.²⁵² The improvement in the levels of non-income inequality is largely the result of the increased access to public services.²⁵³ The African population has benefited significantly from the increase in the provision of basic services since 1994.²⁵⁴ Nonetheless, a large section of the African population remains without access to water, electricity, housing and sanitation, with a Gini coefficient of 0.21 in 2005.²⁵⁵ Addressing these major backlogs in the delivery of basic services will serve to further reduce non-income inequality in the country.²⁵⁶ On the other hand, Van der Berg points that wage income is the dominant component in overall income inequality. Differences in the levels and quality of education fuel wage inequality. “The weak endowment of those currently unemployed would

²⁵⁰H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁵¹See H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁵²H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁵³H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁵⁴H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

²⁵⁵In 1993 and 2005 respectively changes in the Gini coefficient of non-income inequality by race is as follows: coloured – 0.09 and 0.08; Asian – 0.03 and 0.05; and Whites – 0.03 and 0.03. (Bhorat *et al* (2009) “Income and Non-income Inequality in Post-Apartheid South Africa: What are the Drivers and Possible Policy Interventions?” Development Policy Research Unit (DPRU) Working Paper 09/138).

²⁵⁶H Bhorat, C Van der Westhuizen & T Jacobs “Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions” unpublished paper presented at the Development Policy Research Unit at the University of Cape 29-09-2008 cited by C Albertyn “Constitutional Equality in South Africa” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

not assure them of high labour market earning ... if they were employed it would ... be at low wages thus leaving wage and ... aggregate inequality high and little affected.”²⁵⁷

3.5 Inequality in South Africa

3.5.1 Introduction

The post-apartheid government has been clear since it came into power about its commitment to, and political interest in, reducing inequality. A subsequent significant reduction in overall inequality has been (and still is) expected, yet income inequality is not changing and may in fact have worsened since the end of apartheid.²⁵⁸ “State policies played and continue to play a major role in the reproduction of inequality, in interaction with exogenous changes in South Africa and the world economy.”²⁵⁹ Inequality in South Africa has several determinants, which will be explored in the next section.

3.5.2 Determinants of inequality

3.5.2.1 *Income levels and inequality*

Income inequality²⁶⁰ is explained by inequality of opportunity in the market economy, among other factors. In the South African situation differences in educational quality, experience, race and cultural factors may explain differences in income levels. McGrath points out three types of theories on labour market segmentation which account for income level differences:

i) Job competition theories, according to which a certain wage is attached to a specific position and competition for positions thus determines wage distribution. Screening factors

²⁵⁷See S Van der Berg “Current Poverty and Income Distribution in the Context of South African History” Stellenbosch Economic Working Papers: 22/10 October 2010.

²⁵⁸J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 3 – 4.

²⁵⁹J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 4.

²⁶⁰There are different types of income including: a) wages – a wage is a specified amount of money paid to an employee measured by the amount of time they work. Wages are different from a salary, though sometimes people use the terms interchangeably. Usually people who earn salaries receive a specified amount of money per month, not based on the hours they work. They may still work at least 40 hours a week, but may be required to work more when necessary. Salary does not rise or fall depending on time at work, whereas wages do. A remittance is a transfer of money to a person from another place; b) grants – an income grant refers to a payment made by the state to everyone legally resident in a country regardless of age, income, family status or other factors. There are various types of grants in South Africa, including state old age pension, disability grant, war veterans’ grant; foster child grant and the care dependence grant. The most effective grant in South Africa is the state old age pension grant, which is responsible for approximately 50% of rural income; and c) remittances – remittance transfers are a significant source of income particularly for rural black households in South Africa. The September 2002 Labour Force Survey identified remittances as the main source of income for more than a third of rural black households with labour migrants (D Posel & D Casale “Internal Migration and Household Poverty in Post-Apartheid South Africa” in R Kanbur & H Bhorat (eds) *Poverty and Policy in Post-Apartheid South Africa* (2006) Human Sciences Research Council Press 351- 365).

applied by employers such as education, experience, gender and race would then determine wage differentials;

ii) Internal job market theories explain wage rates within an organisation as being largely separated from external wage rates because of the existence of an internal job market, with an entrance into the organisation only taking place at certain entry points in the job hierarchy. As a result internal conditions and administrative criteria, rather than marginal productivity, mainly determine wage levels, and an organisation's tradition may also determine what job opportunities could be competed for by whom;

iii) Crowding theories, according to which certain attractive positions could be reserved for members of a particular group, leaving the rest of the workforce crowded in competing for low-skill jobs, thereby driving down wages in such jobs and increasing wage differentials between occupations.²⁶¹

All these theories are applicable to South Africa and they imply inequality of opportunity. The implications are that race could be used as a screening factor (job competition theory), or that internal labour market rules favour blacks or whites (internal job market theory), or that blacks are crowded into low-skill jobs by tradition (crowding forces). Van der Berg argues that whatever model one applies, the effects are similar.²⁶² Because of the fundamental shift of political power from apartheid to democracy, internal market rules have changed in the reverse direction of favouring blacks. This has been done through affirmative action policies which have given blacks access to certain positions and changing of wage ratios.

Another factor that has contributed to income inequality is the change in the employment patterns as a result of economic policies such as privatisation. Privatisation is one of the push factors that have contributed to non-standard employment also known as 'casualisation'. In South Africa some employers offer 'non-standardised' work in an attempt to circumvent labour legislation.²⁶³ There is a perception among owners of capital that the South African labour market is very rigid and inflexible, and that it protects the rights of workers

²⁶¹M McGrath "The determinants of poverty: A theoretical analysis" (1984) Carnegie Conference paper N0.269. Cape Town: Second Carnegie Inquiry into Poverty and Development in Southern Africa 14.

²⁶²S Van der Berg "Current Poverty and Income Distribution in the Context of South African History" Stellenbosch Economic Working Papers: 22/10 October 2010.

²⁶³See P Benjamin "Who Needs Labour Law? Defining the Scope of Labour Protection" in J Conaghan, R Fischl & K Klare (eds) *Labour Law in the Era of Globalisation: Transformative Practices and Possibilities* (2004) 75 – 92.

extensively (dismissals and retrenchments procedures are said to be onerous).²⁶⁴ ‘Casualisation’ is therefore taking hold in South Africa’s employment ethos, slashing union membership and sapping bargaining power. This has been exacerbated by the fact that rendering of services seems to occur increasingly in the form of subcontracting and outsourcing.²⁶⁵ While changing income levels is important to reduce inequalities, other determinants of employment relative to population also play a role. These include changing age structure, labour force participation rates amongst race groups and respective genders, and the availability and distribution of employment.²⁶⁶

3.5.2.2 Race and inequality

The deracialisation of the labour market and welfare policies inherited by the post-apartheid government provides benefits which are significant for many poor households.²⁶⁷ Nonetheless, it also continues to provide privileges to a deracialised section of the populace at the expense of the very poor.²⁶⁸ Deracialisation has meant that a system from the apartheid era designed to protect the white poor in the formal sector²⁶⁹ has been extended to protect the now predominantly African formal sector.²⁷⁰ In this new dispensation the African formal sector, like the white working class during apartheid, is far from being the poorest section of society.²⁷¹ Those who are not part of the working class constitute the large masses that face a double handicap of being victims of inequality and poverty. There is a shift from inter-racial inequality to intra-racial inequalities within the composition of the South African population.²⁷² Van der Berg *et al* argue that this is a phenomenon which is driven by the gap between rising job prospects for highly skilled members of each race group and declining

²⁶⁴D du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, G Giles, C Bosch, J Rossouw *Labour Relations Law. A Comprehensive Guide* (2006) 37-38.

²⁶⁵D du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, G Giles, C Bosch, J Rossouw *Labour Relations Law. A Contemporary Guide* (2006) 37-38.

²⁶⁶See S Van der Berg “Current Poverty and Income Distribution in the Context of South African History” Stellenbosch Economic Working Papers: 22/10 October 2010.

²⁶⁷J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 3.

²⁶⁸J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 3.

²⁶⁹The formal sector comprises of all those types of employment which offer regular wages and hours, carry with them employment rights and on which income tax is paid.

²⁷⁰J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 46.

²⁷¹J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 46.

²⁷²See M Leibbrandt, I Woolard, A Finn & J Argent “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” (2010) OECD Social, Employment and Migration Working Papers No.101, OECD Publishing, doi:10.1787/5kmms0t7p1ms-en (accessed on 05/09/13).

prospects for less skilled workers.²⁷³ Whiteford and Van Seventer point out that by 1996 intra-racial inequality contributed to 67 per cent of overall inequality in South Africa.²⁷⁴

It is important to note that intra-racial inequality and poverty trends within the black population increasingly dominate aggregate inequality and poverty in South Africa.²⁷⁵ While inter-racial (black, white, coloured or mixed-race and Indian) inequality remains high and is falling slowly, it is the increase in black intra-race inequality which is preventing the aggregate inequality measures from declining. South Africa's ethnic composition has seen the black population expand from 70% to 80% between 1970 and 2001, compared to the shrinking proportion of whites – 17% to 9% - over the same period. Such a demographic change gives increasing importance to the intra-African distribution in driving the aggregate distribution. While inter-racial inequality has fallen, it remains high by international standards and its decline has slowed since the mid-1990s. The bottom deciles of the income distribution and the poverty profile are still dominated by black Africans and racial income shares are far from proportionate with population shares.

3.5.2.3 *Class and inequality*

South Africa is divided along class lines. Seekings and Nattrass assert that there are three distinct categories: i) an upper working class that is deracialising and better off, consisting of managers and professionals; ii) a second working class which is composed of semi-professionals, teachers and nurses; an intermediate working class (white collar, skilled and supervisory); a 'core working class' (composed of semi-skilled and unskilled workers) and petty traders. This group is diminishing in number, but it is generally better off than under apartheid; and iii) the third class, which consists of the marginal working class, composed of domestic and farm workers and an 'under-class' that includes the unemployed. This class is growing in number and it is mostly worse off than before 1994. Theron argues that class is an analytic tool and conflating it with occupational status does not make sense.²⁷⁶ Baker *et al*

²⁷³S Van der Berg "Trends in Poverty and Inequality since the Political Transition" (2005) Stellenbosch Economic Papers:1/2005 Department of Economics and the Bureau for Economic Research, University of Stellenbosch 9.

²⁷⁴A Whiteford & D Van Seventer "South Africa's changing income distribution in the 1990s" (2000)*Studies in Economics and Econometrics* 24(3): 7-30 28.

²⁷⁵This following paragraph draws heavily from M Leibbrandt, I Woolard, H McEwen & C Koep "Better Employment to Reduce Inequality Further in South Africa" in *Tackling Inequality in Brazil, China, India, and South Africa: The Role of Labour Market and Social Policies* (2010) available at Publishing.doi:10.1787/9789264088368-en (accessed on 05/09/13).

²⁷⁶J Theron "Plus ça change: Re-inventing Inequality in the Post-apartheid Workplace" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 127.

point that “the inequality experienced by other groups [*or classes*] may be an effect of cultural, affective or political reasons.” People are not singular in their social identity – they have multiple identities ranging from the political and cultural to the economic.²⁷⁷

Another significant class categorisation is that within the black population. The end of the apartheid era saw the rise of the black middle class and the black elite. Pockets of rural poverty have not benefited from the new dispensation, marking a substantial increase in intra-racial inequalities or class inequalities within the black population. Several commentators affirm that the post-apartheid government has not been responsive to the interests of the black poor.²⁷⁸ The affirmative action policies are biased towards the upper and middle classes, while the rest lag behind.²⁷⁹ This class categorisation however, also rests on significant historical perspectives. According to Terreblanche, the 1970s and 1980s saw the abolishing of discriminatory legislation and the emergence of successful African entrepreneurs and ample opportunities for the rich African rural elite.²⁸⁰ In addition, a new generation of African entrepreneurs emerged in urban areas building empires through political connections as well as dubious and illegal activities.²⁸¹ As a result, the income of the top 20 per cent of African households increased by 38 per cent from 1975 to 1991 and by a further 15 per cent from 1991 to 1996.²⁸² This has contributed to South Africa’s skewed distribution of income shift from being race-based to class-based. Inequality has increased within these groups as well. Evidently, the present economic structure privileges certain social classes and will reproduce those privileges across generations, if institutional structural change does not take place. This echoes Michaels’s sentiments that efforts towards the eradication of racial inequality are fruitless without any confrontation of its deeply ingrained hierarchical class structure.²⁸³

²⁷⁷ J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 67.

²⁷⁸ See A Habib & K Bentley *Racial Redress & Citizenship in South Africa* (2008) 339 – 340.

²⁷⁹ A Habib & K Bentley *Racial Redress & Citizenship in South Africa* (2008) 339 – 340.

²⁸⁰ S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 398 – 400.

²⁸¹ S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 398 – 400.

²⁸² S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 398 – 400.

²⁸³ W B Michaels “What Matters” *London Review of Books* August 2009 at www.lrb.co.uk/31/n16/walter-benn-michaels/what-matters (accessed 29/05/13).

3.5.2.4 Gender and inequality

Gender inequality has distinct characteristics.²⁸⁴ Firstly, gender inequality occurs not only outside the household but also centrally within it. Gender is noted to be an important signifier of differences in interests, preferences and bargaining power. This comes with differences in bargaining power, affecting the allocation of who gets what and who does what, leading to ‘hidden inequalities.’²⁸⁵ Unequal distribution of income and consumption within families can result in ‘hidden inequalities’ between females and males. ‘Hidden female inequality’ reflects structural factors related to women’s economic dependence and male power. It also reflects the (lack of) agency of women, who sacrificed their own needs for the sake of the other family members, especially children. ‘Women’s economic dependence (full or partial) is the price they pay for caring within a gendered division of labour, in which men do the greater share of paid work and women of unpaid, domestic work.’²⁸⁶ This inhibits the accessibility of many women to adequate independent income and their ability to facilitate male economic independence and power. The extent and degree of female economic dependence varies over the course of life, and between groups and countries.

Secondly, gender inequalities are also ideologically embedded.²⁸⁷ They stem not only from pre-existing differences in economic endowments (wealth, income, etc.) between women and men, but also from pre-existing gendered social norms and social perceptions.²⁸⁸ Thirdly, gender inequality can also arise from newly defined rules and procedures that structure the functioning of the governance institution itself.²⁸⁹ For instance, the rules that guide the governance of institutions domestically or internationally can explicitly or implicitly exclude particular sections of the community, such as women, from its decision-making or its

²⁸⁴B Agarwal (2002) “Gender Inequality, Cooperation and Environmental Sustainability” (2002) A revised version of a paper presented at a workshop on *Inequality: Collective Action and Environmental Sustainability*, Santa Fe Institute, 21 – 23 Sept 2001.

²⁸⁵The idea of ‘hidden inequality’ and the rest of the paragraph draw from Lister’s argument on ‘hidden poverty’ in R Lister *Poverty* (2004) 55.

²⁸⁶R Lister *Poverty* (2004) 55.

²⁸⁷B Agarwal “Gender Inequality, Cooperation and Environmental Sustainability” (2002) A paper presented at a workshop on *Inequality: Collective Action and Environmental Sustainability*, Santa Fe Institute, 21 – 23 Sept 2001.

²⁸⁸B Agarwal “Gender Inequality, Cooperation and Environmental Sustainability” (2002) A paper presented at a workshop on *Inequality: Collective Action and Environmental Sustainability*, Santa Fe Institute, 21 – 23 Sept 2001.

²⁸⁹B Agarwal “Gender Inequality, Cooperation and Environmental Sustainability” (2002) A paper presented at a workshop on *Inequality: Collective Action and Environmental Sustainability*, Santa Fe Institute, 21 – 23 Sept 2001.

benefits.²⁹⁰ Albertyn points that women in South Africa enjoyed unprecedented political and legal equality in the form of political participation and entrenched human and legal rights by the year 2000.²⁹¹ Thirty per cent of all parliamentarians are women, which has put South Africa at number eight in the world in the terms of gender equality in government.²⁹² However, the fight for gender equality is far from over. The representation of women in the labour market is still a major concern.

3.5.2.5 Unemployment and inequality

Terreblanche, as well as Natrass and Seekings, argue that unemployment is an important key determinant of inequality and poverty.²⁹³ In South Africa unemployment levels²⁹⁴ are very high and they co-exist with inequality. The literature indicates that unemployment leads to inequality when it continues for consecutive cycles. Unemployment, whether cyclical or structural, adds to the despair of the jobless.²⁹⁵ South African unemployment legislation provides for an unemployment insurance scheme designed to support unemployed workers for a certain period of time.²⁹⁶ When the insurance benefits run out, the jobless workers and their families find themselves in extreme financial difficulties. To survive they resort to

²⁹⁰B Agarwal “Gender Inequality, Cooperation and Environmental Sustainability” (2002) A revised version of a paper presented at a workshop on *Inequality: Collective Action and Environmental Sustainability*, Santa Fe Institute, 21 – 23 Sept 2001.

²⁹¹C Albertyn “Contesting Democracy: HIV/AIDS and the Achievement of Gender Equality in South Africa” (2003) *Feminist Studies* 29 (3) 604.

²⁹²P Garson, “SA’s push for gender equity” at http://www.southafrica.info/ess_info/sa_glance/constitution/gender.htm (accessed 15/04/13).

²⁹³See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 34 – 40; J Seekings & N Natrass *Class, race, and inequality in South Africa* (2006) 30 – 31.

²⁹⁴For unemployment figures see Chapter 2 of this study section 2 4 1 on ‘determinants of poverty’ part (c).

²⁹⁵The OECD defines structural employment as the proportion of unemployed persons who cannot find work even when the economy is booming and which cannot be influenced in the short-term by macro-economic policies (see U Walwei & H Werner “Employment Problems in Active Labour Market Policies in Industrialized countries” in D Hoskins, D Dobbernack & C Kuptsch *Social Security at the Dawn of the 21st Century* (2001) 133). Cyclical unemployment refers to the fluctuation in unemployment that is incurred by business cycles, more specifically the unemployment caused by economic recession.

²⁹⁶Unemployment insurance in South Africa is regulated by the Unemployment Insurance Act 63 of 2001 (UIA) and the Unemployment Insurance Contributions Act 4 of 2002 (UICA). In terms of the UIA, unemployment benefits are paid out in respect of temporary unemployment arising from termination of the employee’s services, illness, maternity and adoption. Dependants are also entitled to benefits should the contributor pass away. The Act extends coverage to certain previously excluded groups, such as domestic workers and seasonal workers as well as to higher-income earners. It also introduces a graduated scale of benefits in that the percentage of remuneration that may be paid out in form of benefits differs according to the rate of income of the contributor. Lower-income earners are entitled to higher pro rata benefits than higher-income earners. The entitlement of pregnant female workers to other categories of unemployment benefits provided for by the Act is not reduced if they receive maternity benefits from the Unemployment Insurance Fund. Unemployment insurance is based on equal employer and employee contributions. The UICA regulates the collection of contributions through the South African Revenue Services (SARS) in the case of a SARS-registered employer, and the Unemployment Insurance Commissioner in other cases.

borrowing, which ultimately leads to their debt burden.²⁹⁷ In case of cyclical unemployment, even successive generations fall into the debt trap. This results in the widening of the income gap between the employed and unemployed sections of the populace, thereby adding to the problem of inequality. According to many economists, the structural economic adjustment programmes and deregulation of labour markets have contributed to the problems of unemployment and inequality. On the other hand, the increased use of technology in the manufacturing sector has led to job reduction, which in turn has aggravated the problem of inequality. Declining job security and fractional job opportunities act as a catalyst in spreading the recurrent problem of inequality among the masses. Given the above determinants, inequality is clearly a problem in South Africa and so is poverty as demonstrated in the previous chapter. Are these two predicaments the same? Are they linked? The questions will be explored in turn below.

3.6 The link between poverty and inequality

Poverty and inequality (the two issues) are not the same, as the public discourse at times tends to suggest. What happens to poverty levels does not necessarily affect inequality although it is possible to combat poverty by reducing inequality.²⁹⁸ Landman *et al* illustrate the economic differences between these two issues.²⁹⁹

- A society with a low level of poverty may still be a society with a high level of inequality. The United States clearly has a lower rate of poverty than Tanzania, but it also has higher levels of inequality.
- A fairly equal society may still have a high level of poverty. Many developing countries would have a lower Gini coefficient than South Africa, thus a lower level of inequality, but poverty is much worse. This will partly explain why citizens from those countries (Zimbabwe, Lesotho, Malawi etc.) migrate to South Africa, some legally and others illegally.³⁰⁰ Judging by the way that people vote with their feet,

²⁹⁷See P Mashigo “The Debt Trap Spiral in the Poor Households in South Africa” (2006) *The International Journal of Entrepreneurship, Advancement, Strategy and Education* available at www.indigenousjournal.com/IJEASVolIIIssIMashigo.pdf (accessed 10/06/13).

²⁹⁸See S Van der Berg & M Louw “Changing patterns of SA income distribution: Towards time series estimates of distribution and poverty” (2003) Paper delivered to the Conference of the Economic Society of SA 17 – 19 September 2003, Stellenbosch.

²⁹⁹J Landman, H Bhorat, S Van der Berg & C Van Aardt *Breaking the Grip of Poverty and Inequality in South Africa 2004-2014: Current trends, issues and future policy options* (2003) Executive Summary available at <http://www.sarpn.org.za/documents/d0000649/P661-Povertyreport3b.pdf>. (accessed on 24/02/13).

³⁰⁰See J Landman, H Bhorat, S Van der Berg & C Van Aardt *Breaking the Grip of Poverty and Inequality in South Africa 2004-2014: Current trends, issues and future policy options* (2003) 4 -5 available at <http://www.sarpn.org.za/documents/d0000649/P661-Povertyreport3b.pdf>. (accessed on 24/02/13).

inequality with less poverty is more attractive than equality in poverty. Moreover, inequality is a major force for migration.³⁰¹

- A society in economic take-off will, whilst in the transition from poor to less poor, experience rising inequality. This is as inevitable as the night following the day. Whilst progress is being made with poverty reduction, inequality may be worsening.
- Poverty and inequality will respond differently to growth. High growth will certainly help to roll back the one (poverty), but it might exacerbate the other (inequality). This confronts policy makers with a brutal choice: which one gets the priority? Under socialism the priority was equality – which ended with everybody being equally poor and societies collapsing. Examples would include Nyerere’s African socialism, the Soviet Union and countries in Eastern Europe. Under rampant growth philosophies, combating poverty is the priority. The best example of that would be present-day China, Korea, Taiwan and Malaysia.³⁰²

However, the two issues plainly overlap and interact with each other. O’Higgins and Jenkins argue that there is an inescapable connection between poverty and inequality.³⁰³ One of the most significant factors that reinforce the link between the two issues is status harm. Poverty brings with it status harm³⁰⁴ and so does inequality. According to Fredman, poverty is not only about socio-economic disadvantage, but it is also about recognition inequality³⁰⁵, which denigrates or humiliates individuals.³⁰⁶ Welfare claimants are stigmatised as scroungers, lazy or irresponsible.³⁰⁷ On the other hand, these individuals often experience limited access to resources and opportunities.³⁰⁸ As pointed out earlier in the chapter, unfair allocation of resources leads to distributive inequality.³⁰⁹ The result of this “can be a vicious circle of

³⁰¹J Landman, H Bhorat, S Van der Berg & C Van Aardt *Breaking the Grip of Poverty and Inequality in South Africa 2004-2014: Current trends, issues and future policy options* (2003) 4-5 available at <http://www.sarpn.org.za/documents/d0000649/P661-Povertyreport3b.pdf>. (accessed on 24/02/13).

³⁰²J Landman, H Bhorat, S Van der Berg & C Van Aardt *Breaking the Grip of Poverty and Inequality in South Africa 2004-2014: Current trends, issues and future policy options* (2003) 4-5 available at <http://www.sarpn.org.za/documents/d0000649/P661-Povertyreport3b.pdf>. (accessed on 24/02/13).

³⁰³See M O’Higgins & S Jenkins “Poverty in the European Community” in R Teekens & B van Praag (eds) *Analysing Poverty in the European Community* (1990).

³⁰⁴S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 16. See also section 3.3.2 of this dissertation.

³⁰⁵See section 3.3.2 of this dissertation for the meaning of recognition inequality.

³⁰⁶S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 38.

³⁰⁷S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 38.

³⁰⁸See section 3.5.2 of this chapter.

³⁰⁹See section 3.3.3 for more on distributive inequality.

subordination as the status order and economic structure interpenetrate and reinforce each other.”³¹⁰ Moreover, the occurrence of both poverty and inequality constitutes harm to the wellbeing of individuals, thereby affecting their status. Poverty and inequality both manifest within social systems, which structure people’s lives and account for their general state of being in society.

Another important aspect that reinforces the link between the two issues is that they both concretise the fusion between status and socio-economic disadvantage. According to Fredman, the ‘fusion’ is one of the promises that substantive equality holds.³¹¹ A closer look at the several determinants of the two issues in South Africa (race, gender, class, education attainment etc.), suggests a connection between status and inequality (and poverty), which often leads to socio-economic disadvantage. For instance, with regard to education, the depth of illiteracy and lack of education attainment within the African population is attributed to systematic exclusion during apartheid. Now in the post-apartheid era the backlogs which exist in the education sector reinforce inequality (and poverty) through the labour market.³¹² The educational backlogs among the poor leave them with less and poorer education in terms of quantity and quality.³¹³ This is a disadvantage to them in the labour market – they cannot find jobs and if they do, the wages tend to be low.³¹⁴ In terms of race and educational attainment, apartheid made status (race), being poor and unequal or socio-economically disadvantaged very apparent. This, among other factors, intensified inter-racial inequalities in South Africa. Furthermore, just to provide a right to education is not enough. There is need for the reconstruction of the right to education with the equality ideal in mind. The education system needs to be reconstructed in a way which makes it possible for the poor to access quality education.

Poverty-alleviation programmes require an explicit awareness of equality concerns, as

³¹⁰N Fraser “Rethinking Recognition” (2003) *New Left Review* 3 118.

³¹¹S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15.

³¹²S Van der Berg, M Louw & L Du Toit “Poverty Trends since the Transition: What we know” (2009) Stellenbosch Economic Papers:19/2009 Department of Economics and the Bureau for Economic Research, University of Stellenbosch 10.

³¹³S Van der Berg, M Louw & L Du Toit “Poverty Trends since the Transition: What we know” (2009) Stellenbosch Economic Papers:19/2009 Department of Economics and the Bureau for Economic Research, University of Stellenbosch 10.

³¹⁴S Van der Berg, M Louw & L Du Toit “Poverty Trends since the Transition: What we know” (2009) Stellenbosch Economic Papers:19/2009 Department of Economics and the Bureau for Economic Research, University of Stellenbosch 10.

policies aimed at poverty reduction can in fact reinforce inequality.³¹⁵ Entitlements are linked to households rather than individuals in a number of poverty-alleviation policies.³¹⁶ This does not take into account the gender imbalances that exist within households.³¹⁷ Women are prone to economic dependence and cultural dominance by men. This reinforces inequality and serves as an indication of the fusion between status and socio-economic disadvantage within the two issues. Viewing poverty in a broader sense as deprivation of social resources such as basic needs, material wealth and other things, places decreasing relative poverty as the primary objective of striving for equality.³¹⁸ On the other hand, the poverty-alleviation equation is incomplete if inequality is not addressed without attention given to issues such as discrimination and (lack of) representation.³¹⁹ As observed in a report of the United Nations Committee on Economic Social and Cultural Rights, “Sometimes poverty arises when people have no access to existing resources because of who they are, what they believe or where they live. Discrimination may cause poverty, just as poverty may cause discrimination.”³²⁰ As discrimination brings poverty, redistributive inequality augments poverty. This reinforces the link between the two issues.

The two issues are also linked in relation to the need for ‘multiple integration’ in society for every individual.³²¹ As noted earlier, inequalities are generated within societal systems and poverty exists within these systems. The ability of poor persons to become integrated into the economic system is limited when they are uneducated, unemployed, etc. The situation is worsened by the fact that societal systems are interrelated and this further affects the integration of the poor into other systems (political, social and affective). In other words, an individual’s capacity to integrate (on multiple levels) in society is dependent on the structural

³¹⁵See S Fredman “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2009) An interview report by Equality Rights Review which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83.

³¹⁶S Fredman “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2009) An interview report by Equality Rights Review which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83.

³¹⁷S Fredman “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2009) An interview report by Equality Rights Review which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83.

³¹⁸M Ilieva “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2009) An interview report by Equality Rights Review which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83.

³¹⁹S Fredman “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2009) An interview report by Equality Rights Review which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83.

³²⁰United Nations, Report on World Social Situation 2001 para 11.

³²¹See Chapter One of this study and also J Berghman “The Resurgence of Poverty and the Struggle against Social Exclusion” (1997) *International Social Security Review* 50 (1) 3-21.

nature of the societal systems. This brings to fore the need for the facilitation of social inclusion.

Eradication of both poverty and socio-economic inequality is a broad and ambitious task. They both influence the cycle of disadvantages in nations and individual families. Tony Judt asserts that inequality plays a crucial role in shaping people's lives.³²² Chances of living a long and healthy life are dependent on the income available to an individual. Moreover, 'threads of disadvantage'³²³ are more likely to follow people from poorer places, fuelling inter-generational poverty, than those living in wealthier areas. As identified by Judt, these threads of disadvantage include: infant mortality; teenage pregnancy; criminality; prison population; mental illness; unemployment; obesity; malnutrition; illegal drug use; economic insecurity; personal indebtedness; and anxiety.³²⁴ Most importantly, these threads of disadvantage are consequences of inequality and poverty.

Crime is another consequence of inequality that is often linked to poverty. Berreman argues that "much of the sources of crime in the streets, terrorism, ethnic conflict, civil war, and international war is inequality so organised and the alarm, repression, and competition it engenders".³²⁵ According to the World Summit report 2005, inequalities in access to production inputs and productive resources have an impact on poverty reduction. These inequalities raise the production and marketing costs of the poor, thereby rendering them less competitive and less able to raise their incomes.

3.7 Conclusion

There are different types of (in)equality including, among others, equality of outcome and equality of opportunity. These inequalities are generated within societal systems such as the social, economic, cultural, political and affective. These systems are distinct yet interrelated at a conceptual and an empirical level. They also contribute fundamentally to the creation and reproduction of the inequalities experienced by social groups. Inequality is also found within dimensions of recognition and redistribution. The dimension of recognition refers to the

³²²T Judt "Ill Fares the Land". *The New York Review of Books* April 2010 available at www.nybooks.com/articles/archives/2010/apr/29/ill-fares-the-land (accessed 22/05/13).

³²³These are the many faces of inequality and poverty.

³²⁴T Judt, "Ill Fares the Land". *The New York Review of Books* April 2010 available at www.nybooks.com/articles/archives/2010/apr/29/ill-fares-the-land (accessed 22/05/13).

³²⁵G D Berreman (1980) "Is the Consideration of Human Rights Merely a Politicised Luxury in the World Today?" *Anthropology and Humanism Quarterly* 5 2- 13.

freedom to live one's life without the burden of contempt and enmity from the dominant culture. The dimension of redistribution refers to having a range of resource-dependent options that are of roughly the same values as those of others.

South Africa has one of the highest levels of inequality in the world, with a national Gini coefficient of 0.72. Inequality manifests itself in South Africa through various determinants. These include race, class, gender, unemployment, income and others. There is a shift from inter-racial inequality to intra-racial inequalities within the composition of the South African population. Differences in educational quality, experience, race and cultural factors may explain differences in income levels. Inequality occurs along class lines in South Africa within the working sector and within the black population. This class categorisation stems significantly from the socio-economic history of South Africa. Gender is noted to be an important signifier of differences in interests, preferences and bargaining power. This involves differences in bargaining power, affecting the allocation of who gets what and who does what, leading to 'hidden inequalities.'

The literature indicates that unemployment leads to inequality when it continues for consecutive cycles. Unemployment, whether cyclical or structural, adds to the despair of joblessness. Poverty and inequality are not the same, but they overlap and interact with each other. Poverty and inequality both bring status harm to those affected. They both concretise the fusion between status and socio-economic disadvantage within the South African context. Sustainable reduction of poverty cannot be achieved unless equality of opportunity and resources is ensured thus reinforces the link between poverty and inequality. However, if the two issues bring status harm and concretise the fusion between status and socio-economic disadvantage does a substantive conception of equality speak to socio-economic disadvantage in South Africa? The next chapter will discuss the substantive conception of equality and its relationship with poverty.

CHAPTER FOUR: THE SUBSTANTIVE CONCEPTION OF EQUALITY AND ITS RELATIONSHIP WITH SOCIO-ECONOMIC DISADVANTAGE

4.1 Introduction

Inequality and poverty (the two issues) subsist within the veil of life chances rather than life choices.³²⁶ These two issues represent burdens that are concentrated in vulnerable, deprived and poor areas of society. The ideal of equality calls for action to achieve the alleviation of the experiences of poverty and socio-economic inequality. This implies that poverty and socio-economic equality are embedded within broader principles of justice, redress, equity and fairness. However, as indicated in the previous chapters, the evils of poverty and inequality are broadly based and pervasive. The efforts to end or ameliorate them are correspondingly broad and ambitious. Nonetheless, this chapter seeks to explore how a substantive conception of equality can contribute towards alleviation of socio-economic disadvantage in South Africa.

The chapter commences with an exploration of the definition of “equality”, which is an elusive notion.³²⁷ Following on from that, the constitutional view of equality, as espoused by the Constitutional Court, is explored in part 3. Part 4 will describe the aims of substantive equality and subject them to critical examination, specifically exploring the possible links they have with poverty and socio-economic inequality. Part 5 will evaluate the implications of the aims (of substantive equality) on socio-economic disadvantage. Part 6 will offer some concluding remarks.

4.2 What is equality?

Equality is an essential feature of domestic laws and as well as international human rights law. Various constitutions – including that of South Africa – protect the right to equality, although the meaning of the right remains contested. Equality is pursued for various reasons. Scanlon identifies them as, among others, a) to eliminate humiliating differences in status created by inequalities; b) to prevent domination by those who have more from exercising unacceptable forms of power over those who have less; c) to preserve the equality of starting places that are required if our institutions are to be fair (procedural fairness); d) to ensure

³²⁶For the purpose of this chapter the term “socio-economic disadvantage” will refer to poverty and inequality (the two issues) and these terms will be employed interchangeably.

³²⁷For example see N Bamforth “Conceptions of Anti-Discrimination Law” (2004) 24 *Oxford Journal of Legal Studies* 693 703.

equal outcomes; and e) to afford equal opportunity to benefit.³²⁸ However, Scanlon acknowledges that these goals can be achieved without using the notion of equality, and submits that the concept of equality is often used as leverage in political arguments, thereby reducing equality to a secondary status.³²⁹ Some commentators view equality as an empty ideal, whose core meaning remains obscure.³³⁰ In addition, others argue that our numerous appeals to equality are often an appeal to some deeper normative values (such as human dignity, redistribution, participatory democracy, freedom etc.) rather than to the value of equality, which illustrates the considerable symbolic power of the notion of equality.³³¹ Pierre de Vos points out that an investigation into the scope and nature of the right to equality produces more questions than answers.³³² To illustrate this, de Vos cites some of the questions raised by Douglas W. Rae in his book *Equalities* (1981).

- Against which individual, group or other yardstick should the position of the affected subjects be measured to determine whether equality has been attained or not? Or is a comparison with any other individual, group or other human determined yardstick already problematic?
- What is the domain of equality or, put differently, with respect to what is the equality being asserted or claimed? Currently and historically an enormous variety of possibilities are or have been debated, ranging from extremely abstract concepts such as ‘welfare’, ‘resources’ or ‘utility’ to more specific ‘goods’ or ‘properties’ such as financial income, years of education or eligibility for certain sorts of positions.
- When we talk about equality, do we refer to the equal distribution of some good or to an equal distribution of opportunity to acquire that good? If we refer to the latter concept, should we not further distinguish between two possible meanings, namely either that people should have equal prospects of obtaining that good, or that they have equal means to obtain that good?

³²⁸T Scanlon “When does Equality Matter?” A paper presented at a conference on Equality at the John F. Kennedy School of Government, Harvard University April, 2004.

³²⁹J DeMarco “Substantive equality as a basic value” (2001) *Journal of Social Philosophy* Vol. 32 No.2, 197 – 206 198.

³³⁰See C O’Cinneide “The Right to Equality: A Substantive legal Norm or Vacuous Rhetoric?” (2008) *UCL Human Rights Review* Vol. 1; R Dworkin “What is equality? Part 1: Equality of welfare” (1981) *Philosophy & Public Affairs* 10 228 – 240; A Sen *Equality of What? Tanner Lectures on Human values*, (1980). See also P Westen “The Empty Idea of Equality” (1982) 95 *Harvard Law Review* 547.

³³¹See J Raz *The Morality of Freedom* (1986) 235 and Elisa Holmes “Anti-Discrimination Rights Without Equality” (2005) 68 *The Modern Law Review* 175.

³³²P De Vos “Substantive Equality after Grootboom” in S Jagwanth & E Kalula (eds) *Equality Law: Reflections from South Africa and elsewhere* (2001) 54.

- When we evaluate the assertions or claims to equality, by what standard of value or norm is such equality being estimated? Do we purport to take some objective independent measure of the good being distributed, or alternatively its value to the person receiving it?
- What is the relationship between the right to equality and the right not to be discriminated against? Are these two concepts merely two sides of the same coin or should they be viewed as two distinct concepts with distinct fields of operation?³³³

In reference to the concept of equality, Dworkin pointedly observes that “people who praise or disparage it disagree about what they are praising or disparaging.”³³⁴ O’Cinneide describes the attempts to give meaning to equality in the following terms:

“[T]hey often fail to add much to the inherent fuzziness of the idea of equality. It may be better for lawyers, judges and other constitutional actors to refrain from wasting excessive energy on attempts to define in positive terms what equality means. Instead, it may be more productive to develop a rigorous analysis of what types of behavior or social outcomes are compatible with the principle of equality. In other words, it may be a more fruitful enterprise to define the equality principle in negative terms as requiring legal intervention to protect the occurrence of certain forms of discrimination and demeaning treatment rather trying to establish what exactly equality is through abstract moral reasoning.”³³⁵

Although O’Cinneide does not support defining equality in positive terms, a question may be raised: Can one denote the negative terms of equality without first establishing what the positive terms of equality are? Through its interpretation of the “right to equality principle”, the Constitutional Court in South Africa has made a valuable attempt to invest the concept of equality with positive meaning.³³⁶ The equality concept in the South African Bill of Rights is influenced by a modern progressive understanding and developments in human rights law and practice.

³³³P De Vos “Substantive Equality after Grootboom” in S Jagwanth & E Kalula (eds) *Equality Law: Reflections from South Africa and elsewhere* (2001) 54.

³³⁴R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 2.

³³⁵C O’Cinneide “The Right to Equality: A Substantive legal Norm or Vacuous Rhetoric?” (2008) *UCL Human Rights Review* Vol. 1 8.

³³⁶The Constitutional Court has dealt with the equality premise substantively in the following case law: *Brink v Kitshoff* No 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC); *The National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) and *Minister of Finance v Van Heerden* 2004 (6) 121 (CC)

The first part of the definition of equality contained in section 9 (2) of the South African Constitution (hereafter the Constitution) reads: “Equality includes the full and equal enjoyment of all rights and freedoms.” The Constitution incorporates corrective measure as a necessary constitutional weapon for advancing equality³³⁷ and further prohibits direct and indirect unfair discrimination.³³⁸ In this way, practices whose purpose is to discriminate unfairly, or whose effect, impact or outcome amount to unfair discrimination irrespective of the motive or intention, are prohibited. The Constitution’s focus extends to redressing institutional, structural and systematic inequalities.

The South African Constitution has been described as “transformative” in nature.³³⁹ Liebenberg and Goldblatt argue that the “Constitution’s transformative vision” is centred on the dismantling of systematic forms of disadvantage and subordination.³⁴⁰ Furthermore, the inclusion of a detailed equality clause in section 9 of the Bill of Rights serves as an acknowledgement of the “transformative imperative” of the Constitution.³⁴¹ In this way, the Constitution embraces a substantive conception of equality. Substantive equality can usefully be contrasted with the more conventional view of equality, namely the idea that likes should be treated alike – also often referred to as the notion of formal equality. Based on the traditional understanding of equality, formal equality and substantive equality are the two distinct models that are often used to consider issues of equality and discrimination.³⁴² The models are explored below.

The two main conceptions of equality

Formal equality represents a symmetrical view of equality. It regards as lawful the usage of race (or sex) as a criterion for decision making whether directed against or in favour of a

³³⁷Section 9(2) of the Constitution.

³³⁸Section 9(3) and (4) of the Constitution.

³³⁹See K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146; C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality”(1998) 14 *SAJHR* 248. See also D Masoneke “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” (2002) 18 *SAJHR* 309; S Liebenberg “Needs, Rights and Transformation: Adjudicating Social Rights”(2006) 17 *Stellenbosch Law Review* 5; P Langa “Transformative Constitutionalism”(2000) 3 *Stellenbosch Law Review* 351; *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *City Council of Pretoria v Walker*; *Minister of Finance v Van Heerden* para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) paras 51- 52.

³⁴⁰S Liebenberg & B Goldblatt “The Interrelationship between equality and socio-economic rights under South Africa’s Transformative Constitution” (2007) 23 *SAJHR* 338.

³⁴¹S Liebenberg & B Goldblatt “The Interrelationship between equality and socio-economic rights under South Africa’s Transformative Constitution” (2007) 23 *SAJHR* 338.

³⁴²C Albertyn & J Kentridge “Introducing the right to equality in the interim constitution” (1994) 10 *SAJHR* 149 152-153.

disadvantaged group.³⁴³ It adheres to the importance of individualism and neutral treatment. In terms of this perspective, equality is primarily about ensuring individual freedom from group stereotyping. However, formal equality is problematic. Brodsky identifies some of these problems:³⁴⁴

- It lacks a commitment to reducing disparities between groups, and to challenging the underlying norms that turn some categories of difference into categories of subordination and disadvantage;
- It is more sensitive to differential treatment than to differential effects. This makes it difficult for disadvantaged groups to actually prove that seemingly neutral government conduct has adverse effects;
- It is slippery and unreliable. Neutral treatment allows exceptions to the general rule of same treatment where difference is thought to matter. But it does not provide a reference guide for the decision-maker in determining when and what differences should matter. This means decisions based on a conception of equality as neutral treatment will sometimes be consistent with substantive equality outcomes and other times not;
- The formal equality principle lacks a commitment to the amelioration of group disadvantage and does not perceive any group-based generalisations as presumptively discriminatory;
- Consequently, it is inundated by a sense of conflict and dilemma in what to do about difference; how to know when it is acceptable for difference to be taken into account; and what to do about it.

Substantive equality, on the other hand, is more concerned with the purpose, the process and the outcome or result of any legal or policy intervention which may lead to unfair discrimination or underpin existing inequalities. It is an approach that departs notably from the traditional dogma and viewpoint of equal treatment (formal equality). Albertyn states that substantive equality draws from the perception that inequality is not a result of arbitrary

³⁴³O Dupper “Affirmative Action and Substantive Equality: The South African Experiences” (2002) 14 *SA Mercantile Law Journal* 278. See also S Fredman, “Facing the Future: Substantive Equality Under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond*, (2009) 17 - 20.

³⁴⁴G Brodsky “Constitutional equality rights in Canada” in E Kalula & S Jagwanth (eds) (2001) *Equality Law: Reflections from South Africa and elsewhere* 246 – 248.

action, but has its “roots in political, social and economic cleavages between groups.”³⁴⁵ It embraces “the complexity of inequality, its systematic nature and its entrenchment in social values”.³⁴⁶ Substantive equality is fashioned to address the limitations imposed by formal equality in the following manner:³⁴⁷

- It focuses on the disadvantage associated with a prohibited ground rather than the ground itself – on women rather than gender; on blackness rather than colour;
- Substantive equality is sensitive to outcomes rather than just treatment, which opens up the way to requiring different treatment in order to achieve equalities of outcome;
- It recognises that identity can be a source of value and therefore aims to treat all individuals identically, but affirming and accommodating differences;
- It is not neutral as to the outcome;
- Substantive equality can go beyond a fault-based model to one which includes positive duties to respect, protect, promote and fulfil.

In addition, substantive equality affords levelling out the playing field by requiring all initiatives to lead to three significant ends, namely equality of outcome; equality of opportunity and equality of access.³⁴⁸ All three will be discussed below.

a) Equality of outcome

Equality of outcome is results-oriented and defines equality in terms of full participation and fair access of groups to education and other public services.³⁴⁹ This aims to overcome the underrepresentation of disadvantaged groups and to ensure fair participation in the distribution of benefits.³⁵⁰ This may involve special measures such as affirmative action to overcome disadvantage.³⁵¹ Hepple argues that equality of outcome can be understood in three

³⁴⁵C Albertyn “Constitutional Equality in South Africa” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 77.

³⁴⁶C Albertyn “Constitutional Equality in South Africa” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 77.

³⁴⁷S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

³⁴⁸There are various types of equality which include, among others, moral equality, equality of outcome, equality of opportunity, proportional equality, equality of responsibility, utilitarianism and libertarianism. Most of these types of equalities embrace issues that are beyond the scope of this chapter.

³⁴⁹B Hepple “Equality and Empowerment for Decent Work” (2001) *International Labour Review* Vol.140, No.1 7- 8.

³⁵⁰B Hepple “Equality and Empowerment for Decent Work” (2001) *International Labour Review* Vol.140, No.1 7- 8.

³⁵¹B Hepple “Equality and Empowerment for Decent Work” (2001) *International Labour Review* Vol.140, No.1 7- 8. An in-depth discussion on affirmative action follows in Chapter Five of this study.

senses: i) it demands the impact of equal treatment on the individual; ii) it is concerned with the impact on a group – women, ethnic groups, people with disabilities, etc.; and iii) it demands an outcome which is equal, such as equal remuneration for women doing work of equal value to that of men, or equal representation of women and men in a given occupational grade.³⁵²

Egalitarian philosophers such as Rawls, Dworkin, Sen, Cohen or Arneson claim that distributive justice does not involve the equality of individual outcomes, but only requires that individuals face equal opportunities for outcome.³⁵³ Despite the growing support for this view, not much economic analysis has been applied to this theory in order to assess the extent to which equality of outcome is in fact empirically satisfied. This could be attributed to the fact that no agreement has been reached – philosophically or in public debates – concerning the manner in which to measure equality of outcome.³⁵⁴ What is meant by outcome will vary from service to service.³⁵⁵ For example, for housing the condition of individuals' dwellings could be measured, and for education the skills with which an individual emerges from the education system and the extra income that he or she can earn as a result of the education.

³⁵²B Hepple "Equality and Empowerment for Decent Work" (2001) *International Labour Review* Vol.140, No.1 7- 8.

³⁵³In his equality theory John Rawls has proposed primary goods as the measure for equality. These are goods which are rational for every person to want, whatever else she wants. On the other hand, Sen has developed the capability equality theory based on functionings and capabilities, pointing to inadequacies in the Rawlsian theory. He suggests that we should be concerned directly with what people are enabled to be and do with their resources, given their traits and circumstances. Furthermore Sen's theory embraces the fact that the correct way to promote equality is to remove barriers to people living the life that they choose and to give them the wherewithal to achieve what they can. Issues of discrimination, poor nutrition and illiteracy are examples of ways in which people's capabilities are hindered.

For more on equality of opportunity, see J Rawls (1971) *A Theory of justice* (1971); R Dworkin "What is equality? Part 1: Equality of Welfare" (1981) *Philosophy & Public Affairs* 10 228 – 240; R Dworkin "What is equality? Part 2: Equality of Resources" (1981) *Philosophy & Public Affairs* 10 283 – 345; A Sen *Equality of What? Tanner Lectures on Human Values* (1980); Sen (1982) *Choice, Welfare and Measurement*; R Dworkin "In Defense of Equality" *Social Philosophy and Policy* (1983) 1 24 – 40; R Dworkin "What is Equality? Part 3: The Place of Liberty" (1987) *Iowa Law Review* 73 at 1 – 54; Cohen "Democratic Equality" (1989) *Ethics* 99 at 727 – 751; G Cohen "Equality of What? On Welfare, goods and Capabilities" in M Nussbaum & A Sen (eds) *The Quality of Life* (1993); G.A Cohen "Where the Action Is: On the Site of Distributive Justice" (1997) *Philosophy and Public Affairs* 26 1 3 – 30; R Arneson "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare (1990) *Philosophy and Public Affairs* 19 159 – 194; R Arneson "Primary Goods Reconsidered" (1990) *Nous* 24 429 – 454; R Arneson "A Defence of Equal Opportunity for Welfare" (1991) *Philosophical Studies* 58 187 – 195; R Arneson "Equality of Opportunity for Welfare Defended and Recanted" (1999) *Journal of Political Philosophy* 7 488 – 497; R Arneson "Luck Egalitarianism and Prioritarianism" (2000) *Ethics* 110 339 – 349; R Dworkin " 'Sovereign Virtue' Revisited" (2002) *Ethics* 113 1 106 – 143.

³⁵⁴J Roemer; R Aaberge; U Colombino; J Fritzell; S Jenkins; A Lefranc; I Marx; M Page; E Pommer; J Ruiz-Castillo; M San Segundo; T Tranas; A Trannoy; G Wagner & I Zubiri "To What Extent Do Fiscal Regimes Equalise Opportunities for Income Acquisition Among Citizens?" (2003) *Journal of Public Economics* 87 539 – 565.

³⁵⁵The following paragraph draws heavily from J Le Grand *The Strategy of Equality: Redistribution and the Social Services* (1982) 15 – 16.

Education has the potential to bring about equality in society in terms of income or social mobility. It also has a crucial influence on social policy making. However, it is not possible in every case to distinguish easily between the use of a service and its outcome, for instance, in education and housing. In the case of housing the service and the outcome emerge, as the services provided are the dwellings themselves. In education the “slightly arbitrary distinction is made that continuation in the education system constitutes use, while educational performance in examination, etc., constitutes (part of) outcome.”³⁵⁶

b) Equality of opportunity

Equality of opportunity advances the idea that people should not be advantaged or burdened by their social background. Their prospects in life should be dependent on their own efforts and abilities. Rawls calls this principle “fair equal opportunity”.³⁵⁷ In other terms, equality of opportunity calls for a platform where everyone is allowed a possibility to nurture their respective prospects. The notion of equality of opportunity is introduced into political discussions when accessibility to certain goods and services is of doubtful value. Williams illustrates three distinct scenarios where such accessibility is of doubtful value:³⁵⁸

- Goods and services desired by a large number of people in all sections of society either as themselves or, as in the case of education, for their children, or would be desired by people in all sections of society if they knew about the goods in question and thought it possible for them to attain them;
- Goods which people may be said to earn or achieve;
- Goods which not all the people who desire them can have. These include positions of prestige, management, etc., which are limited by their very nature. Other goods are contingently limited in the sense that there are certain conditions of access to them and consequently there are goods which are fortuitously limited in the sense that although everyone or large numbers of people can satisfy the conditions of access to them, there is just not enough of them to go round; so some more stringent conditions or systems of rationing have to be imposed to govern access in an imperfect situation.

³⁵⁶J Le Grand *The Strategy of Equality: Redistribution and the Social Services* (1982)16.

³⁵⁷J Rawls (1971) *A Theory of Justice* Cambridge 73; J Rawls (2001) *Justice as Fairness: A Restatement* (2001) 43 – 44.

³⁵⁸B Williams, “The Idea of Equality” in L Pojman & R Westmoreland (eds) *Equality: Selected Reading* (1997) 98 – 99.

A good can be both contingently and fortuitously limited at once. This occurs when there is a shortage of supply of social goods, meaning that not even the people who are qualified to have them – limited in numbers though they could be – can in every case have access to them.³⁵⁹

According to Van der Berg, equality of opportunity entails that people should have the same start in competing for material rewards.³⁶⁰ He also emphasises that full equality of opportunity is an unreachable goal, but social justice requires that inequalities in opportunities should be reduced to tolerable limits. Such limits change in the course of development process and are dependent on the particular society and its current situation. It is clear from the comments that the equality principle demands that the life prospects of any individual should be generally equal to those of any other.

c) Equality of access

Equality of opportunity extends to the issue of accessibility of opportunities and resources. Access is an inclusive concept and can be viewed as a process or an outcome. It is deemed necessary to achieve social connectedness and the opening of doors to opportunities in life. According to Aday and Anderson, access can be regarded as “potential access” or “realised access”.³⁶¹ They posit that potential access occurs at each necessary point along the journey towards realised access. Experiences which occur at the “potential access” point have an impact on the attainment of the “realised access”.³⁶² In other words, access involves positive engagement and response at every process point so that equality of opportunity is realised.³⁶³ On the other hand, if the engagement is negative at the process point, it hinders a possible realisation of an opportunity.³⁶⁴ Legislation formalises the government’s stance on accessibility to resources. However, there may be variability in how legislation is enacted,

³⁵⁹B Williams, “The Idea of Equality” in L Pojman & R Westmoreland (eds) *Equality: Selected Reading* (1997) 98 – 99.

³⁶⁰S Van der Berg “Redressing Economic Inequality in South Africa” in Hugo (ed) *Redistribution and Affirmative Action* (1992) 144.

³⁶¹See L Aday & R Anderson “Equity of Access to Medical: A Conceptual and Empirical Overview” (1981) *Medical Care* 19(12) 4 – 27.

³⁶²L Aday & R Anderson “Equity of Access to Medical: A Conceptual and Empirical Overview” (1981) *Medical Care* 19(12) 4 – 27.

³⁶³See J Owens “The Influence of ‘access’ social exclusion and social connectedness for people with disabilities” in A Taket, B Crisp, A Nevill, G Lemaro, M Graham & S Barter-Godfrey *Theorising Social Exclusion* (2009) 78 - 80.

³⁶⁴J Owens “The Influence of ‘access’ social exclusion and social connectedness for people with disabilities” in A Taket, B Crisp, A Nevill, G Lemaro, M Graham & S Barter-Godfrey *Theorising Social Exclusion* (2009) 78 - 80.

resulting in differences of compliance, effectiveness and efficiency.³⁶⁵ Policy, on the other hand, can facilitate strategic development for affording access.

In reviewing the different ends of substantive equality, it is arguable that all three seek to equalise the starting points by providing a basis for the realisation of “procedural rights to participate in various spheres of life and substantive rights designed to enable people to choose among real options of similar worth”.³⁶⁶ The idea of equalising the starting points in life embraces the transformative nature of the Constitution and its focus on the relative detriment or benefit that attaches to status groups. The next section will discuss to what extent (socio-economic) disadvantage and concerns with poverty and inequality features in the equality jurisprudence of the Constitutional Court.

4.3 Constitutional view on equality

According to Davis, “the paramount duty of our Constitutional Court to take sides in that contest for equality is therefore central to our constitutional enterprise.”³⁶⁷ In its early judgments the Court provided guidance in the interpretation of the equality premise by focusing on the key value of dignity.³⁶⁸ In *Hugo Goldstone J* decreed that

“[At] the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.”³⁶⁹

In *Harksen* an equality test (the so-called Harksen test) was laid down by the court. The test reflected the close link between equality and dignity. The essence of the test is based on the assessment of the impact of a specific rule or power or decision on the person or group complaining of discrimination to determine whether their human dignity has been affected.³⁷⁰

³⁶⁵See R Imrie “Housing Quality and the Provision of Accessible Homes” (2001) *Housing Studies*, 18(3) 387–408.

³⁶⁶J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 57.

³⁶⁷D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 69.

³⁶⁸See section 4.4.3 of this chapter for more on the concept of dignity.

³⁶⁹At para 41. See also *Prinsloo v Van der Linde* 1012 at paras 31–33.

³⁷⁰The Constitutional Court has set out stages of enquiry for the unfairness test in *Harksen*:

“a) Does the provision differentiate between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to “unfair discrimination”? This requires a two-stage analysis:

i) Firstly, does the differentiation amount to “discrimination”? If it is not on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and

In doing so, several factors are taken into account – a contextual approach is adopted.³⁷¹ It requires the examination of the actual economic, social and political setting to determine whether the Constitution's commitment to equality is being upheld or not. It reveals a world of systematic and pervasive group-based inequality, which needs to be taken into account in the formulation of approaches to equality rights towards the reduction of such inequality.³⁷²

Some commentators argue that the Court's use of the dignity-based approach obstructs the establishment of a truly transformative equality jurisprudence. For instance, Albertyn and Goldblatt assert that focusing on dignity has a propensity to lead towards an individualistic conception of equality, which does not take into consideration the group-based nature of discrimination and systematic forms of inequality.³⁷³ They further argue that the notion of 'dignity' creates too much room for an individualised understanding of equality and that the credence to be placed on substantive considerations of disadvantage is made to be almost

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.

ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been found on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant and others in his or her situation.

In order to determine whether or not the discriminatory provision has impacted on the complainant unfairly, various factors must be considered. These would include:

- a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but it is aimed at achieving worthy and important societal goals, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of that particular case, have a significant bearing on whether the complainants have in fact suffered the discrimination in question.
- c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature" paras 50-53.

The unfairness test is similar to the contextual factors that the Canadian courts consider. They were pointed out in an Canadian case, *Lovelace v Ontario*: i) pre-existing disadvantages, stereotyping, prejudice or vulnerability ii) the correspondence, or lack thereof between the grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society and iv) the nature and scope of the interest affected by the impugned government activity."

³⁷¹ See above for more on the approach.

³⁷² P De Vos "Substantive equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence" in E Kalula & S Jagwanth *Equality Law: Reflections from South Africa and elsewhere* (2001) 52. According to Aylward, contextual analysis can become one of the lenses through which the social context of the individual can be examined. In some measure, it can address social conditions relating to poverty and exclusion. See further, "An intersectional approach to discrimination: Addressing multiple grounds in human rights crimes." Discussion Paper prepared by Policy and Education Branch, Ontario Human Rights Commission, October 2001. Found at www.ohrc.on.ca/en/resources/discussions_consultation/DissIntersectionalityfntns/pdf. (Accessed 15/05/13).

³⁷³ See C Albertyn & B Goldblatt "Facing the Challenge of Transformation; Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248.

exclusively dependent on the approach of an individual judge.³⁷⁴ In addition, they contend that the right to equality and non-discrimination should be interpreted in the light of the value of equality rather than the value of dignity.³⁷⁵ In this way, interpretation would place “disadvantage, vulnerability and harm, and their connotation of groups-based prejudice” at the core of the equality right.³⁷⁶ Davis also criticises the Court for collapsing equality into dignity and failing to develop a substantive vision of equality.³⁷⁷ He argues that “by conflating equality with dignity or its variants the Court has failed to engage with the component parts of equality, let alone achieve any working balance.”³⁷⁸ However, Botha points out that it is very unlikely that the Court will abandon the dignity-based interpretation of equality in the foreseeable future.³⁷⁹ He argues that this approach has resulted in several context-sensitive and transformative judgments.³⁸⁰

On the other hand, the Court has regularly emphasised the remedial and restitutionary aspects of substantive equality.³⁸¹ According to De Vos, substantive equality “requires the courts to examine the actual economic and social and political conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”³⁸² In elaborating the Constitutional Court’s remedial approach to equality, Ackerman J stated the following in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*:³⁸³

“It is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”³⁸⁴

³⁷⁴C Albertyn & B Goldblatt “Facing the Challenge of Transformation; Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 248.

³⁷⁵C Albertyn & B Goldblatt “Facing the Challenge of Transformation; Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 248.

³⁷⁶C Albertyn & B Goldblatt “Facing the Challenge of Transformation; Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 258.

³⁷⁷D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 96.

³⁷⁸D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 97.

³⁷⁹H Botha “Equality, Dignity and the Politics of Interpretation” in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 170.

³⁸⁰H Botha “Equality, Dignity and the Politics of Interpretation” in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 170. See *S v Makwanyane* 1995 (6) *BCLR* 665 (CC); *S v Makwanyane* 1995 (3) *SA* 391 (CC).

³⁸¹*City Council of Pretoria v Walker* 1998 2 *SA* 363 (CC), 1998 3 *BCLR* 257 (CC) paras 45-48.

³⁸²P De Vos “The Role of Equality in the South African Legal System” in L.J Vande, J Sarkin & Y Haeck (eds) *The Principle of Equality: A South African and A Belgian Perspective* (2001) 144.

³⁸³1998 (12) *BCLR* 1517 (CC).

³⁸⁴*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1546 para 60.

In *Brink v Kitshoff*³⁸⁵ the Court dealt with an alleged breach of the right to equality and it held that where the legally relevant differentiation is not aimed at the creation or perpetuation of patterns of disadvantage, but instead intended at breaking down those structural inequalities and therefore at reaching for “true” or “substantive” equality, the Court will not be ardent to declare the measure unconstitutional.³⁸⁶ In relation to the remedial approach by the Court, De Vos further points out:

“It can be argued that the court’s contextual or remedial approach provides the potential for taking into account the role of law in the creation and maintenance of structural inequalities and disadvantages between groups based on perceived or ‘real’ differences. It acknowledges that inequality results from complex power relations in society and seems to view law as having an important role in reordering these power relations in ways which strive to ensure that all individuals are treated as if they have the same moral worth. Disadvantage here, then, is not equated with some harmful impact, direct or indirect, the differentiation might have on the complainant, where a determination of harm can only be made within the historical context of South Africa.”³⁸⁷

In *Van Heerden* the Court linked the realisation of equality with the achievement of a society based on “social justice”.³⁸⁸ The Court emphasised that this required a progressive positive commitment based on remedial equality to “eradicate socially constructed barriers to equality”.³⁸⁹ Albertyn and Goldblatt argue that although the Court does not use the term “redistribution” in *Van Heerden*, its interpretation of the equality premise envisages economic redistribution and the removal of material disparities.³⁹⁰ In this way, as argued by Judge Chaskalson, the value of substantive equality encompasses a notion of redistributive justice.³⁹¹

Botha asserts that the Court’s equality standard needs to be infused with an understanding of the complexity of equality.³⁹² In his view, the understanding should be based on the following principles:

³⁸⁵ 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC).

³⁸⁶ *Brink v Kitshoff* No 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC).

³⁸⁷ P De Vos “The Role of Equality in the South African Legal System” in L Vande, J Sarkin & Y Haeck (eds) *The Principle of Equality: A South African and A Belgian Perspective* (2001) 145.

³⁸⁸ Para 31.

³⁸⁹ *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) para 31.

³⁹⁰ C Albertyn & B Goldblatt “Towards a Substantive Right to Equality” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 238.

³⁹¹ See Judge A Chaskalson “Third Bram Fischer Memorial Lecture” (2000) 16 *SAJHR* 193.

³⁹² H Botha “Equality, Dignity and the Politics of Interpretation” in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 169 – 171.

- Equality cannot and should not be reduced to a single value such as human dignity or democracy or social justice. An adequate understanding of the moral, political and material dimensions of equality is needed;
- An understanding of equality must recognise the possibility that different forms of discrimination may require different types of analysis. Rather than focusing on issues of personhood and identity, the Court should concentrate on questions of domination and access to the means of political and economic power;
- A vision of complex equality would resist the conclusion that a single criterion is suitable to a particular ground of discrimination, such as gender, and would require sensitivity to the concrete life experiences of those affected, the intersectional nature of disadvantage, and the different considerations that may be applicable in different spheres, such as education, employment, welfare and citizenship.³⁹³

Botha's approach does not require a rejection of the equality standard enunciated in *Harksen*, but calls for its modification and reinterpretation to allow for a consideration of different forms of disadvantage.³⁹⁴ In other words, the *Harsken test* "should be 'opened up' to enable a careful, contextual evaluation of the factors and normative principles that are relevant in the particular area of discrimination."³⁹⁵ The main aim of interpretation tests or approaches to equality is to give substantive content to the meaning of the equality premise. In this regard, the question that needs to be asked is whether the right to equality can have an effect on alleviation of poverty and socio-economic inequality?

While the right to equality (through substantive equality) has the potential to make a valuable contribution to some aspects of socio-economic disadvantage, it has not been sufficiently developed by the Court to address distributive inequalities in its own right. This serves as an acknowledgement of the complexity of the nature of poverty as a phenomenon and the elusiveness of equality.³⁹⁶ It is submitted that a further step is required by the judiciary –

³⁹³H Botha "Equality, Dignity and the Politics of Interpretation" in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 170 – 171.

³⁹⁴H Botha "Equality, Dignity and the Politics of Interpretation" in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 170 – 171.

³⁹⁵H Botha "Equality, Dignity and the Politics of Interpretation" in W le Roux & K Van Marle *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 170 – 171.

³⁹⁶C Albertyn "Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court" *Stellenbosch Law Review* 2011 3 591; Sandra Fredman further notes that central to the transformative project of the South African Constitution, although not always recognised as such, is the need to address the distinctive forms of poverty and inequality in South Africa. However, there seems to be reluctance to regard the

embodying the aims of substantive equality when interpreting the right to equality. Borrowing from Sandra Fredman, these aims include: (i) breaking the cycle of disadvantage; (ii) promoting respect for dignity; (iii) affirmation of identity; and (iv) facilitation of full social participation in society. From the earlier discussion on the Constitutional jurisprudence, one of the aims of substantive equality – dignity – is a key value in the interpretation of the equality premise. In this regard, I submit that including the rest of the aims of substantive equality in the interpretation process of the right to equality will allow (substantive) equality to be more receptive to poverty alleviation. Furthermore, these aims complement the Court's interpretation of equality 'initiatives' (through its focus on dignity).

The next section will discuss a possible interrelationship between substantive equality and poverty (and socio-economic disadvantage). This will be done by exploring the link between the aims of substantive equality and socio-economic disadvantage.

4.4 The relationship between substantive equality and socio-economic disadvantage: analysis of the implications

4.4.1 Introduction

Although equality is a difficult concept to define and demarcate (as pointed out in the previous sections), there are certain attributes about equality that affirm its relevance to the fight against poverty. This section will explore the possible link between aims of substantive equality and poverty and socio-economic inequality. Following Fredman, it will be argued that these aims include the following aspects: (i) breaking the cycle of disadvantage; (ii) promoting respect for dignity; (iii) affirmation of identity; and (iv) facilitation of full social participation in society.³⁹⁷ In establishing the possible link between substantive equality and socio-economic disadvantage, the effect of the aims of substantive equality on alleviation of poverty will be discussed. One of the central tenets of substantive equality is the acknowledgement of the link between status (for example, race) and (socio-economic)

right to equality as generating social rights in its own right (S Fredman "The Potential and Limits of an Equal Right Paradigm in Addressing Poverty" (2011) *Stellenbosch Law Review* 3 566).

³⁹⁷See S Fredman "Providing Equality and the Positive Duty To Provide" (2006) 21 *SAJHR* at 163,167 and S Fredman "Facing the Future: Substantive Equality under the Spotlight" in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15.

disadvantage.³⁹⁸ This section will further explore how this characteristic provides a basis from which substantive equality can ‘speak to’ poverty and socio-economic inequality.

4.4.2 The possible link between aims of substantive equality and socio-economic disadvantage

4.4.2.1 *Breaking the cycle of disadvantage*

The several determinants of poverty and inequality indicated in the previous chapters show the magnitude of socio-economic disadvantage in South Africa. However, it is important to note that these determinants are a result or an epitome of an underlying problem – the cycle of disadvantage – which tends to aggravate the magnitude of the two issues. There are different forms of cycles of disadvantage: a) (inter-)generational disadvantage; b) communal vulnerability; and c) systematic disadvantage. The cycles can cause poverty or socio-economic inequality individually or simultaneously. Each of these forms will be discussed in turn.

a) Inter-generational disadvantage

MacNicol uses the term “inter-generational underclass” in reference to those who are inter-generationally disadvantaged.³⁹⁹ Inter-generational disadvantage refers to a cycle of disadvantage or deprivation that is passed from generation to generation. Such disadvantage has an element of individual agency which often surfaces through the ‘vulnerability to poverty’ of children within families. Schorr and Schorr argue in their book *Within Our Reach: Breaking the Cycle of Disadvantage* that there is a close association between poverty and certain risk factors that lead to life damage in children.⁴⁰⁰ These risk factors give life to a cycle of disadvantage in children, in turn leading to later damage. The authors give the following account of these childhood risk factors:

- Children growing up with parents who are not only poor but isolated, impaired, undermined by their surroundings, and stressed beyond their ability to endure. The adversity that assaults these children persists overtime, continually reinforcing its destructive impact;

³⁹⁸S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15.

³⁹⁹See J MacNicol “In Pursuit of the Underclass”(1987) *Journal of Social Policy* 16 (3) 293-318.

⁴⁰⁰L B Schorr & D Schorr *Within Our Reach: Breaking the Cycle of Disadvantage* (1988) 20 – 32.

- Children who have been accumulating burdens from before birth, when their mother's health was not cared for, nor was their own health as infants and small children. They are more vulnerable than others to stress, yet additional stresses are heaped on them as they grow, and they are far less likely to be protected against the effects of these stresses;
- Children growing up in families whose lives are out of control, with parents too drained to provide the consistent nurturance, structure, and stimulation that prepare other children for school and for life. They experience failure as soon as they enter the world outside the family (and often before) and rapidly become convinced that they are born to fail;
- Children whose experiences of failure is compounded and reinforced by not learning the skills that schools are meant to teach, and who soon become aware that the future holds little promise for them. Their prospects for a satisfying and well-paying job and for a stable family life seem bleak. Because they perceive a future that holds few attractions, they enter adolescence with no reason to believe that anything worthwhile will be lost by dropping out of school, committing crimes, or having babies as unmarried teenagers; and
- Children who lack the hope, dreams, and stake in the future that is the basis for coping successfully with adversity and for sacrificing immediate rewards for long-term gains.⁴⁰¹

The above risk factors highlight the possible role that substantive equality can play in breaking inter-generational disadvantage. Programmes that will result in a significant reduction of the probabilities of adverse outcomes for children growing up at risk are crucial to breaking the cycle of disadvantage.

There are two programmes in the US and UK based on the theme 'Catch them young and give them a chance'.⁴⁰² In the 1960s the United States introduced a 'Head Start' programme, which ensures that pre-school education was available to disadvantaged children.⁴⁰³ The intention of the programme is to afford the children from poor families access to programmes

⁴⁰¹L B Schorr & D Schorr *Within Our Reach: Breaking the Cycle of Disadvantage* (1988) 30. See also P Attree "Growing up in Disadvantage: A Systematic Review of the Qualitative Evidence" (2004) *Child: Care, Health and Development*, 30 679-89.

⁴⁰²D Bryne *Social Exclusion* (2005) 157 – 158.

⁴⁰³D Bryne *Social Exclusion* (2005) 157–158. For more on Head Start, see www.acf.hhs.gov/programs/ohs/ (accessed 17/03/13).

of learning to defer the linguistic and other possible cultural deficits they experienced through their exposure to the culture of poverty in their home environments.⁴⁰⁴ A similar programme was implemented in UK called the ‘Sure Start’ programme;⁴⁰⁵ it targeted areas of relatively high deprivation. Since 2001 300 million pounds has been spent on Sure Start programmes.⁴⁰⁶ In reviewing the success of programmes such as Head Start, Schorr point out that children who participated in this programme develop social and academic attributes which later in life manifested in increased school success. Although such programmes are redistributive (and have the ability to break a cycle of disadvantage), they have a potential to increase social conflict as a result of the individualised nature of the benefit. In other words, the fact that the benefit is not universal has the potential to exacerbate tension between differently situated disadvantaged groups.⁴⁰⁷ However, Fredman argues that substantive equality is sensitive to outcomes, which opens a way of requiring different treatment in order to achieve equalities of outcome.⁴⁰⁸ In this way policies that are receptive to this approach are vital in breaking cycles of disadvantage. This makes programmes such as Head Start and Sure Start more relevant in the fight against poverty and socio-economic inequality, even in South Africa.

b) Communal vulnerability

“Communal vulnerability” is evident in communities that are poor and have limited resources, which often prevents individuals from breaking free from the clutches of disadvantage. Individuals from such communities have limited choices to maintain an acceptable standard of living. Examples of such communities range from communities in rural areas; townships; former mining towns which often turn into ‘ghost towns’ as a result of an economic downturn; small towns; and squatter camps. There are various reasons that make up communal vulnerability as a cycle of disadvantage. For instance, rural areas are prone to natural disasters like drought and often lack access to basic services, fuelling a cycle of

⁴⁰⁴D Bryne *Social Exclusion* (2005) 157 – 158.

⁴⁰⁵D Bryne *Social Exclusion* (2005) 157 – 158.

⁴⁰⁶The principles of Sure Start programmes are that they should be: a) two-generational: involve parents as well as children; b) non-stigmatising: avoid labelling “problem families”; c) multifaceted: target a number of factors, not just, for example, education or health or “parenting”; d) persistent: last long enough to make a real difference; e) locally driven: based on consultation and involvement of parents and local communities; and f) culturally appropriate and sensitive to the needs of children and parents (D Bryne *Social Exclusion* (2005) 158).

⁴⁰⁷D Bryne *Social Exclusion* (2005) 158.

⁴⁰⁸S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

disadvantage. It has been argued that the perspectives of rural populations, for instance, are often not considered in policy making. As Eversole and Martin point out:

“Development policy and planning have historically revolved around quests for large successes. Policy makers, usually located in urban centres, take a bird’s-eye view of nations or regions and set out to create change at a macro scale, with significant impacts – through a major new industry, or a large and visible infrastructure project, or public policies based on utilitarian principles. Yet over time, it has become increasingly obvious that macro-scale successes can only be micro-statistics which may indicate more production, more infrastructure, better health and housing, more access to employment and education, or more services – that is, successful development – but significant pockets of the population may find themselves isolated from these benefits.”⁴⁰⁹

The above brings to the fore the issue of participatory democracy and alleviation of poverty in South Africa. Participatory democracy refers to a process whereby a democratic state actively fosters the abilities of its citizens to participate in the life of the polity as equals and it forges a platform to ensure that the citizens’ independence and voice is regarded.⁴¹⁰ Sarah Van Doosselaere views participatory democracy “as a way for organised citizens to take direct responsibility for some of their concerns and to exercise permanent control over the leaders they choose at elections.”⁴¹¹ Furthermore, participatory democracy functions through political agenda setting, decision-making, implementing and evaluating, among other aspects, through participatory budgets, local assemblies, extra-municipal commissions, public consultations, e-democracy, etc.⁴¹² It is often argued that the majority of South Africans are yet to experience the benefits of democracy, if one considers the poverty profile of South Africa. However, the effectiveness of rural populations or the poor in policy making is dependent on their access to unbiased and comprehensive information on the nature of the policy issues in question.

c) Systematic disadvantage

Systematic disadvantage describes prevalent practices, laws or attitudes that are viewed as impartial and sometimes acceptable, but that entrench the inequality and disadvantage

⁴⁰⁹R Eversole & J Martin “Twin Challenges: Diversity and Exclusion” in R Eversole & J Martin (eds) *Participation and Governance in Regional Development: Global Trends in an Australian Context* (2005) 176.

⁴¹⁰See B R Barber *Strong Democracy: Participatory Politics for a New Age* (1984) 157.

⁴¹¹S Van Doosselaere “What do you mean by participatory democracy?” Vienna, September 2004 at www.ngo.at/civilspciety/taskforce/ppt/participatory_democracy.ppt (accessed 28/09/10).

⁴¹²See B R Barber *Strong Democracy: Participatory Politics for a New Age* (1984)

experienced by certain groups of people in society.⁴¹³ It also encompasses institutionalised or structural discrimination, where seemingly neutral practices or proposals are viewed as normal or necessary, while in fact they result in discrimination against individuals or groups.⁴¹⁴ In this way, systematic disadvantage can to some extent be measured by outcomes and results rather than intentions.⁴¹⁵ According to Sunstein, systematic disadvantage operates along standard and predictable lines in multiple important spheres of life and it applies in realms that relate to basic participation as a citizen in a democracy.⁴¹⁶ Sunstein further argues that social and legal practices have the effect of systematically subordinating members of the relevant group, unlike a mere social or biological difference.⁴¹⁷ The inclusion of systematic disadvantage incorporates a concept of group-based disadvantage rather than an individually-based conception of equality.⁴¹⁸ However, systematic disadvantage becomes a cycle as long as that particular system's order or structure is not altered. Systematic cycles of disadvantage exist within societal spheres and along multiple indicators of social welfare: inequality, poverty, educational attainment, political power, employment, division of labour within families geographical location, among others.⁴¹⁹

Some political and economic regimes produce a better understanding of the existence of systematic disadvantage in society. It is arguable that South Africa's history is characterised by successive systematic regimes (colonialism, imperialism, segregation and apartheid) that have disadvantaged the majority of South Africans⁴²⁰. The structural forces that accompanied these systems "deprived indigenous people of their land and reduced them to different forms of unfree labour."⁴²¹ Although a new democratic political system has been

⁴¹³J H Beck, J G Reitz and N Weiner "Addressing Systematic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) available at http://www.utoronto.ca/ethnicstudies/Beck_Reitz_Wein.pdf (accessed 29/05/13).

⁴¹⁴J H Beck, J G Reitz and N Weiner "Addressing Systematic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) available at http://www.utoronto.ca/ethnicstudies/Beck_Reitz_Wein.pdf (accessed 29/05/13).

⁴¹⁵J H Beck, J G Reitz and H Weiner "Addressing Systematic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) available at http://www.utoronto.ca/ethnicstudies/Beck_Reitz_Wein.pdf (accessed 29/05/13).

⁴¹⁶R Sunstein *Designing Democracy: What Constitutions Do* (2001) 170.

⁴¹⁷R Sunstein *Designing Democracy: What Constitutions Do* (2001) 170.

⁴¹⁸S Liebenberg & M O'Sullivan "South Africa's New Legislation: A Tool for Advancing Women's Socio-economic Equality?" in E Kalula & S Jagwanth (eds) *Equality Law: Reflections from South Africa and elsewhere* (2001) 93. See also O Fiss "Groups and the Equal Protection Clause" (1975) 5 *Philosophy and Public* 107.

⁴¹⁹See Chapter 3 of this study for more on societal spheres.

⁴²⁰S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 14.

⁴²¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 14.

institutionalised, the corresponding socio-economic transformation has yet to take place.⁴²² The majority of South Africans are still systematically disadvantaged in the current system of “democratic capitalism.”⁴²³ Terreblanche argues:

“The ‘logic’ of democracy and capitalism is contradictory: while democracy emphasises joint interests, equality, and common loyalties, capitalism is based on self-seeking inequality and conflicting individual and group interests. The legal system that protects both democracy and capitalism is based on the principle of equality before the law, but maintains inequalities in the distribution of property rights and opportunities in the capitalist system. The logic of capitalism – given the unequal freedoms and unequal rights upon which is based – thus goes against the grain of the ‘logic’ of democracy.”⁴²⁴

Although the logics of democracy and capitalism are conflicting, Terreblanche further emphasises that democracy cannot continue without the monetary assistance of capitalism.⁴²⁵ Political and economic regimes have contributed greatly to systematic disadvantage in South Africa. A systematic intervention is vital – extending both equality of opportunity and resources (*redistributive interventions*). Intervention in this regard requires not only the provision of benefits to subordinated beneficiaries, but also the use of resources to create a sense of universal citizenship and solidarity.⁴²⁶ It entails institutional restructuring both in the public and the private spheres – addressing the labour market, education and other public institutions (*equality of resources and equality of welfare*) as well as division of labour within the family unit.⁴²⁷ Thus, breaking the systematic cycle of disadvantage is conceivable in structural terms.⁴²⁸

4.4.2.2 Promoting respect for dignity

Dignity is a relatively modern concept and can be contrasted with the medieval concept of honour. According to Berger, honour is “associated with a hierarchical order of society ... a direct expression of status, a source of solidarity among social equals and a demarcation line against social inferiors.”⁴²⁹ In contrast, dignity “always relates to the intrinsic humanity divested of all socially imposed roles or norms ... it pertains to the ... individual regardless of

⁴²²S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 14.

⁴²³S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 16.

⁴²⁴S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 16.

⁴²⁵S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 16.

⁴²⁶S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁴²⁷S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁴²⁸S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁴²⁹P Berger “On the Obsolescence of the Concept of Honor” in S Hauerwas & A MacIntyre (eds) *Revisions: Changing Perspectives in Moral Philosophy* (1983) 174.

his position in society.”⁴³⁰ The concept of human dignity has its roots in the post-war human rights movement, providing more meaningful protection than legal capacity for human existence, expression and identity.⁴³¹ Further, human dignity is fundamentally a ‘shell concept’ – open to diverse but usually common interpretations that do not challenge the status quo.⁴³² Dignity is often viewed as both a value and a right. The horrific experiences of the Holocaust made the issue of human dignity in the West “the over-arching protector-value”.⁴³³

Most of the rights in the Constitution aim to secure and respect an individual’s inherent human dignity. In *S v Makwanyane*⁴³⁴ Judge O’Regan wrote as follows:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... the Bill of Rights.”⁴³⁵

The importance of human dignity extends to the idea of human rights. Ronald Dworkin remarks that the human rights discourse depends upon “the vague but powerful idea of human dignity”.⁴³⁶ Section 10 of the Constitution explicitly protects human dignity, thus endorsing it as a right, although the reliance on it as an individual discrete right is still questionable.

Dignity is connected to freedom which reinforces constraints on state action.⁴³⁷ Feldman argues that if the state takes a view of what a dignified life entails, this may require regulating the freedom to make choices.⁴³⁸ In this regard, the need for human dignity may subvert rather than enhance choice and impose limitations on the realisation of human rights and freedoms.⁴³⁹ Liebenberg points out that dignity is then an indeterminate value.⁴⁴⁰ It cannot

⁴³⁰P Berger “On the Obsolescence of the Concept of Honor” in S Hauerwas & A MacIntyre (eds) *Revisions: Changing Perspectives in Moral Philosophy* (1983) 176.

⁴³¹K A Lahey *Are we Persons Yet?: Law and Sexuality in Canada* (1999) 113.

⁴³²P Westen “The Empty Idea of Equality” (1982) *Harvard Law Review* Vol. 95 3 537.

⁴³³P Westen “The Empty Idea of Equality” (1982) *Harvard Law Review* Vol. 95 3 537. See also Holocaust Encyclopedia: “The Holocaust was the systematic, bureaucratic, state-sponsored persecution and murder of approximately six million Jews by the Nazi regime and its collaborators. ‘Holocaust’ is a word of Greek origin meaning ‘sacrifice by fire’. The Nazis, who came to power in Germany in January 1933, believed that Germans were ‘racially superior’ and that the Jews, deemed ‘inferior’, were an alien threat to the so-called German racial community” (<http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143>).

⁴³⁴1995 (6) BCLR 665 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴³⁵328.

⁴³⁶R Dworkin *Taking Rights Seriously* (1987) 198 – 199.

⁴³⁷D Feldman “Human Dignity As Legal Value” (1999) *Public Law Review* 682.

⁴³⁸D Feldman “Human Dignity As Legal Value” (1999) *Public Law Review* 682.

⁴³⁹D Feldman “Human Dignity As Legal Value” (1999) *Public Law Review* 682.

⁴⁴⁰S Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 173.

be a guiding ideal as to when state interferences with liberties can be constructive or detrimental to the wellbeing of society.⁴⁴¹ She further notes that human dignity should possibly be viewed as a relational concept.⁴⁴² On the other hand, the relationship of dignity with other fundamental values is also a matter of concern. Weisstub argues:

“As an idealised ... right, human dignity is as suitable as any other to fuel the judicial system with appropriate respect for its human members. However, the question still remains whether, apart from an idealised statement which really amounts to a proclamation of respect for humanity, there is anything residing in the concept itself that clarifies its relationship to other fundamental values, giving us a logic with respect to the flow of decision-making, and really does direct the opinion of the judges on hard cases where there are conflicting values or interests between or among individuals, groups, and/or the state. Furthermore, the concept itself does not through its own intrinsic logic equip us with how to override established common law that respects special populations. It does not inform us about whether the core and substance of human dignity is best articulated over a long process through the amalgamation and interaction with other rights, values, principles and rules established nationally and trans-nationally in law and legislation.”⁴⁴³

This brings to the surface the subversive nature of the concept of human dignity. Some commentators thus argue that focusing on human dignity is an essential element.⁴⁴⁴ The German constitutional system has fashioned human dignity as the basic and absolute value of the entire constitutional structure.⁴⁴⁵ It is the only value in the German constitution with such absolute status and the judiciary is required to “balance and proportionalise” other values against this “absolutist pronouncement.”⁴⁴⁶ In addition, the value of human dignity is regarded as an illuminating value that has an instructive force into reconciling conflicting values that involve issues of humanity or personhood.⁴⁴⁷

What does human dignity add apart from reasons of its political necessity and idealisation?

⁴⁴¹S Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 173.

⁴⁴²S Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 173.

⁴⁴³D Weisstub “Honor, Dignity and the Framing of Multicultural Values” in D Kretzner & E Klein (eds) (2002) *The Concept of Dignity in Human Rights Discourse* (2002) 274.

⁴⁴⁴See D P Sulmosy “Human Dignity and Human Worth” in J Malpa & N Lickiss (eds) *Perspectives on Human Dignity: A Conversation* (2007) 13-17. See also C Mason “A Journey Towards Understanding True and False Dignity” in J Malpa & N Lickiss (eds) *Perspectives on Human Dignity: A Conversation* (2007) 109 – 118.

⁴⁴⁵See C Mason “A Journey Towards Understanding True and False Dignity” in Malpa & Lickiss *Perspectives on Human Dignity: A Conversation* (2007) 109 – 118.

⁴⁴⁶D Weisstub “Honor, Dignity and the Framing of Multicultural Values” in D Kretzner & E Klein (eds) *The Concept of Dignity in Human Rights Discourse* (2002) 274.

⁴⁴⁷D Weisstub “Honor, Dignity and the Framing of Multicultural Values” in D Kretzner & E Klein (eds) *The Concept of Dignity in Human Rights Discourse* (2002) 274.

L'Heurex-Dubé views human dignity as being inextricably linked with material circumstances.⁴⁴⁸ It should be noted, however, that being poor or socio-economically disadvantaged does not mean that one does not have dignity. One can be both materially disadvantaged and have dignity. Every human being is born with inherent dignity which cannot be taken away. However, conditions of poverty deprive the poor of opportunities to live in dignity, to live in conditions that enable them to develop their capabilities to participate as agents in the shaping of their lives and society in general.⁴⁴⁹ Furthermore, the systematic nature of inequality undermines the effectiveness of inherent dignity, which is also “an inherently individualistic concept”.⁴⁵⁰ Thus upholding human dignity entails affording ready access to all that is necessary for living a genuinely humane life. e.g. food, clothing, and access to housing, healthcare and other basic services.

Justice Iacobucci of the Supreme Court of Canada considers a violation of “human dignity” as an unfair treatment that does not take into consideration an individual’s capacities and merits.⁴⁵¹ In this way, the embracing of a substantive or redistributive motivation to fight poverty requires a broad construction of human dignity. A broad reading of human dignity can benefit the critical assessment of discriminatory structures.⁴⁵² On the other hand, conferring human dignity by taking cognisance of material inequalities or socio-economic disadvantage might be a useful elaboration of a substantive conception of equality. The elaboration, in this context, could be facilitated by the “purposive approach to interpretation”, which involves incorporation of contextual factors in assessing the state of deprivation and its effect on respect for human dignity.⁴⁵³

The concept of dignity also revolves around stigma, hatred, humiliation or even violence directed at an individual because of group membership. This constitutes recognition inequality. Recognition as a valued, respected member of society is a basic human need.

⁴⁴⁸*Egan v Canada* (1995) 2 SCR 544. See also J Bates “Human Dignity – An Empty Phrase in Search of Meaning” (2005) *Judicial Law Review* Vol 101 165 – 168; and C Albertyn, S Fredman & J Fudge “Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective” (2007) *SAJHR* Vol. 23 (2) 209 – 213.

⁴⁴⁹See S Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” in A.J van der Walt *Theories of Social and economic justice* (2005) 141 - 167.

⁴⁵⁰S Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” in A.J van der Walt *Theories of Social and economic justice* (2005) 141 - 167.

⁴⁵¹*Law v Canada (Minister of Employment and Immigration)* (1999) SCR 530.

⁴⁵²See H Graham “*Law v Canada*: New Directions for Equality Under the Canadian Charter?” (2002) *Oxford Journal of Legal Studies* Vol 22 No.2 641 – 661.

⁴⁵³More on the purposive approach see Chapter one of this study, section 1.2.2 4.

Steven Smith asserts that “the desire to be recognised is not just another desire that we happen to have; it is the core human desire, central to our sense of wellbeing, our sense of who and what we are”.⁴⁵⁴

Woolman argues that dignity has four distinct roles: a) as a first-order rule – litigants can rely on the right to dignity to secure relief that would not be available under any other right; b) as a second-order rule – dignity informs and even determines the content of other rights and in particular the right to equality; c) as a correlative right – the Court requires that litigants simultaneously assert all relevant rights and dignity often features in challenges based upon privacy, freedom and security of the person, freedom of trade, occupation and profession and various socio-economic rights; d) dignity as a *grundnorm* – referring to the role of dignity as a value that informs the interpretation of all the substantive rights in the Bill of Rights and many of the remaining provisions of the Constitution.⁴⁵⁵ Woolman further asserts that dignity can be used to promote transformation in South Africa if it is linked to Sen’s theory of capabilities.⁴⁵⁶ This view of dignity would require that all people are free from interference by the state and other private actors, and that they are provided with the material conditions that facilitate their pursuit of a life of their choice.⁴⁵⁷

In the Third Bram Fischer Memorial Lecture Judge Chaskalson argues that there is a direct link between the right to dignity and the various socio-economic rights in the Constitution:

“As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance. In the light of our history the recognition and realisation of the evolving demands of human dignity in our society – a society under transformation – is of particular importance for the type of society we have in the future.”⁴⁵⁸

⁴⁵⁴S B Smith *Hegel’s Critique of Liberalism: Rights in Context* Chicago (1989) 117.

⁴⁵⁵See S Woolman “The Widening Gyre of Dignity” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 193 – 200.

⁴⁵⁶See Chapter 2 of this study for more on Amartya Sen’s capability approach.

⁴⁵⁷S Woolman “The Widening Gyre of Dignity” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 193 – 200.

⁴⁵⁸Judge A Chaskalson “Third Bram Fischer Memorial Lecture” (2000) 16 *SAJHR* 204 – 205.

In the light of the above sentiments, we should infuse dignity with meaning and link it to other more substantive rights such as housing. In this regard, dignity (and respect for dignity) “should be used in alliance with socio-economic rights to create a powerful means of upholding substantive equality.”⁴⁵⁹

4.4.2.3 Affirmation of identity within community

According to Stuart Hall, “identities are names we give to the different ways we are positioned by, and position ourselves within, the narratives of the past”.⁴⁶⁰ “In fact, identities are often created in the crucible of colonialism, racial and sexual subordination, and national conflict, but also in the specificity of group histories and structural position.”⁴⁶¹ In other words, “identity can refer to forms of (individual) personhood as well as collectives or groups”.⁴⁶² Positive affirmation of identity is an aspect of recognition which goes beyond equal respect due to the abstract, universal individual.⁴⁶³ Equality in the recognition arena demands that, instead of a bland adherence to the principle of like treatment for all, different identities should be accommodated and respected (promoting equality of recognition and equality of identity).⁴⁶⁴ The notion of identity can be ascribed to different societal spheres (*economic identity; affective identity, political identity, cultural identity and economic identity*) and social categories (*among others; ethnicity identity, racial identity, gender identity, class identity, childhood identity, sexual identity and citizenship identity*) which add up to create the multiple identities that structure our social worlds.⁴⁶⁵ Some of these identities “are understood to be mutually exclusive and rely on not being able to be combined”.⁴⁶⁶ However, although there are multiple identities within the social world, there are important

⁴⁵⁹S Fredman “Facing the Future: Substantive Equality Under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 30. Fredman argues over-reliance on the right to dignity should be exercised with caution. If taken alone dignity could undermine the distributive notion. The relationship between an individual and community should be the basis, to imply a person’s dependence on a commitment to the community, without infringing upon a person’s individual values (S Fredman “Facing the Future: Substantive Equality Under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 19 – 22.

⁴⁶⁰S Hall “Cultural Identity and Diaspora” in K Woodward *Identity and Difference* (1997) 52.

⁴⁶¹L Alcoff-Martin Linda “Introduction” in L Alcoff-Martin & E Mendieta *Identities: Race, Class, Gender and Nationality* (2003) 3.

⁴⁶²See R Rouse “Questions of Identity: Personhood and Collectivity in Transnational Migration to the United States” (1995) *Critique of Anthropology* 15 (4) 351-380.

⁴⁶³S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 17 - 19.

⁴⁶⁴S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 17 - 19.

⁴⁶⁵See Chapter 3 of this study for more on society spheres.

⁴⁶⁶S Lawler *Identity: Social Perspectives* (2008) 3.

diversities and interesting similarities between analyses of race, gender, sexual, class and nationality-based identities.⁴⁶⁷ Lawler argues further that it should not be viewed “as though one could have a gendered identity, and then, in addition to that, a raced identity, and then, somewhere ‘on top of’ that, a sexual identity and so on.”⁴⁶⁸ Instead, different identities intermingle:

“(R)ace, gender and the rest interact (as do all forms of identity), so that to be white is not the same – in terms of meaning or experience – as to be a black woman. Different forms of identity, then, should be seen as interactive and mutually constitutive, rather than ‘additive’. They should also be seen as dynamic.”⁴⁶⁹

In this way, an individual does not have one identity but numerous identities, and these identities impact on each other.

South Africa still suffers from “the legacy of an identity-assigning colonisation and racialism” imposed by apartheid. Lipton identifies some of the parameters of identity formation which were instituted by the apartheid government.

- The hierarchical ordering of economic, political and social structures on the basis of race, identified by physical characteristics such as skin colour and hair texture.
- Exclusion of black people from many of the civil, political and economic rights enjoyed by white people, such as the right to vote, to move freely, to be full citizens of South Africa, and to own property and work anywhere in South Africa.
- Confining black people to inferior housing, schools, universities, hospitals and transport, and prohibiting sexual relations and inter-marriage across the colour bar. This discrimination insinuated that black cultures were inferior to those of white people.
- Institutionalising this hierarchical, discriminatory and segregated system in law, enabling the government to enforce it through various measures.⁴⁷⁰

The above-mentioned parameters are fundamental to understanding the link between individual and group-based identities and the “determinants of poverty and inequality” in South Africa.⁴⁷¹ In this regard, affirming identities in communities provides a platform to

⁴⁶⁷S Lawler *Identity: Sociological Perspectives* (2008) 3.

⁴⁶⁸S Lawler *Identity: Sociological Perspectives* (2008) 3.

⁴⁶⁹S Lawler *Identity: Sociological Perspectives* (2008) 3.

⁴⁷⁰M Lipton *Capitalism and Apartheid: South Africa, 1910-1986* (1986) 14-15.

⁴⁷¹See Chapters 2 and 3 for discussions on the determinants of poverty and inequality.

focus on a particular identity and the disadvantages associated with that particular identity. In addition, this allows for the provision of well-tailored programs and ensuring that they benefit the intended beneficiaries. This resonates with the fact that it is not status *per se* which is problematic, but the disadvantage that attaches to status.⁴⁷²

Affirmation of identity within community is often linked to the notions of stigma and discrimination. Stigma is argued to be “an artefact of community” and a deeply discrediting attribute that devalues an individual.⁴⁷³ Stigma exists within communities, suggesting communal obligations. Dworkin argues that discrimination in favour of members of one’s group may “conflict, not just with duties of abstract justice the group’s members owe everyone else, but also with associative obligations they have because they belong to a larger or different associative communities.” He continues:

“For if those who do not belong to my race or religion are my neighbours or colleagues or .. my fellow citizens, the question arises whether I do not have responsibilities to them, flowing from those associations, that I ignore in deferring to the responsibilities claimed by my racial or religious group.”⁴⁷⁴

The existence of a significant number of excluded or poor individuals living in a community can result in the stigmatisation of the entire community. Stigmatisation of communities is often based on high crime rates or unacceptable social behaviours such as illegal drug use, teenage pregnancies, high unemployment, among others.⁴⁷⁵ Living in a stigmatised community can hinder one’s prospects of participation in employment or other opportunities afforded to those who live in communities which are regarded as more favourable by outsiders. Young asserts the importance of stigma in biasing societal decision making and perpetuating the inferior status of certain groups.⁴⁷⁶ Socio-economic inequality and poverty are bad if they are simply a misfortune, but they are worse if they are the objective expression of social stigma based on a particular identity.

Social class as an identity can have a profound effect on children becoming victims of persistent material deprivation. Fishkin highlights the injustice for children or babies of a

⁴⁷²S Fredman “Facing the Future: Substantive Equality under the Spotlight” (2009) in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15 – 19.

⁴⁷³E Goffman *Stigma: Notes on the Management of Spoiled Identity* (1963) 12.

⁴⁷⁴R Dworkin *Law’s Empire* (1986) 202 – 203.

⁴⁷⁵See E Richardson, J LeGrand “Outsider and Insider Expertise: The response of residents of deprived neighbourhoods to an academic definition of social exclusion.” *Social Policy and Administration* 36(5) (2002) 496-515 eScholarID:1b4140 | DOI: 10.1111/1467-9515.00299 .

⁴⁷⁶I M Young *Justice and the Politics of Difference* (1990)152.

system of social class.⁴⁷⁷ He notes that if one enters a hospital ward of healthy new-born babies, one can envisage with a high degree of accuracy the eventual social standing of those children in society on the basis of their social class.⁴⁷⁸ This leads to a situation of ascribed status or identity. Some children are poor by accident of birth (they just happened to be born to poor parents). When such children come into the world, ascribed identities are conferred on them that will have a significant effect on the nature of the opportunities available to them. Massey *et al.* argue that an individual's structural position in society has considerable implications for the benefits and opportunities received by the individual.⁴⁷⁹ They further point out that "although people function as independent actors, the possibilities they face and the decisions they make are inevitably constrained by the positions they occupy in the social order".⁴⁸⁰ This highlights the evil of class as something that confers identity. It is also arguable that affirmation of identity creates a synthesis between social (re)construction and a reduction of socio-economic inequality. The character of such a synthesis is illustrated by Koppleman:

"Members of the privileged groups will find that their taken-for-granted norms include using their great power in ways that maintain the stigmatised groups' subordinate status symbolically, politically, and materially. Those in the stigmatised groups may themselves internalise the reigning values, and so may develop such a low opinion of themselves that they do not, either overtly, challenge their position in society, and it has consequences for the distribution of wealth, power, and prestige ... Antidiscrimination law is part of a project of social reconstruction. It seeks to disrupt the machineries of universe-maintenance that reproduce unjustifiably stigmatising meanings, and thereby to reshape the socially constructed reality of society."⁴⁸¹

It is interesting to note that affirmation of identity as an aim elucidates how a substantive conception of equality may contribute to changing habitual social practices (which include, among other things, stigmatisation) – for example, the idea that certain classes of people are inherently inferior and unworthy because of their status (either by race or gender).⁴⁸² The consequences of that idea are part of the injustice to be eliminated as they reproduce the idea itself.⁴⁸³

⁴⁷⁷See J Fishkin *Justice, Equal Opportunity and the Family* (1983) 4.

⁴⁷⁸See J Fishkin *Justice, Equal Opportunity and the Family* (1983) 4.

⁴⁷⁹D Massey, A Gross & M Eggers "Segregation, the Conception of Poverty and the Life Chances of Individuals" *Social Science Research* 20 (1991) 397 – 420.

⁴⁸⁰D S Massey, A Gross & M Eggers "Segregation, the Conception of Poverty and the Life Chances of Individuals" *Social Science Research* 20 (1991) 397.

⁴⁸¹A Koppleman *Antidiscrimination Law and Social Inequality* (1996) 95.

⁴⁸²I M Young *Justice and the Politics of Difference* (1990) 13 - 14.

⁴⁸³I M Young *Justice and the Politics of Difference* (1990) 13 – 14.

The existence of zones of poverty in South Africa's urban areas is a tragedy regardless of who lives there, but it is made worse by the fact that large numbers of their inhabitants are African. The injury of poverty and inequality is amalgamated by the insult of stigma and discrimination, which means that, in addition to enduring poverty, the poor are often victims of stigma and discrimination. It can be argued that it is this augmentation of stigma and discrimination that substantive equality is concerned about through aiming affirmation of identities within communities.

4.4.2.4 Facilitation of full social participation

The final aim of substantive equality that needs to be highlighted is the facilitation of full social participation. Full participation entails participation in the labour market and civil society, be it in education, the health or the voluntary sector. Individuals who are victims of social exclusion often do not participate fully in these spheres for reasons beyond their control. Burchardt, Le Grand and Piachaud define social exclusion as follows: "An individual is socially excluded if he or she does not participate in key activities of the society in which he or she lives."⁴⁸⁴ These key activities are found within systems, defined by Berghman as the democratic and the legal system; labour market system; welfare state system, and family and community system.⁴⁸⁵ The democratic system and legal system facilitate political and legal engagement (civic integration).⁴⁸⁶ The labour market system involves production and participation in economically or socially valuable activities (economic integration).⁴⁸⁷ The welfare system involves consumption and the capacity to purchase goods and services by society (social integration).⁴⁸⁸ The final system is the family and community system, which facilitates social interaction by promoting integration of individuals with family friends and community (interpersonal integration).⁴⁸⁹

⁴⁸⁴T Burchardt, J Le Grand & D Piachaud "Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure" in J Hills, J Le Grand & D Piachaud (eds) *Understanding Social Exclusion* (2002) 30.

⁴⁸⁵J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6. See also T Burchardt, J Le Grand & D Piachaud "Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure" in J Hills, J Le Grand & D Piachaud (eds) *Understanding Social Exclusion* (2002) 30.

⁴⁸⁶J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6.

⁴⁸⁷J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6.

⁴⁸⁸J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6.

⁴⁸⁹J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6.

These systems promote multiple integration, which is necessary for every citizen (especially the poor) to maintain social inclusion and break (cycles of) disadvantage. Burchardt *et al.* argue that lack of participation or integration in any one dimension is sufficient for social exclusion. Bergham also points out that if lack of integration is prolonged, it fuels the process of impoverishment.⁴⁹⁰ Each of the above systems represents an outcome considered to be important in alleviating poverty and reducing inequality, although there are interactions between the outcomes. For example, if the economic system becomes accessible to an individual (perhaps through a job appointment), it exposes them to new set of social networks and tools which would allow them to find ways to become integrated into the mainstream of society.

However, equality of both recognition and redistribution is necessitated by the acknowledgement that individuals cannot participate fully without some guaranteed basic social rights.⁴⁹¹ They cannot also be duly recognised by those holding political power without being afforded social rights.⁴⁹² South Africa's poor, who form the majority of the populace, have suffered economic, political and social marginalisation and exclusion. Such a lack of participation has not occurred merely as a consequence of their poverty. It has occurred mainly because of cumulative structural factors and as a direct result of deliberate policies of the apartheid regime, which discouraged economic participation, deepened economic inequalities and social disparities. Effective political, social, economic and interpersonal participation is essentially an expression of effective economic and political empowerment. This cannot be over-emphasised, since inequality is often generated within the societal systems (political, social, economic and affective) in which these participation capacities are emulated.⁴⁹³ The absence of such empowerment means that efforts to respond effectively to the needs of the poor will be futile.

It has already been pointed out that socio-economic inequality and poverty in South Africa are structural in nature. Several commentators agree that key factors, among many, causing structural poverty are: skewed distribution of wealth, assets and incomes; impoverishment;

⁴⁹⁰J Berghman "The Resurgence of Poverty and the Struggle against Social Exclusion" *International Social Security Review* (1997) 50 (1) 4 – 6.

⁴⁹¹S Fredman "Facing the Future: Substantive Equality Under the Spotlight " in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁴⁹²S Fredman "Facing the Future: Substantive Equality Under the Spotlight" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁴⁹³See Chapter 3 of this study.

the lack of opportunities; the dual-tier education system; and policy making which is disadvantageous to the poor.⁴⁹⁴ These structural causes of poverty and inequality cannot be adequately addressed without effective political, economic, social and interpersonal empowerment and participation of the poor. Economic empowerment of the poor requires commitment on the part of the state to a democratic agenda of development which is pro-poor.⁴⁹⁵ This requires a high quality of governance and the genuine democratic representation of the interests of the masses by the government itself.⁴⁹⁶ In addition, any pro-poor developments need to take into account the various determinants of poverty and inequality in South Africa. This might allow the development of policies that are tailor-made for South Africa's poverty profile – policies that genuinely 'speak' to the material conditions of the South African poor.

According to Cook, the right to full participation in society is theoretically and unconditionally accorded to all citizens, meaning every person is entitled to social citizenship.⁴⁹⁷ The notion of social citizenship was first introduced by T. H. Marshall as a subset of general citizenship. According to Higgins and Ramina, social citizenship "exists when a nation's laws and social provisions override *de facto* disadvantage based in ascriptive difference and personal misfortune".⁴⁹⁸ "Citizenship is an important form of participation at the macro, state level, and lack of, or ineligibility for, citizenship is a form of social exclusion".⁴⁹⁹ Taket *et al.* argue that the extent to which an individual or group feels included or excluded in a community may differ substantially from the extent to which they feel accepted by wider society.⁵⁰⁰ This brings to the surface ways in which notions of community

⁴⁹⁴See S Van der Berg "Trends in Poverty and Inequality since the Political Transition" (2005) Stellenbosch Economic Papers:1/2005; H Bhorat, C van der Westhuizen & T Jacobs "Income and Non-income Inequality in Post-Apartheid South Africa: What are the Drivers and Possible Policy Interventions?" (2009) Development Policy Research Unit (DPRU) Working Paper 09/138; see M MacDonald *Why Race Matters in South Africa* (2006) 147 – 148; S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 334 – 335.

⁴⁹⁵See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 334 – 335

⁴⁹⁶S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 334 – 335

⁴⁹⁷K Cook "Not Measuring up: Low-income Women Receiving Welfare Benefits" in A Taket; B R Crisp; A Nevill, G Lenaro, M Graham & S Barter- Godfrey *Theorising Social Exclusion*(2009) 55.

⁴⁹⁸W Higgins & G Ramina "Social Citizenship", in W Hudson & J Kane (eds) (2000) *Rethinking Australian Citizenship* 137.

⁴⁹⁹B Pease "The other side of social exclusion: interrogating the other role of the privileged in reproducing inequality" in A Taket; B R Crisp; A Nevill, G Lenaro, M Graham & S Barter- Godfrey *Theorising Social Exclusion*(2009)24.

⁵⁰⁰A Taket; B R Crisp; A Nevill, G Lenaro, M Graham & S Barter- Godfrey *Theorising Social Exclusion*(2009) 19.

and social exclusion interact: exclusion of individuals or groups within a community and the exclusion of communities from full participation at the wider society level.⁵⁰¹

Exclusion of groups resonates with the theory of group disadvantage, which focuses on the substantive social position of disadvantaged groups. In her work Iris Marion Young highlights the multifaceted nature of group disadvantage.⁵⁰² The theory of justice she develops identifies oppression and domination as injustices towards groups:

“Oppression consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognised settings, or institutionalised social processes which inhibit people’s ability to play and communicate with others or to express their feelings and perspective on social life in contexts where others can listen ... Domination consists in institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions.”⁵⁰³

Furthermore Young, points out some conditions which indicate that a group is oppressed:

- The benefits of their work or energy go to others without those others reciprocally benefiting them (exploitation);
- They are excluded from participation in major social activities, which in our society means primarily a workplace (marginalisation);
- They live and work under the authority of others and have little work autonomy and authority over themselves (powerlessness);
- As a group they are stereotyped at the same time that their experience and situation is invisible in the society in general, and they have little opportunity and little audience for the expression of their experience and perspective on social events (cultural imperialism);
- Group members suffer random violence and harassment motivated by group hatred or fear.⁵⁰⁴

Oppression and domination are driving forces for the injustice created by the abovementioned conditions. They systematically frustrate the realisation of some aspects of wellbeing: “a)

⁵⁰¹ A Taket; B R Crisp; A Nevill, G Lenaro, M Graham & S Barter- Godfrey *Theorising Social Exclusion*(2009) 19.

⁵⁰² See I M Young *Justice and the Politics of Difference* (2009) 15.

⁵⁰³ I M Young *Justice and the Politics of Difference* (2009) 38.

⁵⁰⁴ I M Young *Justice and the Politics of Difference* (2009) 43 - 63.

developing and exercising one's capacities and expressing one's experience; and b) participating in determining one's action and the conditions of one's action."⁵⁰⁵ It is interesting to note that "the achievement of formal equality does not eliminate social differences, and rhetorical commitment to the sameness of persons makes it impossible even to name how those differences presently structure privilege and oppression".⁵⁰⁶ In contrast, substantive equality appreciates difference, which affords a platform for acknowledging and addressing the conditions that result in oppression and domination.

Group disadvantage theories – like those propounded by Young – emphasise the importance of a process of meaningful engagement with the disadvantaged themselves.⁵⁰⁷ Meaningful engagement participation requires the participation of both the state and private parties in the process of engagement. All parties – especially the disadvantaged group – should be placed in a position in which they will be aware which of their rights are at stake in order for them to assert these rights effectively. "In the absence of a substantive evaluation of the rights at stake, meaningful engagement takes place in a normative vacuum."⁵⁰⁸ Victims of oppression and domination are "particularly vulnerable to being pressured by more powerful counterparts to negotiate away their constitutional rights".⁵⁰⁹ The issue of meaningful engagement is in line with participatory democracy. The post-apartheid era has been one of 'transitional governance', involving the negotiation of demands for democratisation and deep social transformation. In this regard, community participation has literally become synonymous with legitimate governance. According to John J Williams, "this began with the negotiated ... spaces of participation such as the RDP and the Constitution: the former the outcome of community participation and the latter ensconcing the right to participate in local government programmes".⁵¹⁰

The quest for change in South Africa has seen the rise of new transformative entities such as the Treatment Action Campaign and other local initiatives seeking "to democratise politically

⁵⁰⁵I M Young *Justice and the Politics of Difference* (2009) 37.

⁵⁰⁶I M Young *Justice and the Politics of Difference* (2009) 164.

⁵⁰⁷I M Young *Justice and the Politics of Difference* (2009) 15.

⁵⁰⁸S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 423 – 424.

⁵⁰⁹S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 423 – 424.

⁵¹⁰J J Williams "Social Change and Community Participation: The Case of Health Facilities Boards in the Western Cape of South Africa" in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 96.

liberated spaces.”⁵¹¹ Currently, given the entrenched nature of power relations in society, community participation has a strong and meaningful place in public debates on governance.⁵¹² With the advent of democracy, local government assumed an institutional transformative role. Section 152e of the Constitution states that “the objective of the local government is to encourage the involvement of communities and community organisations in the matters of local government.” Williams argues that this position is radical and one that encounters profound structural limitations in the midst of bureaucratic institutions and uneven relations of power.⁵¹³ In questioning the process of meaningful engagement and full participation in South Africa, Williams notes:

“There is a reason for concern that in South Africa ordinary people serve mainly as endorsers of pre-designed planning programmes and objects of administrative manipulation in which bureaucratic elites impose their own truncated version of ‘community participation’ on particular communities. Consent for governance is not earned through rigorous policy debates of the merits and demerits of specific social programmes; rather, political acquiescence is manufactured through skilful manipulation by a host of think-tanks, self-styled experts, opinion polls and media pundits. Indeed, often community participation is managed by a host of consulting agencies on behalf of pre-designed, party-directed planning programmes and is quite clearly not fostered to empower local communities. What possibilities exist, then, for meaningful spaces of participation? Some of the limitations of these spaces, and also some of their possibilities are evident ... which are meant to contribute towards the institutional transformation ... yet [are] shaped and constrained by the complex legacies of institutionalised racism and exclusion.”⁵¹⁴

Meaningful engagement with the socio-economically disadvantaged on matters that concern their material conditions is thus dependent on their involvement in decision-making processes.⁵¹⁵ Participants’ knowledge bases inevitably vary, given their highly differential access to information and ability to make sense of it. These differences have an effect on shaping the level of understandings of, and perspectives on, community participation. The majority of the poor are educationally disadvantaged, which hinders their full participation in

⁵¹¹J J Williams “Social Change and Community Participation: The Case of Health Facilities Boards in the Western Cape of South Africa” in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 96.

⁵¹²See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

⁵¹³J J Williams “Social Change and Community Participation: The Case of Health Facilities Boards in the Western Cape of South Africa” in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 96.

⁵¹⁴J J Williams “Social Change and Community Participation: The Case of Health Facilities Boards in the Western Cape of South Africa” in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 97-98.

⁵¹⁵J J Williams “Social Change and Community Participation: The Case of Health Facilities Boards in the Western Cape of South Africa” in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 97-98.

the various participatory spheres. With regard to the aim of full social participation, a substantive conception of equality begins to raise a number of questions about the politics of participatory and deliberative governance. For example, what forms of representation exist even within participatory processes? How do the norms of deliberation translate across different political cultures and settings? How do participatory processes overlay and interact with existing political structures? What are the tangible outcomes – both in democracy-building and developmental terms – of engagement in the new participatory sphere, and how can they be seen in everyday life?⁵¹⁶

Conversely, what is it about the interrelationship between substantive equality (through the discussed aims) and the two issues (poverty and inequality) that can contribute to the fight against socio-economic disadvantage? The next section will evaluate the impact of the established interrelationship on the alleviation of socio-economic disadvantage.

4.4.3 Evaluation of the implications of the aims (of substantive equality) on socio-economic disadvantage.

In the earlier discussion of the aims of substantive equality, I pointed to the direct link between substantive conceptions of equality and addressing socio-economic disadvantage. The poor experience cycles of disadvantage; their lack of access to social rights prevents them from leading a dignified life; they suffer from stigmatisation and, because of their marginalised position in society, the poor are prone to social exclusion and low levels of democratic participation. Firstly, the aim of breaking the cycle of disadvantage requires that the roots of inequality and poverty be identified and opportunities be established to sever the causal link. For instance, inter-generational disadvantage as a cycle is maintained by the transference of disadvantage from one generation to the other. To break such a cycle, an intervention designed to disrupt the cycle is necessary. Programmes such as Sure Start and Head Start are examples of interventions that can counter the transference of inter-generational disadvantage.⁵¹⁷

⁵¹⁶The questions were taken from John Gaventa “Foreword” in A Cornwall & V S Coelho (eds) *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) xv. Answers to these questions can be found by engaging with Sandra Liebenburg’s analysis of the subject of meaningful engagement in her article “Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’” (2012) 12 *African Human Rights Law Journal* 1- 29.

⁵¹⁷See section 4.4.2.1 of this chapter for more on Sure Start and Head Start programmes.

Secondly, the aim of promoting respect for dignity directly implicates the social rights that need to be realised in order to afford every person the opportunity to lead a dignified life. The call to promote dignity in relation to social rights also places the spotlight on the issue of service delivery. When delivery of service is poor (inadequate housing, poor sanitation, lack of decent health care, etc.), the socio-economic disadvantaged are disproportionately affected, and this impedes their ability to maintain a dignified life. In other words, provision of services resonates with promoting equal respect for dignity.

Thirdly, affirmation of identities recognises the importance of the various identities in society. Such recognition aims to impact not only on the attitude of individuals who are stigmatised, but also on the perpetrators. Cultural environments tend to influence the attitude individuals develop and this in turn influences how people treat each other in society.

The fourth aim focuses on social participation. Poverty is associated with marginalisation and social exclusion. Hence programmes that promote full social participation create a platform for the excluded (the poor) to integrate into society on different levels. Such integration can eventually create ways for the poor to escape poverty. In this regard, substantive equality requires that the roots of inequality be identified, the goal of opportunity be established, and a legal mechanism be developed that will achieve this goal in a principled way. The mechanism for achieving the goal involves removing the barriers associated with the targeted group's situation rather than securing an equal result.

It is arguable that the aims of substantive equality display two distinct characteristics in the affirmation of the disadvantaged, namely a) socio-economic inclusion; and b) psychological liberation. Two of the aims of substantive equality, namely breaking the cycle of disadvantage and full social participation, aim for economic inclusion. While on the other hand, the other two (equal promotion of dignity and affirmation of identity) address the psychological liberation of the victims of socio-economic disadvantage. As indicated earlier, poverty often leads to isolation, which means that it requires what can be described as a 'liberation of the mind'. In this way, substantive equality – through its various strategic elements (including affirmative action, which forms basis of the discussion in the subsequent chapters)⁵¹⁸ – could be used as the basis of both a policy for socio- economic empowerment

⁵¹⁸See Chapter 5 and subsequent chapters.

as well as for psychological liberation. Victims of poverty and inequality need to be empowered socially, economically and otherwise. Empowerment is an inclusive notion – intended to create a platform for the poor to be part of mainstream society in all social spheres. In this regard, both socio-economic empowerment and psychological liberation are necessary in the fight against socio-economic disadvantage. This means the equality premise could be a basis to pave way for the poor to exit poverty.

Fredman points out that substantive equality provides no guarantees that members of a particular group will achieve equality of results.⁵¹⁹ Substantive equality, through its aims, embraces dimensions that are relevant to the fight against poverty and socio-economic inequality. These include: a) recognition of diversity, difference, disadvantage and discrimination, and affirmation of the equality of everyone; b) the encompassing of *de jure* and *de facto* equality; c) correction of the environment that causes the disadvantage; and d) levelling out the playing field by requiring all initiatives to ensure the various aspects of equality (equality of opportunity, equality of results, equality of access, etc.). I argue that these dimensions reinforce the existence of an interrelationship between a substantive conception of equality and poverty alleviation. In addition, I also submit that the aims of substantive equality create new paths to bring ‘us’ closer to the poor. They imply an existence of ‘us’ or ‘we’ who are underpinning of a particular human social order. The need for breaking disadvantage, affirming identities within communities, promoting respect for dignity and increasing full participation indicates that “individuals are not negated, but there is a society and as a result public sphere understood as a concern for matters of common interest and for the interests of society as a whole.”⁵²⁰ Nonetheless, it is arguable an empirical testing of the aims of substantive equality is required. Such an argument must first recognise that the states of wellbeing and deprivation (due to poverty and socio-economic inequality) imply a dualism whereby one is either poor or above the basic standard of living. This is suggestive of the fact that people are either poor or victims of socio-economic inequality in relation to a particular variable or factor. But a question arises: are those without access to resources and opportunities necessarily poor? Instead of adopting such a dualistic approach, it is submitted that inequality and poverty should be viewed as existing along a continuum whereby individuals are placed somewhere between absolute wellbeing and absolute

⁵¹⁹S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 18.

⁵²⁰E S Bustelo “Expansion of Citizenship and Democratic Construction” in W Van Genugten & C Perez-Bustillo (eds) *The Poverty of Rights: Human Rights and the Eradication of Poverty* (2001)10.

deprivation. In this regard, the aims of substantive equality forge an interrelationship between substantive equality and poverty, on the one hand, and with inequality, on the other.

4.5 Conclusion

The chapter explored some of the key aspects of the process of conceptualising substantive equality. While equality is an essential feature of national law and as well as international human rights, its precise meaning remains contested. There are two main theories of equality, namely substantive equality and formal equality. Formal equality represents a symmetrical view of equality. It adheres to the importance of individualism and neutral treatment. In terms of this perspective, equality is primarily about ensuring individual freedom from group stereotyping. The second main theory of equality, namely substantive equality, on the other hand, examines the purpose, the process and the outcome or result of any particular action or policy. It is an approach that departs notably from the traditional dogma and viewpoint of equal treatment (formal equality). Substantive equality is fashioned to address the limitations imposed by formal equality. In addition, substantive equality leads to levelling of the playing field by requiring all initiatives to result in three significant ends, namely equality of outcome, equality of opportunity and equality of access.

The Constitutional Court in South Africa has given positive meaning to equality through its interpretation of the “right to equality” principle. Characterised as “transformative” in nature the Constitution, through a detailed equality provision, aims to dismantle systemic forms of disadvantage and subordination. In this way, it can be argued that the Constitution embraces a substantive conception of equality.

In this chapter I have argued that substantive equality has four distinct aims, namely breaking the cycle of disadvantage; promoting respect for dignity; affirmation of identity; and facilitation of full participation in society. These aims reinforce a link between substantive equality and alleviation of socio-economic disadvantage. In addition, the aims provide a platform for substantive equality to address the issues of poverty and socio-economic inequality. Through these aims substantive equality arguably embraces dimensions that are relevant to the fight against poverty and socio-economic inequality. These dimensions include the following: a) recognition of diversity, difference, disadvantage and discrimination, and affirmation of the equality of everyone; b) the encompassing of *de jure* and *de facto* equality; c) correction of the environment that causes the disadvantage; and d)

levelling the playing field, which would lead to equality of opportunities, equality of outcome and equality of access.

Consequently, it is imperative to note that having established the existence of a link between a substantive conception of equality and (the alleviation of) poverty, the study is based on the assumption that the elements of substantive equality afford a platform for the aims of substantive equality to be realised. The next chapter will explore the theory of substantive equality and its link to affirmative action. I will argue that the policy of affirmative action, as a strategic element of substantive equality, can (and indeed should) fulfil the aims of substantive equality. In this regard, the aim of the next chapter is to evaluate whether and to what extent the policy of affirmative action is aligned with the specific aims of substantive equality, which would enable it to play a role in the alleviation of poverty.

CHAPTER 5: AFFIRMATIVE ACTION AND THE THEORY OF SUBSTANTIVE EQUALITY

5.1 Introduction

The attainment of substantive equality involves a number of strategic elements which include, among others, preferential treatment in the competition for jobs and access to educational institutions (affirmative action); promoting ownership, control and management of the economy amongst those previously excluded through a variety of legislative and other means (economic empowerment); and redistribution by means of cash grants to the elderly, the young and the disabled (social security). As established in the previous chapter, the notion of substantive equality facilitates the adoption of such strategies to address patterns of disadvantage, socio-economic inequality and social exclusion. The right of each person to “a standard of living adequate for health and medical care and necessary social services”⁵²¹ cannot be guaranteed without a significant intervention in the social structure. Thus, interventions and strategies are required for socio-economic reconstruction. This dissertation focuses on one of these, namely affirmative action. It is the aim of this chapter to explore the manner in which affirmative action was (or is) conceptualised, justified and implemented, and whether the aims it seeks to achieve (among others, reducing socio-economic inequality and poverty) can be realised.

The first part of the chapter examines the meaning of the term “affirmative action”. Part 2 explores the justifications and goals of affirmative action. In part 3 the focus will shift to a critical examination of affirmative action and its links to the aims of substantive equality, namely breaking cycles of disadvantage; promoting equal respect for dignity; affirmation of identity; and full social participation.⁵²² Part 4 suggests an evaluation the link between of affirmative action and the aims of substantive equality and then part 5 makes some concluding remarks.

⁵²¹ Articles 5 and 25 (1) of the United Nations Declaration of Human Rights.

⁵²² See Chapter 4 of this study.

5.2 What is affirmative action?

The term ‘affirmative action’ originated in United States (USA), where it has been implemented in various forms for over thirty years.⁵²³ Many accounts date the birth of the term “affirmative action” to 6 March 1961, when President John F. Kennedy issued Executive Order 10925.⁵²⁴ The Order placed a duty on government contractors and subcontractors to institute affirmative action and to promote inclusion of marginalised groups into the workforce and business without regard to their race, creed, colour or national origin. When affirmative action was first introduced in the USA, it was intended to redress state-sponsored discrimination and was an attempt to remove government-erected barriers to the fair and equal treatment of individuals. The same terminology was used in Executive Order 11246, issued by Lyndon Johnson in 1965.

Affirmative action is often defined by distinguishing between strong and weak remedial measures.⁵²⁵ Preferential treatment amounts to what has been called *strong affirmative action*, a policy that should be distinguished from *weak affirmative action*, which merely involves efforts to ensure equal opportunities for members of groups that have thus far been subject to discrimination.⁵²⁶ Such efforts include “active recruitment of qualified applicants from the formerly excluded groups, special training programs to help them meet the standards for appointment, and measures to ensure that they are fairly considered in the selection process.”⁵²⁷ Dupper further argues that ‘strong affirmative action’ is more controversial than

⁵²³ The following two paragraphs draw heavily from O Dupper “Affirmative Action in South Africa: (M)Any Lessons for Europe?” 39 (2006) *Verfassung und Recht in Übersee* (Law and Politics in Africa, Asia and Latin America) 135-136.

⁵²⁴ See D J Garrow “Affirmative Action and the U.S. Black Freedom Struggle” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 35 - 37.

⁵²⁵ The next few paragraphs draw heavily on Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195. Also See T Nagel “A Defense of Affirmative Action”, in T Beauchamp and N Bowie (eds) *Ethical Theory and Business*, (1988) 345.

⁵²⁶ See footnote 27 in O Dupper’s article entitled “Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195” he points out that the European Community Law is a paradigmatic example of a body of law that embraces ‘weak’ as opposed to ‘strong’ affirmative action. He argues the approach is best exemplified in the decision of the European Court of Justice (ECJ) in the case of *Kalanke*. In *Kalanke* the court had to decide whether a “tie-break” policy pursued by the City of Bremen was allowed under EC law. The policy in question provided that if a man and a woman with the same qualifications applied for promotion, women were to be given priority to the extent that they were under-represented in that job grade. The policy was held to be irreconcilable with the Equal Treatment Directive. The court stressed that it is permissible to take measures that give an advantage to women with a view to improving their ability to compete equally with men in the labour market. However, once that is achieved, individual merit again becomes paramount. Thus, any policies “which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive”. See *Kalanke* ECJ 17-10-1995, C-450/93, [1995] ECR I-3051, [1995] IRLR 660 ECJ.

⁵²⁷ “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195.

its weaker counterpart. Most people, Dupper assumes, would agree that what is referred to as ‘weak affirmative action’ is a good policy as it is fair, just and requires less energy. Weak affirmative action, if put into practice, ensures that members of those groups who would qualify for positions under normal circumstances are not overlooked.

Conversely, ‘strong affirmative action’ is open to a charge of unfairness.⁵²⁸ It is argued to lead towards a “departure from the ideal that people should be judged as far as possible on the basis of individual characteristics that are relevant to the situation, rather than involuntary group membership, especially when based on arbitrary criteria such as skin colour or sex.”⁵²⁹

The application of affirmative action today is global, although different terms are used to refer to the same phenomenon.⁵³⁰ Some countries, such as Canada, have chosen to use the term ‘positive action’ to distance itself from the US meaning of the term. In South Africa the term ‘positive measures’ was used in the policy documents and the draft legislation leading up to the final version of the Employment Equity Act (EEA).⁵³¹ The term ‘affirmative action’ was later reintroduced into the final version of the EEA adopted in 1998. In the Constitution of South Africa the term ‘affirmative action’ is not used, although preferential treatment is openly endorsed. Section 9(2) instead refers to “measures designed to protect or advance persons, disadvantaged by unfair discrimination”.⁵³²

Affirmative action is supported by various domestic laws as well as international law.⁵³³ For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states parties to take definite steps to ensure the full realisation of the rights guaranteed by the Covenant. Article 2(1) of the ICESCR provides:

“Each State Party to the present Covenant undertakes to take steps, individually through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁵³⁴

⁵²⁸O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195.

⁵²⁹O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195.

⁵³⁰The following paragraph rely primarily on O Dupper “Affirmative Action in South Africa: (M)Any Lessons for Europe?” 39 (2006) *Verfassung und Recht in Übersee* (Law and Politics in Africa, Asia and Latin America)135-136.

⁵³¹Act 55 of 1998. In terms of the EEA, “affirmative action” is viewed as one of two means to achieve “employment equity”, the other being the elimination of unfair discrimination (see section 2).

⁵³²See section 9(2) of the Constitution of the Republic of South Africa, 1996.

⁵³³See Global Rights *Affirmative Action: A Global Perspective* (2005).

⁵³⁴International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 6 I.L.M.

The General Comment 5 of the Committee on Economic, Social and Cultural Rights (CESCR) suggests direct support for affirmative action. Comment 5 provides that the espousal of “special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the non-discrimination principle”.⁵³⁵ According to Dupper, “this is a significant statement, because in denoting that affirmative action measures do not violate non-discrimination norms, provided that the goal is to ensure *de facto* equality for disadvantaged groups, it reflects a substantive rather than formal notion of equality.”⁵³⁶

Similarly, CEDAW provides that:

“Adoption by State Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the Convention, but still in no way entails as a consequence the maintenance of equal or separate standards. These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”⁵³⁷

“Adoption by State Parties of special measures, including those measures contained in the present convention, aimed at protecting maternity shall not be considered discriminatory.”⁵³⁸

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also contains some provisions that seek to provide affirmative action for indigenous peoples and individuals. The UNDRIP affirmative action provision includes measures on reflecting indigenous cultures, traditions and histories in education and public information;⁵³⁹ measures on protection of indigenous children against economic exploitation;⁵⁴⁰ measures for the improvement of the economic and social conditions of indigenous peoples;⁵⁴¹ measures on indigenous elders, women, youths, children and persons with disabilities;⁵⁴² and effective measures to maintain contacts with their own people and other peoples across international

360, [hereinafter ICESCR] art. 2(1) (emphasis added where?).

⁵³⁵ CESCR General Comment 5, Persons with Disabilities, E/1995/22 (Dec. 9, 1994) paragraph 9. CESCR comments on state party reports similarly display support for affirmative action. For example, in a report on Guatemala’s compliance, the Committee recommends affirmative action measures to benefit indigenous communities (see Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Art. 16 and 17 of the Covenant, Guatemala (1996) at paragraph 27 (as cited in *Global Rights Affirmative Action: A Global Perspective* 10).

⁵³⁶ O Dupper “Affirmative Action in Comparative Perspective” in M Langford (ed.) *Equality Rights Revisited: Social Rights, Discrimination and International Law and Practice* (forthcoming).

⁵³⁷ Article 4 (1).

⁵³⁸ Article 4 (2).

⁵³⁹ Article 15.

⁵⁴⁰ Article 17.

⁵⁴¹ Article 21.

⁵⁴² Article 22.

borders.⁵⁴³ Moreover, the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) also contains several measures to ensure that the historical and current circumstances of indigenous peoples do not have the effect of depriving indigenous peoples of the right to equal treatment. The Convention contains provisions on land and natural resources, including on traditional ownership and on the use and transmission of rights;⁵⁴⁴ on recruitment and conditions of employment;⁵⁴⁵ on vocational training;⁵⁴⁶ measures on social security and health;⁵⁴⁷ education and means of communication,⁵⁴⁸ among others.

Some commentators argue that affirmative action should be viewed within the framework of international human rights law. For example, Yussun Kly argues that affirmative action is consistent with any of the international legal obligations of states to respect, protect and promote the human rights of its citizens, as well as the obligations of states to compensate or provide restitution in the case of damages or harm caused by past gross violations of human rights.⁵⁴⁹ Kly further notes that when correctly interpreted, affirmative action can be seen to be an obligatory fundamental principle of international law, one which attempts to ensure equal status relations between the targeted disadvantaged group and the advantaged.⁵⁵⁰ He also asserts that viewing positive measures within international human rights law serves as an encouragement for the provision of adequate economic, political and social environments, including the socio-political institutions necessary to permit targeted groups to experience both equal-status and socio-economic development within the context of state economic and political unity, as well as peace.⁵⁵¹

On the basis of the above discussion, I define affirmative action simply as *a remedial policy that seeks to secure and provide advantages for the (previously) disadvantaged*. The creation

⁵⁴³ Article 36.

⁵⁴⁴ Article 13 – 17.

⁵⁴⁵ Article 20.

⁵⁴⁶ See articles 21 – 23.

⁵⁴⁷ Articles 24, 25.

⁵⁴⁸ See articles 26 – 31.

⁵⁴⁹ Y N Kly “Dances with Affirmative Action: Aboriginal Canadians and Affirmative Action” (1994) *The Canadian Journal of Native Studies* Vol. 14 No.1 77 82 – 85, 93 – 96.

⁵⁵⁰ Y N Kly “Dances with Affirmative Action: Aboriginal Canadians and Affirmative Action” (1994) *The Canadian Journal of Native Studies* Vol. 14 No.1 77 95 – 96.

⁵⁵¹ Y N Kly “Dances with Affirmative Action: Aboriginal Canadians and Affirmative Action” (1994) *The Canadian Journal of Native Studies* Vol. 14 No.1 77 95 – 96.

and provision of these advantages is based on certain justifications and goals. The next section explores the common and general justifications and goals of affirmative action.

5.3 Justifications and goals of affirmative action

5.3.1 Introduction

Several justifications have been offered for affirmative action and are vulnerable to different objections. These justifications are an assortment of backward- and forward-looking arguments and include, among others, compensatory justice; distributive justice; diversity; social justice; recognition justice; and political stability.⁵⁵² Some countries embrace both backward- and forward-looking arguments in their respective jurisdictions.⁵⁵³ One of these countries is India, where affirmative action for historically disadvantaged groups (Scheduled Tribes and Scheduled Castes) is justified along compensatory lines,⁵⁵⁴ while affirmative action that is targeted at the so-called “Other Backward Classes” is justified as distributive justice.⁵⁵⁵ However, among the justifications mentioned above, the two common justifications, namely compensation and distribution, will now be discussed in turn.

5.3.2 Compensatory justice

The notion of compensatory justice is based on the idea that the society has to compensate for the particular legacy of racial and other forms of oppression and exclusion, the effects of which continue to burden the subordinated group. In terms of this view, affirmative action is justified primarily as a form of redress for the injustices of the past, which makes it “fundamentally backward-looking”.⁵⁵⁶ The compensatory principle embraces the fact that there is a perpetrator and a victim, and that the perpetrator is responsible for compensating the victim for the wrong committed.⁵⁵⁷ Who should pay the costs of compensation? Fullinwider provides two obvious answers.⁵⁵⁸ Firstly, the perpetrators of the injustice should pay compensation, in other words, those whose unjust actions gave rise to the need for

⁵⁵²See O Dupper “In Defence of Affirmative Action” (2004) 121 *SAJHR* 193- 207.

⁵⁵³O Dupper “In Defence of Affirmative Action” (2004) 121 *SAJHR* 193- 207.

⁵⁵⁴See K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 271- 276.

⁵⁵⁵K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 271- 276.

⁵⁵⁶See O Dupper “In Defence of Affirmative Action” (2004) 121 *SAJHR* 193- 207.

⁵⁵⁷K W Greene *Affirmative Action and Principles of Justice*, (1989) 3.

⁵⁵⁸R K Fullinwider “Preferential Hiring and Compensation” in M Cahn (ed) *The Affirmative Action Debate*(1995) 92.

compensation. This principle imposes costs on those persons responsible for injustice. In this regard, Fullinwider poses the following question: How do we determine who was responsible for instituting and perpetuating a particular unjust practice? To answer this question, information about who did what to whom is necessary, but that alone is not sufficient. Fullinwider further notes that despite the fact that philosophers have begun to address these questions, a satisfactory theory of responsibility is still lacking.⁵⁵⁹

Secondly, compensation should be paid by those who benefited from injustice, whether directly or indirectly (for example, inheriting wealth originally acquired by unjust means).⁵⁶⁰ This second principle has been endorsed by many who suggest that it should be applied only to those who have benefited intentionally or voluntarily. Fullinwider questions whether such a restriction is necessary. He points out that those who endorse this principle are interested in restoring the competitive balance that would have existed had the injustice in question never taken place. He further argues that they believe that the natural way to accomplish this goal is simply to ask those who have gained from injustice to give up what they have gained.

In the South African context Sampie Terreblanche argues along similar lines.⁵⁶¹ He claims that white South Africans of both Afrikaans and English descent “should acknowledge explicitly that they have benefited from colonialism, segregation, and apartheid”⁵⁶² and be prepared for substantial wealth transfers to the wronged Africans. Moreover, since most economic and social ills afflicting contemporary South Africa flow not only from whites’ obsession with power and entrenched privileges, but also from their short-sightedness, greed and reductionist individualism, white South Africans ought to realise that these ills cannot effectively be addressed “without a willingness to make substantial sacrifices – materially and symbolically – as part of an open commitment to the restoration of social justice”.⁵⁶³ Furthermore, Terreblanche insists that all whites, and not only those individuals who knowingly propagated apartheid, bear a “collective responsibility” for the ills of racial domination.⁵⁶⁴

⁵⁵⁹R K Fullinwider “Preferential Hiring and Compensation” in M Cahn (ed) *The Affirmative Action Debate* (1995) 92.

⁵⁶⁰R K Fullinwider “Preferential Hiring and Compensation” in M Cahn (ed) (1995) *The Affirmative Action Debate* 92.

⁵⁶¹S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 3.

⁵⁶²S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 4.

⁵⁶³S Terreblanche *A history of Inequality in South Africa 1652 – 2002* (2002) 5.

⁵⁶⁴S Terreblanche *A history of Inequality in South Africa 1652 – 2002* (2002) 5.

5.3.3 Distributive justice

According to Folger and Cropanzano, distributive justice refers to “the perceived fairness of the outcomes or allocations that an individual receives.”⁵⁶⁵ Decisions or outcomes are determined by making use of three major rules of justice: the equity rule, the needs rule and the equality rule.⁵⁶⁶ The equity rule focuses on contributions, the needs rule is applied for reasons of personal welfare, and the equality rule is used to preserve social harmony.⁵⁶⁷ From a remedial measure point of view, the equality rule should thus be used to make decisions.⁵⁶⁸

The notion of distributive justice emanates from the idea that a just and fair society should afford equal opportunities to all its citizens.⁵⁶⁹ It seeks a more just distribution of goods and resources such as employment and educational opportunities.⁵⁷⁰ This justification is “forward-looking” and defends affirmative action measures on the basis of two main arguments. In the first place, affirmative action is a way of addressing the discriminatory attitudes held towards the disadvantaged groups⁵⁷¹ and, secondly, it is a way to facilitate the integration of disadvantaged groups into a democratic society.⁵⁷² This line of thinking compels us to go beyond the realm of formal equality and into the realm of substantive equality, recognising that democracy is at risk when society fails to respect and accommodate the rights of all people, including the disadvantaged. Furthermore, this justification portrays affirmative action as a means to promote certain highly desirable forms of social change – in other words, transformation – which is one of the major objectives of the South African Constitution. The forward-looking rationale is therefore in line with the aims of substantive

⁵⁶⁵R Folger & F Cropanzano *Organisational Justice and Human Resource Management* (1998)33.

⁵⁶⁶G S Leventhal “Fairness in Social Relationships” in J Thibaut, J Spencer & R Carson (eds) *Contemporary Topics in Social Psychology* (1976) 220.

⁵⁶⁷G S Leventhal “Fairness in Social Relationships” in J Thibaut, J Spencer & R Carson (eds) *Contemporary Topics in Social Psychology* (1976) 220.

⁵⁶⁸G S Leventhal “Fairness in Social Relationships” in J Thibaut, J Spencer & R Carson (eds) *Contemporary Topics in Social Psychology* (1976) 220.

⁵⁶⁹Aristotle and many other scholars for millennia after him viewed distributive justice as a matter of distributing what each ought to get from merit or desert in some sense. Equality was arguably anathema to Aristotle and other theorists until modern times. However, Hume demolished the views of Aristotle and others on distributive justice based on merit as also utterly impracticable. See D Hume *An Enquiry Concerning the Principles of Morals* (1975) 169 – 323.

⁵⁷⁰See N Fraser *Social justice in the age of identity politics: redistribution, recognition, and participation* The Tanner Lectures on Human Values3. Fraser characterises affirmative action as an example of “affirmative redistribution” as opposed to “transformative redistribution”.

⁵⁷¹What Dupper refers to as the “attitude changing argument” (See O Dupper “In Defence of Affirmative Action” (2004) 121 *SAJHR* 193- 207).

⁵⁷²What Dupper refers to as the “integration argument” (See O Dupper “In Defence of Affirmative Action” (2004) 121 *SAJHR* 193- 207).

equality, which, as pointed out in Chapter 3, include the destruction of the cycle of disadvantage; the promotion of respect for the dignity of each person; the affirmation of identity within community; and finally, the facilitation of full social participation.

The redistribution of certain benefits by means of affirmative action is justified on the basis that it reduces other distributive inequalities caused by discrimination. Fiscus points out that distributive arguments supposedly avoid the problems associated with the compensatory principles, where there is a lack of correlation between the individuals benefiting from affirmative action (in other words, those who suffered from discrimination) and those who are required to compensate them.⁵⁷³ These distributive arguments proceed from the basic assumption that at birth all individuals are equal as there are no race-related intellectual or other differences at birth. In an ideal non-racist society race would not be a factor that would affect children's later development, meaning that in all spheres there would be a natural balance.⁵⁷⁴ In Fiscus's model world, racial or other forms of discrimination would not have any effect and thus he draws the conclusion that the races would customarily be balanced.⁵⁷⁵ Therefore, in such a model world, deviation from the original racial proportions could only be ascribed to racism.⁵⁷⁶ However, such an ideal world does not exist and distributive justice requires that all be given equal opportunities of gaining access to societal benefits. This requirement is in line with a substantive conception of equality. This study accordingly discusses affirmative action and the theory of substantive equality below.

5.4 AFFIRMATIVE ACTION AND THE THEORY OF SUBSTANTIVE EQUALITY

5.4.1 Introduction

Affirmative action is a strategic element of substantive equality. The policy of affirmative action acknowledges that treating all equally will achieve very little if some people face barriers in society that are not experienced by others.⁵⁷⁷ This implies that the essence of affirmative/positive action is centred on "pro-active, anticipatory and integrative methods"⁵⁷⁸

⁵⁷³R J Fiscus *The Constitutional Logic of Affirmative Action* (1992) 9 – 10.

⁵⁷⁴R J Fiscus *The Constitutional Logic of Affirmative Action* (1992) 9 – 10.

⁵⁷⁵R J Fiscus *The Constitutional Logic of Affirmative Action* (1992) 9 – 10.

⁵⁷⁶R J Fiscus *The Constitutional Logic of Affirmative Action* (1992) 15.

⁵⁷⁷See S Nott "Gender mainstreaming as an instrument for combating poverty" in A Williams, A Kjonstad & P Robson (2003) *Law and Poverty* 212.

⁵⁷⁸See B Hepple, M Coussey and T Choudhury *Equality – A New Framework: Report of the Independent Review of the enforcement of Anti-Discrimination Legislations* (2000) Chapter 3 para 3.8.

which require “positive duties”⁵⁷⁹ to achieve the desired outcome. Fredman argues that affirmative action creates a fusion of status and socio-economic disadvantage, specifically attaching socio-economic benefits to those disadvantaged by status.⁵⁸⁰ She further argues that redress strategies such as affirmative action can be genuinely transformative, if they bring about structural change rather than simply changing the colour or gender composition of institutions. Structural change is often what is required to advance the poor and deal with social exclusion.

Remedial measures can be effective if they are targeted towards a particular set of aims.⁵⁸¹ A close focus on what the measures are trying to achieve by means of corrective steps is important. Whether the goal is to remove prejudice and harassment, or to redistribute resources, or to accommodate diversity, there should also be clarity on the principle of equality to be utilised: formal equality; equality of results; equality of opportunity, equality of access; or some other substantive value.

However, there are others who hold a different view. For example, Nancy Fraser argues that affirmative action has a backlash effect.⁵⁸² By introducing special measures to ensure accessibility and thereby tackling the unfair sharing of resources, the beneficiaries of the special measures can become further stigmatised as getting special treatment. Measures aimed at improving the economic position of the targeted group can blur citizen differentiation. She emphasises that, because the economy and culture are imbricated, recognition and redistribution policies can each produce the effects of its counterpart. Sources of inequality are not removed and life is given to new forms of misrecognition and

⁵⁷⁹Law-makers have emphasised the strike out the imposition of positive duties rather than just refraining from discrimination. Such a duty has taken different forms with the United States’ imposition of positive duties on government contractors to increase representation of minorities and of women in the workforce, following Executive Order 10925 of 1961, and Order 11246 of 1964 and amended in 1967 to cover sex and religion. The Order 11246 covers about 300 000 federal contractors, employing about 40 per cent of the working population (see B Hepple, M Coussey & T Choudhury *Equality – A New Framework: Report of the Independent Review of the enforcement of Anti-Discrimination Legislations*, (2000) Chapter 3, para 3.8).

⁵⁸⁰See S Fredman “Combating Poverty through Equality Law – Possibilities and Pitfalls” (2000) An interview report by *Equality Rights Review*, which featured Sandra Fredman and Margarita Ilieva *The Equal Rights Review*. Vol. 3 83 90).

⁵⁸¹The rest of the paragraph draws heavily from S Fredman “Combating Racism with Human Rights: The Right to Equality” in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 29; See also S Fredman “Providing equality and the Positive duty to provide” (2006) 21 *SAJHR* 163,167.

⁵⁸²See N Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *The Tanner Lectures on Human Values* (1998); N Fraser *Justice Interruptus: Critical Reflections on the “Post-Socialist” Condition* (1997) 68 - 74.

maldistribution. Such backlash effects can in time develop a life of their own.⁵⁸³ Sharing the same line of thought, Morris Abram's argues in his article "Affirmative Action: Fair Shakers and Social Engineers" that affirmative action embodies a results-based approach to equality, which confers social benefits on members of disadvantaged groups without actually addressing the underlying causes of disadvantage in society.⁵⁸⁴

This dissertation is premised on the assumption that affirmative action as a strategic element of substantive equality supports the aims of substantive equality. The question thus arises of whether the pursuit of affirmative action, within the realm of substantive equality, can alleviate poverty. The next section will explore how the aims of substantive equality can be realised through the implementation of positive measures as a step towards the reduction of poverty and socio-economic inequality.

5.4.2 Affirmative action and the aims of substantive equality

5.4.2.1 Breaking the cycle of disadvantage and affirmative action

As discussed in Chapter 4 of this study, there are at least three distinct cycles of disadvantage, namely (inter-)generational disadvantage, communal vulnerability and systematic disadvantage.⁵⁸⁵ These cycles 'feed' on threads of disadvantage⁵⁸⁶ which are found within families, communities and the society at large. These threads serve as barriers for an individual or group progression, which in turn leads to abject poverty. These threads of disadvantage link with each other to form a cycle of disadvantage. The link between affirmative action and each of the three cycles is explored below.

- Inter-generational disadvantage

Tackling inter-generational disadvantage, that is, deprivation that is passed from generation to generation, calls for substantive outcomes with regard to availability of opportunity as well as accessibility to those opportunities. (Inter-)generational

⁵⁸³ "[E]conomic harms that originate as by-products of the status order have an undeniable weight of their own. Left unattended, moreover, they may impede the capacity to mobilize against misrecognition" (N Fraser "Social Justice" in *The Tanner Lectures on Human Values* (1998) 21).

⁵⁸⁴ (1986) 99 *Harvard Law Review* 1312.

⁵⁸⁵ See Chapter 4 of this study for more on breaking the cycle of disadvantage.

⁵⁸⁶ Threads of disadvantage can also be determinants of poverty and inequality. They include, among others, unemployment, lack of mobility, the HIV/AIDS pandemic, race, gender, class, lack of economic growth, low income levels and low quality [or lack] of education. For more on these determinants see Chapters 2 and 3 of this study.

disadvantage has an element of individual agency which often surfaces through the ‘vulnerability to poverty’ of children within families. In general terms, breaking (inter-)generational disadvantage involves the provision of support and opportunities essential to an individual’s personal and economic development. In this way, the benefits of affirmative action (jobs and access to education) prevent the state of deprivation of the older generation from being transferred to the next generation. If individuals from poor families are afforded an opportunity to be involved in a programme of learning or access to job opportunities, it somewhat defers some of the possible deficits they experience through their exposure to the culture of poverty from being transferred to the next generation. Such opportunities expose the children within the respective families to a whole new world of possibilities and social networks pivotal to social and academic development. These children become indirect beneficiaries of affirmative action because of the opportunities given to their parents or guardians through affirmative action, which, in turn, can contribute to the reduction of poverty and inequality in small but nevertheless significant ways.

- Communal vulnerability

The second cycle of disadvantage, namely communal vulnerability, is evident in communities that are poor and have limited resources, which often prevents individuals from breaking free from the clutches of disadvantage. Individuals from such communities have limited choices to maintain the accepted standards of living. There is also an increasing amount of literature indicating that it is not only family-oriented problems that have an effect on an individual but neighbourhoods as well.⁵⁸⁷ For instance, in South Africa poverty is concentrated in former Bantustan areas and townships, which are characterised by underdevelopment and crime.⁵⁸⁸ This is part of the legacy of apartheid. There is therefore a need for redress strategies (affirmative action) to address such disadvantage and embrace community-level interventions to deal with communal vulnerability. In the US context, Anderson points out that the targets of affirmative action remain linked to social networks of family, neighbourhood and friendship that are largely black and typically poorer than they

⁵⁸⁷See J Barnes, I Katz, J Korbin & M O’Brien *Children and Families in Communities: Theory, Research and Policy* (2006) 13 - 53.

⁵⁸⁸See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 8- 18.

are.⁵⁸⁹ They serve as sources of social capital to less advantaged black relatives, acquaintances, and neighbours.⁵⁹⁰ This means that affirmative action indirectly increases the accessibility and reach of services into poor communities where the beneficiaries come from. It is thus submitted that as the beneficiaries or targets progress on the basis of their acquired opportunities, they can facilitate the recognition of the various and interconnected problems experienced by families in disadvantaged communities and the benefits of designing services that are non-stigmatising. It also allows affirmative action to be a “process that provides the insurance policy against the cutting of the bootstrap, i.e. the closing of doors, the absence of opportunities and the non-availability of breaks”⁵⁹¹ and hereby placing affirmative action within the *(re)distributive dimension*.

- Systematic disadvantage

The third cycle of disadvantage, namely systematic disadvantage, encompasses prevailing practices, laws or attitudes, which are viewed as impartial and sometimes acceptable, yet entrench the inequality and disadvantage experienced by certain groups in society. Dealing with systematic disadvantage requires positive actions that not only remove barriers, but equip the victims to make use of the newly expanded opportunities. Systematic responses are required to bring about a systematic change that can challenge the existing institutional structure. This means that, for affirmative action to contribute significantly to the breaking of the cycle of systematic disadvantage, an element of restructuring needs to be included rather than being restricted to measures within the existing framework.⁵⁹² Instead of assimilating the disadvantaged into the existing framework, it is crucial to change the existing framework in order to reflect the norms of the victims.

However, equal opportunity policies carry no guarantee that resources will be available to ensure a genuine equalisation of starting points. Not everyone within the targeted membership group is a victim to cycles of disadvantage. Furthermore, those who are victimised by cycles of disadvantage suffer different degrees of disadvantage. This brings to the fore the issue of the accumulation of affirmative action benefits by members of the

⁵⁸⁹See E Anderson *The Imperative of Integration* (2010) Chapter 7.

⁵⁹⁰E Anderson *The Imperative of Integration* (2010) Chapter 7.

⁵⁹¹T Herbert *Affirmative Action in the South African Workplace – Allowing Black Eagles to Soar* (1994) 6

⁵⁹²See S Fredman *Discrimination Law* (2002) 192 – 193.

‘targeted groups’ who are the most economically, socially and educationally advantaged members of the ‘targeted group’. Thakur argues:

“Affirmative action based on promoting interests is self-negating because, for a number of reasons (for example, lack of access to information or resources), such programmes are captured by those who are privileged rather than disadvantaged. First, the problems continue. Second, the spotlight of the public shifts from their problems, for affirmative action, by expatriating the guilt of hereditary privileged, permits them to ignore the continuing problems with an easier conscience. Third, the conviction grows that the poor surely now deserve to be poor because of indolence or other self-inflicted faults.”⁵⁹³

Thakur’s sentiments also allude to the need for individual agency programmes to increase the impact of affirmative action on the socio-economically disadvantaged. This means that a substantive conception of equality, through aiming to break the cycle of disadvantage, calls for a focus on the actual disadvantage of an individual within the targeted group. However, placing this sentiment within the labour market, there is no guarantee that employers would make an effort to establish ‘actual disadvantage’ in their recruitment processes.

5.4.2.2 *Promoting equal respect for dignity and affirmative action*

As mentioned in the previous chapter, human dignity is inextricably linked with material circumstances. Conditions of poverty deprive the poor of opportunities to live with dignity, and to live in conditions that enable them to develop their capabilities to participate as agents in shaping their lives and society in general. Human dignity entails ready access to all that is necessary for living a genuinely humane life, e.g. food, clothing, and access to housing, healthcare and other basic services. It also requires freedom from interference by the state and other private actors and the possession of material conditions that facilitate one’s pursuit of the life of one’s choice.

Access to jobs or education has a “substitutory and complementary” element.⁵⁹⁴ There is an assumption that such access affords individual short- and long-term benefits. Such access also becomes a platform to pursue a dignified life – a source of income will allow a person to

⁵⁹³R Thakur “From the Mosaic to the Melting Pot: Cross-National Reflections on Multiculturalism” in C Kukathas(ed) (1993) *Multicultural Citizen: The Philosophy and Politics of Identity* 118.

⁵⁹⁴The development of the following paragraph was inspired by the work of Erik Thorbercke. He discusses certain social rights as having a substitutory and complementary effect on the wellbeing and standard of life of an individual (see “Multidimensionality of Poverty: Conceptual and Measurement Issues” (2008) in N Kakwani & J Silber *The Many Dimensions of Poverty* (2008) 4; E Thorbercke “Multidimensionality of Poverty: Conceptual and Measurement Issues” Conference Paper, Brazil, August 2005 12 - 16).

make efforts towards achieving an adequate standard of living. In other words, the income that comes with the access to opportunity provides the means to replace, for example, hunger with food, or walking barefoot with buying a pair of shoes (which are short-term benefits). Furthermore, the income obtained from a job appointment (which could itself be the result of the education acquired in some instances) allows a beneficiary to put food on the table for his/her family and pay for social services. This is, of course, dependent on the viability of the job and the availability of the resources in society. On the other hand, the income from the opportunity complements the beneficiary's potential ability to acquire and maintain a decent living in the long term. Accordingly, the overall assumption is that education increases one's chances of qualifying for a job appointment. A job or occupation is of fundamental importance to most people and it is also an important part of each person's definition of his or her own life.⁵⁹⁵ It is an opportunity so important that denying participation in it may imply that those who are excluded are of lesser worth.⁵⁹⁶ Hence when affirmative action is implemented (through the provision of jobs and education), it allows a beneficiary to craft a life for themselves by conferring the opportunity for making choices. This is based on a conception of human dignity which includes the idea that individuals should have at least a fighting chance to pursue a life of their choice. In this context, it is submitted that affirmative action carries with it dignity-constituting benefits which are also socio-economic in nature.

Thakur has argued that affirmative action is counter-productive in seeking societal reconstruction. He writes that affirmative action "undermines the dignity of a collective entity and retards the realisation of human worth of its individual members."⁵⁹⁷ He further points out the undesirable effects of preferential policies:

- They rest on the assumption that the non-target group is so superior to the target group that the latter cannot possibly compete without extra help;
- They reinforce the sense of inferiority of the members of the target group, who are considered to be incapable of uplifting themselves by their own wit and ability; and
- They perpetuate the target group's sense of being victims and not masters of their own destiny.

⁵⁹⁵See E Thorbercke "Multidimensionality of Poverty: Conceptual and Measurement Issues" Conference Paper, Brazil, August 2005 12 – 16; See R D Kahlenberg *The Remedy: Class, Race, and Affirmative Action* (1996) 80 – 85.

⁵⁹⁶R Kahlenberg *The Remedy: Class, Race, and Affirmative Action* (1996) 80 – 85.

⁵⁹⁷R Thakur "From the Mosaic to the Melting Pot: Cross National Reflections on Multiculturalism" C Kukathas (ed) *Multicultural Citizen: The Philosophy and Politics of Identity* (1993) 118.

However, Thakur's argument becomes questionable when placed within a context in which the majority of a "collective entity" have been victims of past discrimination and live in abject poverty. As established earlier in the study, poverty imposes limitations on one seeking to live a dignified life. In this way, when affirmative action extends social benefits to the poor, it has a propensity to promote rather than undermine their human worthiness, thereby placing affirmative action within the *transformative dimension*.

Anderson argues that "on a larger scale, affirmative action aims to break the public association of blacks with entrenched poverty and associated dysfunctional behaviours by moving blacks to secure middle-class positions that are reproduced across generations."⁵⁹⁸ The "public association of blacks with entrenched poverty and dysfunctional behaviours" indicates issues of stigmatisation and stereotype which fall within the realm of recognition inequality.⁵⁹⁹ The securing of middle-class positions by blacks suggests an element of the redistribution impact of affirmative action, which allows them to move up the social ladder. One would argue here that such 'breaking of the public association of blacks with entrenched poverty' and the 'moving of blacks to secure middle-class positions' reconciles the recognition and redistribution aspects of equality.⁶⁰⁰ It also suggests some level of social mobility, which has an effect on the beneficiary's worthiness and dignity in general. Although Anderson expresses her sentiments within the US context, her argument is relevant to the South African milieu, where apartheid made being black and poor all too obvious.

5.4.2.3 Affirmation of identity and affirmative action

Affirming identities in communities provides a platform to focus on a particular identity and the disadvantages associated with that particular identity. The issue of identities places the spotlight on the debate around preferential identity criteria for affirmative action benefits. A substantive sense of equality requires measures to be taken which ensure that socio-economically disadvantaged individuals from all sections of society have a genuinely equal chance of access to a particular social good (such as jobs and places at university). This requires a reconsideration of existing criteria of merit to acquire a social good. According to Hepple, one is not supplying genuine equality of opportunities if one applies an unchallenged

⁵⁹⁸See E Anderson *The Imperative of Integration* (2010) chapter 7.

⁵⁹⁹See Chapter 3 of this study for more on recognition inequality.

⁶⁰⁰S Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 *SAJHR* 214. See also Chapter 3 of this study sections 3.3.2 and 3.3.3 on recognition and redistribution inequalities.

criterion of merit to people who have been deprived of the opportunity to acquire ‘merit’ for a particular social good.⁶⁰¹ Moreover, there is much that obstructs people from fully developing their potential, especially those who have endured or endure adverse social conditions and attitudes.

Although selecting beneficiaries based on identities or status is necessary in the allocation of benefits, selection should be supplemented by the requirement that social barriers to their acquisition of these benefits be removed. In this way, affirmative action maximises the development and possession of “meritorious characteristics”⁶⁰² among the target groups it is designed to assist⁶⁰³ (in this case the poor, which could pave a way for them to exit their condition of poverty). This brings to the fore the right to development as a central aspect of the bundle of rights that protect the survival and livelihood of people and communities.

Affirmation of identities gives force to the argument that the reliance on anti-discrimination laws on a single axis of legal identity categories leaves the material and discursive effects on socially constituted subjects unpacked and interrogated.⁶⁰⁴ This leads to the inadequate recognition of the complexly situated subject by various institutions or policy strategies. “The type of analysis then takes the following form: a subject might encounter the law, or the state, only to find that [*her or his*] experiences of inequality do not fit the dominant model.”⁶⁰⁵ This resonates with the argument that the race-based affirmative action adopted in South Africa is not benefiting the majority of Africans, who are also victims of past disadvantage and experiencing the adverse impacts of socio-economic inequality.⁶⁰⁶ It is simply contributing to the privilege of the (black) middle and upper classes. This points to the repressive functions of the trickle-down effect and the exacerbation of hierarchical power relations by the failure to recognise the subject’s (an African’s) full identity, position or the complexity of her

⁶⁰¹ B Hepple “Discrimination and Equality of Opportunity: Northern Irish lessons” (1990) 10 *Oxford Journal of Legal Studies* 408–411.

⁶⁰² Borrowing from J Kaler, such characteristics refer to features acquired by an individual, which place her or him in a position to advance in life (J Kaler “Diversity, Equality and Morality” in M Noon & E Ogbonna (eds) *Equality, Diversity and Disadvantage in Employment* (2001) 55–57.

⁶⁰³ J Kaler “Diversity, Equality and Morality” in M Noon & E Ogbonna (eds) *Equality, Diversity and Disadvantage in Employment* (2001) 55–57.

⁶⁰⁴ The following paragraph heavily draws from J Conaghan “The Complexity of Intersectionality” in E Grabham, D Cooper, D Krishnadas & J Herman *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009) 22–27.

⁶⁰⁵ E Grabham, D Cooper, D Krishnadas & J Herman “Introduction” in E Grabham, D Cooper, D Krishnadas & J Herman *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009) 2.

⁶⁰⁶ J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2006) 3; S Terreblanche *A History of Inequality in South Africa 1652–2002* (2002) 34–40.

disadvantages.⁶⁰⁷ Crenshaw argues that “the problem with identity politics is not that it fails to transcend difference, as some critics argue, but rather the opposite – that it frequently conflates or ignores intra-group differences.”⁶⁰⁸ For remedial programmes to have an impact, they should also be targeted at class differences within groups. This will allow various forms of disadvantage to surface and afford affirmative action to address those disadvantages (which include poverty and inequality). This will resonate with the promise that substantive equality holds – namely, that it is not status which is problematic but the disadvantage attached to it.⁶⁰⁹

However, Fraser argues that an approach aimed at redressing past disadvantage of distribution can end up creating injustices of recognition.⁶¹⁰ Fraser rejects affirmative policies because of the cycles of misrecognition and maldistribution they perpetuate.⁶¹¹ Firstly, she focuses on the relationship between recognition and redistribution. Secondly, she insists that the underlying structures are the cause of inequalities in status and resources. Consequently, her critique is not levelled at logical or theoretical contradictions between differentiation and de-differentiation.⁶¹² It is levelled at the failure of positive measures to remove inequalities that are, in her account, unjust. To concretise this argument she identifies the three types of affirmative action policies:

- The first one “aims to redress ‘othering’ the sort of misrecognition that burdens group members with excessive ascribed or constructed differences.” “This type of claim is universalist, demanding recognition of groups members or persons, it tends to de-differentiate social groups”,⁶¹³

⁶⁰⁷E Grabham, D Cooper, D Krishnadas & J Herman “Introduction” in E Grabham, D Cooper, D Krishnadas & J Herman *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009)2.

⁶⁰⁸K Crenshaw “Mapping the Margins: Identity Politics, Intersectionality and Violence against Women” (1991) *Stanford Law Review*, 43 1244-1299 1257.

⁶⁰⁹S Fredman “Facing the Future: Substantive Equality under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15.

⁶¹⁰N Fraser “From Redistribution to Recognition? Dilemmas of Justice in a “Post Socialists” Age” in N Fraser *Justice Interruptus: Critical Reflections on the “Post Socialists” Condition* (1997) 11.

⁶¹¹N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46; N Fraser “From Redistribution to recognition? Dilemmas of Justice in a Post-Socialist Age” *New Left Review* (1995).

⁶¹²In Fraser’s article “From Redistribution to Recognition? Dilemmas of Justice in a Post-Socialist Age”, the contradictions between differentiation and de-differentiation were fundamental to her critique. However, in the Tanner Lectures (1996) Fraser modifies this position, stating “Here, however, I avoid this terminology, which I now consider misleading” (Fraser (1996)) 45 footnote 46.

⁶¹³N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46.

- The second type “aims to redress ‘saming’ the sort of misrecognition that fails to acknowledge groups members’ distinctiveness”; it “is differentialist, seeking recognition of group specificity, it tends to enhance group differentiation”;⁶¹⁴
- The third one “shifts the focus onto dominant or advantaged groups, outing the latter’s distinctiveness” and it “is differentialist”.⁶¹⁵

Fraser does not analyse the above policies, but she contrasts them to transformative recognition and redistribution policies. According to her, the transformative policies are distinct because they eliminate the problems that arise from the “imbrications of economy and culture”. But what distinguishes affirmative policies from transformative ones? Transformative policies “restructure the relations of production” and so she argues that they “would change the social division of labour, reducing social inequality without creating stigmatising classes of vulnerable people perceived as beneficiaries of special largesse”.⁶¹⁶ In her view, the policy that would counteract underlying systems or structures needs to be deconstructive. Such a policy “seeks to deconstruct the very terms in which attributed differences are currently elaborated”.⁶¹⁷ It advocates for the reduction of “the salience” of, for instance, ‘race’ “as a structural principle of social organisation.” Kelly Oliver, in her book *Witnessing: Beyond Recognition*, borrows from Fraser the distinction between affirmative and transformative remedies for social domination, insisting that any effective theory of subjectivity and any ethical programme for interrupting oppression must transform pathological hierarchies rather than fortifying them by simply finding ways to navigate around them.⁶¹⁸

In Fraser’s ideal world the state would carry out transformative policies as “socialist” and “recognitionist”. She asserts that transformative redistribution to redress racial injustices in the economy consists of some form of antiracist social democracy.⁶¹⁹ For transformative recognition to redress racial injustice in the culture, it will have to implement antiracist

⁶¹⁴N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46.

⁶¹⁵N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46.

⁶¹⁶N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46.

⁶¹⁷N Fraser “Social Justice” in The Tanner Lectures on Human Values (1996) delivered at Stanford University April 30 – May 3 46- 47.

⁶¹⁸K Oliver *Witnessing: Beyond Recognition*, (2001) 251.

⁶¹⁹N Fraser “From Redistribution to Recognition? Dilemmas of Justice in a “Post Socialists” Age” in *Justice Interruptus* (1997) Routledge 31.

deconstruction aimed at dismantling identities that are caught and subordinated in Eurocentric and androcentric status hierarchies.⁶²⁰ For transformative policies in general to take hold, people have to be “weaned from their attachment to current cultural constructions of their interests and identities”.⁶²¹ These sentiments suggests that for Fraser transformative remedies are to be accomplished by a campaign which includes stripping people of identities they would chose to retain – and this applies to the oppressed and privileged alike. In this regard, it is not very convincing that the majority of women, for example, would wish to be part of a transformative process that would eliminate the distinction between femininity and masculinity. On the other hand, “it is difficult to imagine people who would object to losing a disadvantaged economic identity – few of us would insist on remaining poor.”⁶²²

Conversely, one is compelled to ask how exactly transformative remedies are to be implemented? Are they to be imposed by an outsider or can they be initiated by those within the group? Reviewing Fraser’s book *Justice Interruptus* (1997), Gatens points out that despite the “contemporary ring” of the terms used here, the reader is left with the somewhat depressingly familiar formula “socialism in the economy plus deconstruction in the culture”.⁶²³ Gatens further argues that the strength and originality of Fraser’s analyses of the current political dilemmas are weakened by the remedies she offers.⁶²⁴ Gatens then poses the questions: “... but what form of antiracist social democracy? And how does one destabilise status hierarchies?”⁶²⁵ These questions rather suggest that perhaps we should be mainly concerned with the disadvantage attached to status and not status *per se* – the promise of substantive equality. Thus affirmation of identities, as an aim of substantive equality, arguably becomes a basis for taking cognisance of the various ways people are identified in society with the intention of addressing the disadvantages that are attached to those identities.

⁶²⁰N Fraser “From Redistribution to Recognition? Dilemmas of Justice in a “Post Socialists” Age” in *Justice Interruptus* (1997) Routledge 31.

⁶²¹N Fraser “From Redistribution to recognition? Dilemmas of Justice in a Post- Socialist Age” in *Justice Interruptus* (1997) 91.

⁶²²See J Wong & A Lotus “Fraser and the Politics of Identity: Human Kinds and Transformative Remedies” *Philosophia* (2003) Vol. 31 205 212.

⁶²³N Fraser “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post Socialists’ Age” in *Justice Interruptus* 1997 31.

⁶²⁴See M Gatens “Recognition, Redistribution and the ‘Post socialist Condition’ ” (1998) *Theory and Event* Volume 2 Issue 4 available at <http://10.05.73/tae.1998.0038> (accessed on 09/09/2013).

⁶²⁵M Gatens “Recognition, Redistribution and the ‘Post-socialist Condition’” (1998) *Theory and Event* Volume 2 Issue 4 available at <http://10.05.73/tae.1998.0038> (accessed on 09/09/2013).

5.4.2.4 Full social participation and affirmative action

This aim seeks to promote the equipping of the disadvantaged to make use of the newly expanded opportunities. Effective political, social, economic and interpersonal participation is essentially an expression of effective economic and political empowerment. The absence of such empowerment obstructs the efforts to respond effectively to the needs of the poor. Affirmative remedies should be linked to socio-economic rights to facilitate effective integration of the poor into mainstream society.

In her work Elizabeth Anderson justifies affirmative action as a means of integrating the disadvantaged into mainstream society.⁶²⁶ She argues that affirmative action embodies “its beneficiaries as agents of integration rather than victims” as its benefits are targeted at those best able to perform.⁶²⁷ In this regard, those who are likely to be better skilled and more educated and have suffered less from discrimination are selected among the disadvantaged class. These more privileged selected peers will then be better situated to help those less privileged within their class directly or unintentionally.⁶²⁸ In addition, they play a critical role in the workplace and institutions, to which they have been given access by affirmative action, to break down stereotypes “or getting others to see blacks as individuals.”⁶²⁹ As a result, individual identities within the targeted group are recognised by others (non-targeted group).⁶³⁰ This directly and indirectly influences how identities are perceived and “makes decision-makers more aware of and accountable for the impact of their decisions on all racial groups and invigorates the democratic change in civil society”.⁶³¹ In other words, it promotes a balanced and unbiased contemplation by the non-targeted group, decision makers and the advantaged in general and enhances social integration.⁶³²

⁶²⁶E S Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* 77 1195 - 1271; E S Anderson “Racial Integration as a Compelling Interest” (2004) *Constitutional Commentary* Vol. 21:13; E S Anderson *The Imperative of Integration* (2010) Chapter 7.

⁶²⁷E Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* Vol. 77 1195 1203.

⁶²⁸E S Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* Vol. 77 1195 1203.

⁶²⁹E Anderson “Integration, Affirmative Action and Strict Scrutiny” (2002) *New York University Law Review* Vol. 77 1195 1203.

⁶³⁰This encapsulates the *attitude-changing argument* for affirmative action as proposed by Dupper (see O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 193- 207).

⁶³¹E Anderson *The Imperative of Integration* (2010) Chapter 7.

⁶³²E Anderson *The Imperative of Integration* (2010) Chapter 7.

There are two contending processes through which integration or participation might be developed which are not dependent on a foundation of legal rights.⁶³³ Contributing to the growth of the economy through economic development tends to lead to increasing numbers of people gaining rights. This is because the effect of engaging in the economic process is to develop relationships which serve to maintain not only the worker and his/her dependants, but also those who are able to provide services to the workers. The economic argument is not simply about resources; it extends to the issue of inclusion. Being part of the economic sphere may lead directly to social inclusion.

Political participation and political rights have often determined the level of economic integration and the rights that comes with it. Spicker points that economic rights are not gained simply through engagement in the economic sphere; they are gained through political action.⁶³⁴ This means that full social participation has political connotations and thus that affirmative action can be a political matter. The success of affirmative action strategies demands political commitment, which is often dependent on the political economy.⁶³⁵ This raises the question of political integration and also affirms the interconnectedness of societal spheres (in this context the political sphere and the economic sphere), which calls for the need to promote *multiple integration*. In this regard, affirmative action can be a vehicle for integration and pave the way for the excluded to become part of mainstream society. In other terms, the aim of full social participation gives leverage to the integrative aspect of affirmative action and therefore places it within the *participative dimension*

5.4.3 Evaluation

In the preceding sections I attempted to point out to the explicit links between affirmative action and each of the aims of substantive equality. From the aims of substantive equality above it becomes clear that a substantive conception of equality takes as its starting premise the view that discrimination against certain groups is so pervasive that real equality for the members of the group can never be achieved through the simple identification and removal of discriminatory barriers. Alternatively, systematic measures or actions conferring benefits on the group are required to remedy past injustice against the group.

⁶³³The rest of the paragraph heavily draws from P Spicker "Exclusion and Rights" in L Williams, A Kjonstad & P Robson *Law and Poverty: The Legal System and Poverty Reduction* (2003) 136.

⁶³⁴P Spicker "Exclusion and Rights" in L Williams, A Kjonstad & P Robson *Law and Poverty: The Legal System and Poverty Reduction* (2003) 136.

⁶³⁵See N Fraser "From Redistribution to Recognition? Dilemmas of Justice in a Post-socialist Age" in *Justice Interruptus* (1997).

Firstly, I argued the benefits of affirmative action (jobs and access to education) prevent the state of deprivation of the older generation from being transferred to the next generation – breaking the cycle of inter-generational disadvantage. Such opportunities expose children within their respective families to a whole new world of possibilities and social networks pivotal to social and academic development. This in turn can lead to the reduction of poverty and inequality. Thus affirmative action can contribute somewhat to the breaking of cycles of disadvantage.

Secondly, the link between the aim of promoting respect for dignity and affirmative action assumes an onus on affirmative action to ‘carry’ dignity-constituting benefits which are also socio-economic in nature. These benefits (access to jobs or education) have a ‘substitutory and complementary’ element which impacts on the socio-economic status of a beneficiary. The income that comes with the access to opportunity provides the means to substitute, for example, hunger with food – short-term benefits. Furthermore, the income from the opportunity complements the beneficiary’s potential ability to acquire and maintain a decent living in the long term. In other words, the benefits simply provide the beneficiary with a basis on which to pursue a dignified life.

Thirdly, the aim of affirmation of identity arguable to be in alignment with the idea that relying on a single-axis of legal identity categories leaves some imperative socially constituted subjects unpacked and interrogated. This aim, therefore, calls for remedial programmes to be targeted at class differences within groups to have an impact – hence allowing various forms of disadvantage to surface and afford affirmative action an opportunity to address those disadvantages (which include poverty and inequality).

Fourthly, the aim of full social participation illuminates to the integrative aspect of affirmative action. Positive remedies should be linked to socio-economic rights to facilitate effective integration of the poor into mainstream society. These remedies epitomise the targeted groups as agents of integration rather than victims. In other words, affirmative action can be a medium for integration allowing the excluded to become part of mainstream society.

It is evident from the above that substantive equality measures equality by the degree to which groups and their members have a share in the quantitative and qualitative allocation of resources. This implies the assessment of equality is gauged by the respective shares of opportunities enjoyed by various race, gender or other status groups. The aims of substantive

equality places equality as a premise that seeks to provide all with equal opportunity to compete rather than a mere prospectively symmetrical provision or proportionate share of the fruits of that provision. This sets affirmative action within the realm of ‘fourth-generation’ equality, which calls for the positive duty to effect changes in underlying discriminatory structures.

In this regard, affirmative action not only addresses injustices through eliminating unfair discrimination, but seek to develop the human capacity of the victims of discrimination. The development aspect falls within the framework of substantive equality. Each of the aims of substantive equality, as discussed in this chapter, affords affirmative action a basis from which it can assist victims of disadvantage to develop ‘potentially meritorious characteristics’. The process of development involves setting of goals and moderate risk-taking in line with individual (and/or society’s) strengths and weaknesses. For instance, breaking the cycles of disadvantage would include measures such as education and skills training for the disadvantaged to acquire ‘meritorious characteristics’. It is not enough to acquire those characteristics, but the potential to acquire them must also be examined.⁶³⁶ This calls for a need to establish positive reinforcers of the linkage between the aims of substantive equality and affirmative action to ensure there is a genuine redistribution of resources.⁶³⁷

It is imperative to note that this model of achieving equality is potentially radical in nature and departs fully from the traditional values of neutrality. Some would prefer to hold back from its potential impact when faced with the phantom of the “‘innocent’ individual ... who ostensibly pays the price for remedying social ills”.⁶³⁸ The underlying foundation for conferring on affirmative action such a radical dimension is the “recognition that true equality cannot be achieved if individuals begin the race from different starting points.”⁶³⁹ This argument is affirmed by the fact that theorists such as Ronald Dworkin have emphasised the fundamental role which equality plays within society.⁶⁴⁰ The weight Dworkin attaches to equality justifies restrictions on the rights of some (to date advantaged) members of society in order that equality may prevail. In other words, achieving equality can and does require that

⁶³⁶J Kaler “Diversity, Equality and Morality” in M Noon & E Ogbonna (eds) *Equality, Diversity and Disadvantage in Employment* (2001) 55 – 57.

⁶³⁷See Chapter 8 where positive reinforcers of this linkage are explored.

⁶³⁸S Fredman *Women and the Law* (1997) 384.

⁶³⁹J Kaler “Diversity, Equality and Morality” in M Noon & E Ogbonna (eds) *Equality, Diversity and Disadvantage in Employment* (2001) 55 – 57.

⁶⁴⁰See R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 2 - 4.

those who have been the target of discrimination should receive preferential treatment in the form of positive action. Given the context of alleviating socio-economic disadvantage, this translates into a definition of adverse impact that takes account of how, in reality, status groups will be affected by a particular policy (in this case affirmative action), including their access to resources and opportunities.

5.5 Conclusion

The term ‘affirmative action’ originated in United States (USA), where it has been in effect effective for over thirty years. The application of affirmative action today is global, although different terms are used to refer to essentially the same phenomenon. Many justifications have been offered for affirmative action and are open to different objections. These justifications are a mixture of backward- and forward-looking arguments, including those related to a) compensatory justice and b) distributive justice, among others.

Substantive equality views affirmative action as a means to achieve equality. The concept of affirmative action acknowledges that treating all humankind equally will achieve very little if others’ face barriers in their progression in society which are not experienced by others. However, the assumption is that affirmative action, as a strategic element of substantive equality, carries with it the aims of substantive equality. In this chapter I have identified these aims as (i) breaking the cycles of disadvantage; (ii) promoting equal respect for dignity; (iii) affirmation of identities; and (iv) full social participation. Each of these aims seeks to confer on affirmative action a leverage that is relevant in the fight against socio-economic disadvantage.

The aims of substantive equality place affirmative action within the realm of redistributive policy measures and further requires a fusion between status and disadvantage for affirmative action not to have a ‘merely distant distributive impact.’ In addition, these aims place affirmative action within four dimensions: recognition, distributive, transformative and participative. This affirms affirmative action as “a planned and positive process and strategy aimed at transforming socio-economic environments which have excluded individuals from

disadvantaged groups in order for such disadvantaged individuals to gain access to opportunities, based on their suitability”.⁶⁴¹

The next chapter will explore the implementation and impact of affirmative action on poverty and socio-economic inequality, with specific reference to some case studies. The comparative aspect is incorporated so that the emerging need for South Africa’s affirmative action policy to be more comprehensive can be understood in the light of world trends and critiques.

⁶⁴¹ Black Management Forum (1993) Policy statement: Affirmative Action Blueprint: Johannesburg 3 As cited by Trevor Herbert in Herbert (1994) *Affirmative Action in the South African Workplace – Allowing Black Eagles to Soar*.

CHAPTER 6: THE IMPLEMENTATION AND IMPACT OF AFFIRMATIVE ACTION ON POVERTY AND SOCIO-ECONOMIC INEQUALITY: CASE STUDIES

6.1 Introduction

Both the concept of affirmative action and its implementation are still debatable issues in several jurisdictions around the world. There is no general theory that can deal with the reduction of disparities among status groups and managing status conflicts at the same time.⁶⁴² These are two conflicting goals which are difficult to deal with. Weiner argues that there are no wholly dominant models from which one can develop a theory, adding that “I know of no country that has yet satisfactorily resolved the disparities among its racial or ethnic groups or among genders.”⁶⁴³

A comparative investigation of policy strategies thus becomes a compelling alternative to the analysis of societal issues. Nonetheless, comparative analyses of policies are complicated by the vast differences that exist across jurisdictions and societal systems. It is also necessary to acknowledge the fact that while some policies (specifically those dealing with affirmative action) succeed in one jurisdiction they do not necessarily have the same consequences in others. This requires one to study the various affirmative action programmes that the respective states have implemented to assess what has been successful and what has not. On the basis of the assessment, one could make other recommendations or consider other alternatives. The study of policy strategies in different jurisdictions could provide clarity on one's own country's problems and the range of available options that can address the problems, as well as some guidance as to what works and what does not.

It is for these reasons that this section focuses on the experiences of other countries with positive action policies. Three countries will be reviewed, namely the United States of America (USA), Canada and India. These jurisdictions have all attempted to redress socio-economic inequalities among groups by means of – among other strategies – affirmative action. India has been specifically selected because race is not a criterion to qualify for affirmative action benefits in that country. The affirmative action policy in India is intended

⁶⁴²See M Weiner “Rejected Peoples and Unwanted Migrants in South Asia” in M Weiner (ed) *International Migration and Security* (1993) 2.

⁶⁴³M Weiner “Rejected Peoples and Unwanted Migrants in South Asia” in M Weiner (ed) *International Migration and Security* (1993) 14.

to target the socio-economically disadvantaged. Moreover, India openly embraces substantive equality.⁶⁴⁴

There a variety of reasons Canada was selected. Firstly, the drafters of South Africa's EEA borrowed from Canada's EEA.⁶⁴⁵ Secondly, Canada's approach to affirmative action is similar to South Africa's in terms of the justification and the way in which the demarcation of beneficiaries is approached. Thirdly, the fact that in Canada substantive equality is explicitly embraced has implications for how affirmative action is approached and the degree of scrutiny that the courts apply in reviewing the legitimacy of such programmes. In the USA racial inequality is an issue (as in South Africa). Although race is the dominant basis for affirmative action in USA, there are programmes that use socio-economic disadvantage as their basis. This brings to the fore the issue of using class as a criterion for affirmative action benefits. Unlike India and Canada, the principle of substantive equality is not openly embraced in the United States.

The main objective of this section of the chapter is to reflect on how affirmative action in South Africa can be restructured and refocused to be relevant in the fight against poverty and to promote social inclusion. However, not a single affirmative action court case has addressed the failure to alleviate poverty as a major legal issue. It is in fact difficult to argue that the great failure of affirmative action in South Africa has been its inability to remedy a social problem, particularly poverty, since it was never designed to do so. Nonetheless, as indicated in the previous chapter, affirmative action has poverty-alleviating benefits (such as the provision of jobs and education). In this regard, affirmative action is hereby explored to "challenge frozen mental maps and stimulate alternative innovative thoughts and policies in South Africa."⁶⁴⁶ It should be noted that the researcher focuses only on those aspects of affirmative action policies in these countries that address socio-economic disadvantage (and substantive equality.)

⁶⁴⁴K Sankaran "Towards Inclusion and Diversity: India's Experience with Affirmative Action" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 293 -294.

⁶⁴⁵H Jain & F Horwitz "Employment Equity in Canada and South Africa: A Comparative Review" A paper presented at the African Regional Congress International Relations Association (IIRA) Cape Town 26 – 28 March 2008.

⁶⁴⁶H Adam & K Moodley *The Opening of the Apartheid Mind: Options for the New South Africa* (1993) 202.

6.2 United States

6.2.1 Aims and purpose of affirmative action in United States.

The implementation of affirmative action in the USA commenced in the 1960s with the issuing of an executive order to introduce the Committee on Equal Employment Opportunity.⁶⁴⁷ This order used for the first time the language of affirmative action as a means to prevent racial discrimination on the grounds of race, beliefs, colour or national origin.⁶⁴⁸ In 1964 the Civil Rights Act was enacted which legalised affirmative action programmes in the USA based on Title VII of the Act. This was almost a century after the introduction of the Fourteenth Amendment. The Civil Rights Act was passed in response to the nationwide civil rights movement and represented a defining moment in the struggle for economic justice in the USA. The Act applied to private employers and was later amended to include public employers. The judiciary reacted positively to the Civil Rights Act and the Executive Orders in favour of affirmative action. The Supreme Court consolidated the *Brown v Board of Education*⁶⁴⁹ law by upholding the legitimate aim to achieve substantive equality and in addition demanded that the state introduce positive measures.⁶⁵⁰

George Gerapetritis argues that the position of affirmative action in the American legal system is often overestimated.⁶⁵¹ Neither state organs nor society in general have been unanimously in favour of affirmative action. Most federal or state laws either set out the general principle of equality or apply it in a very particular segment of social interaction in such a way that it cannot have a spill-over effect.⁶⁵² This means that a formal reading would result in the repudiation of positive measures. The full constitutionality of affirmative action is still contentious within the judiciary. The more or less explicit judicial principle is that the prevailing conception of equality is that of equality of opportunities, not of end results.⁶⁵³ Be that as it may, the pursuit of affirmative action in USA has been based on a number of

⁶⁴⁷Executive Order 10925 of 6 March 1961.

⁶⁴⁸T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 124.

⁶⁴⁹347 US 483 (1954).

⁶⁵⁰See *Loving v Virginia*, 388 US 1 (1967); *Green v County School Board of New Kent County*, 391 US 430 (1968).

⁶⁵¹G Gerapetritis "Affirmative Action: A New Challenge for Equality" in G Anthony, J Auby, J Morison & T Zwart (eds) *Values in Global Administrative Law* (2011) 290.

⁶⁵²G Gerapetritis "Affirmative Action: A New Challenge for Equality" in G Anthony, J Auby, J Morison & T Zwart (eds) *Values in Global Administrative Law* (2011) 291.

⁶⁵³G Gerapetritis "Affirmative Action: A New Challenge for Equality" in G Anthony, J Auby, J Morison & T Zwart (eds) *Values in Global Administrative Law* (2011) 291.

factors: *removal of barriers to economic opportunities*;⁶⁵⁴ *promoting racial equality*;⁶⁵⁵ and *diversity*. There are other aims, which include promoting gender equality; improvement in service provision;⁶⁵⁶ to create role models;⁶⁵⁷ and social cohesion and inclusion – affirmative action promotes the prevention of social stigma and social bias against minorities.⁶⁵⁸ With the above aims and purposes, positive measures in the USA typically encompass preferences by virtue of membership to a particular designated category or categories, a topic which the next section will explore.

6.2.2 Beneficiaries and types of benefits

Title VII of the Civil Rights Act affords protection to both genders and all races. It does not name any particular group – not even black Americans, who are the prime group intended to benefit from positive measures. Conversely, affirmative action in terms of Executive Order 11246 means that beneficiaries are more limited; they are minorities and women. Minorities are defined in terms of race only to mean: Blacks, Hispanics, American Indian or Alaskan Native, and Asian or Pacific Islander.⁶⁵⁹

⁶⁵⁴Title VII of the Civil Rights Act was the first comprehensive legislative framework against discrimination in the workplace. Its equality clause states that:

“It shall be an unlawful employment practice for an employer-

- 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, colour, religion, sex, or national origin (section 703(a)(1);

Or

- 2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, colour, religion, sex, or national origin (section 703(a)(2).”

Title VII prohibits discrimination in employment but does not impose any statutory duty on the employer to implement affirmative action. However, the courts are authorized by the Act to order affirmative action in terms of section 706(g)(1).

⁶⁵⁵The Supreme Court decision in *Brown v Board of Education* U.S. 483 (1954) gave recognition to the issue of racial equality. The Court held that racial segregation was contrary to the Fourteenth Amendment to the extent that it was “inherently unequal” for the minorities. This decision, in conjunction with the human rights movement at the time, strengthened the demand for the elimination of all form of racial discrimination. The quest for wide acknowledgement of human rights paved the way for economic growth and the policy of incorporating racial minorities into industry. It was part of a larger-scale scheme to improve an already thriving economy.

⁶⁵⁶*Defunis v Odegaard* 416 US 312 (1974).

⁶⁵⁷*Wygant v Jackson Board of Education* 476 US 267 (1986).

⁶⁵⁸*Brown v Board of Education* U.S 483 (1954).

⁶⁵⁹‘Black’ is defined as all persons (not of Hispanic origin) having origins in any of the Black racial groups of Africa. ‘Hispanic’ means all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. Asian or Pacific Islander means all persons having origins in any of the original peoples of the Far East, South-east Asia, the Indian subcontinent or the Pacific Islands. This area includes China, India, Japan, Korea, the Philippine Islands and Samoa. American Indian or Alaskan Native means all persons having origins in any of the original peoples of North America and who maintain cultural identification though tribal affiliation or community recognition. (See P Breast & M Oshige “Affirmative action for Whom?” (1995) *Stanford Law Review* 47 855 – 900 877-897 for a general description of these groups).

Most affirmative action measures in the USA seek to promote the inclusion of marginalised groups in one of the three areas: education, employment and government contracting.⁶⁶⁰ Benefits of the targeted groups could include lower admission requirements for schools, different standards used for hiring, promotion and retention in the workplace, or government contracts in which members from a class receive more favourable treatment than non-members from the class.⁶⁶¹

Education

Affirmative action measures in education have been established to increase the number of minorities or women entering colleges and universities in the USA. The underlying principle for affirmative action in educational institutions in the USA includes not just the need to remedy the past but also consideration of the value of educational diversity. The concerns about the legality of affirmative action policies in education must be considered in the light of the First Amendment and the Fourteenth Amendment and the civil rights laws.⁶⁶² Most of the students within the designated group have limited choices with regard to the school they can attend. Their education attainment is largely a function of the resources the state has chosen to devote to them. Admissions based on merit do not measure purely individual factors such as talent and determination. They are a reflection of various dimensions such as class, race and gender privilege.

In 2003 the Supreme Court upheld the University of Michigan's "flexible policy".⁶⁶³ It suggested that candidates should be admitted on the basis of an evaluation of their academic qualification in conjunction with a flexible judgment of their talents, experiences and potential, as revealed in their dossier (especially their statement as to why they wished to pursue particular areas of study.); their recommendation letters, high school grades, entry test results and other series of variables.⁶⁶⁴ Throughout the period that the flexible admission policy applied, the university considered Black Americans, Hispanics and Native Americans as "underrepresented" races. Such consideration relates to the call for resolving status-related

⁶⁶⁰M J Sweet "Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation" (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 162.

⁶⁶¹M J Sweet "Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation" (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 162.

⁶⁶²See *Grutter v Bollinger* 539 US 306 (2003).

⁶⁶³See *Grutter v Bollinger* 539 US 306 (2003).

⁶⁶⁴Enthusiasm of those providing the recommendations, the quality of their high school grades, the difficulty of graduating from the particular high school.

inequalities through status-related initiatives (in this case affirmative action in higher education based on a status indicator such as race). The initiatives are imperative not just for their own sake, but also because a failure to accommodate differences in universities and colleges can generate inequalities of resources as well. This sentiment embraces *recognition equality*⁶⁶⁵ and *affirmation of identities*. In addition, Robert Bruce Slater notes that “[w]ithout the highly targeted push of affirmative action it appears that two thirds of the approximately 3,000 African Americans now enrolled each year at the nation’s 25 highest-ranked universities would be denied admission to these schools.”⁶⁶⁶ Afterwards, “results of standardised tests used for college admissions show that under a straight socio-economic affirmative action admission plan almost all places at America’s highest-ranked universities would be taken up by non-blacks.”⁶⁶⁷ This suggests that racial preferences in the USA’s affirmative action processes serve as a “removal of barriers” to access to opportunities (particularly admissions into higher education institutions), which is in line with the principles of substantive equality. In other words, racial preferences in the US context afford a plausible platform for Blacks and other minorities to benefit, as “white poor greatly outnumber black poor.”⁶⁶⁸

Interestingly some universities have had admission policies which provide for “particularistic advantages.”⁶⁶⁹ Most of the private institutions such as Harvard, Chicago and Stanford have given preference to the children of alumni, faculty and athletes. Such preferences are examples of practices that advantage the already privileged, thereby reinforcing a cycle of advantage which is outside the realm of substantive equality and its goals. In addition, “[i]t conceals the practice whereby educationally disadvantaged students are systematically discouraged from entering institutions with higher levels of attainment, thereby fostering ghettos of advantage and disadvantage within the school system.”⁶⁷⁰

⁶⁶⁵See Chapter 3 of this study.

⁶⁶⁶R Slater “Why Socio-economic Affirmative Action in College Admissions Works against African Americans” (1995) *The Journal of Blacks in Higher Education*, No. 8 57-59 57.

⁶⁶⁷R Slater “Why Socio-economic Affirmative Action in College Admissions Works against African Americans” (1995) *The Journal of Blacks in Higher Education*, No. 8 57-59 57.

⁶⁶⁸R Slater “Why Socio-economic Affirmative Action in College Admissions Works against African Americans” (1995) 58. If admissions decisions at the University of California, Berkeley were made solely on grade point averages and standardised test scores, very large numbers of the black who are presently admitted and enrolled would not have met minimum admissions criteria (R B Slater “Why Socio-economic Affirmative Action in College Admissions Works against African Americans” (1995) *The Journal of Blacks in Higher Education* No. 8 57-59 57).

⁶⁶⁹S Lipset “Equality and the American Creed: Understanding the Affirmative Action Debate” at http://www.dlc.org/document/equality_lipset.

⁶⁷⁰J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 147.

Employment and Federal contracting

In 1965 President Lyndon B Johnson issued Executive Order No. 11246 (hereafter the Order), which embodied the basic principles of Title VII and built on it in its equal opportunity clause. The Order prohibits discrimination in hiring and employment decisions of non-exempt federal/government contractors and subcontractors on the basis of race, creed, colour and national origin. The Order also requires contractors and subcontractors with a federal contract⁶⁷¹ to take affirmative action in favour of “qualified” minorities and women to ensure equal employment opportunity.⁶⁷² Furthermore, the Order established the Philadelphia Plan, which required federal contractors, first in Philadelphia and later in 55 other cities, to employ minority employees as a prerequisite for the receipt of federal contract money.⁶⁷³ In 1970, under the administration of President Nixon, new guidelines were instituted which required federal contractors to have affirmative action plans containing both minority and female hiring goals. Affirmative action was now being transformed into a numerical concept.⁶⁷⁴ According to Bates and Williams, by the time the administration of President Carter came to office, affirmative action programmes that were designed to remedy inequities against Black Americans ironically covered a majority of the US population.⁶⁷⁵

The federal contract initiative typically provides preferential treatment for minority-owned businesses in the bidding process for government contracts. The preferential treatment ranges from “set-asides” or “sheltered markets”, whereby only targeted groups can compete for the federal contracts.⁶⁷⁶ Federal affirmative action contracting programmes involve “minority business enterprises” (MBEs). An MBE is defined as a business, at least 50 per cent of which is owned by minority group members who have been socially and economically disadvantaged. When the government seeks to purchase a service or a good, there is a probability of contracting with an MBE. Several commentators note that the major focus of

⁶⁷¹Contracts of \$50 000 or more and employers with 50 or more employees – big contracts and employers for federal government employment or government agencies, federal government contracts and subcontractors and construction contracts (Parts I; II; III of Executive Order 11246).

⁶⁷²Section 202(1) of Executive Order 11246.

⁶⁷³M Sweet “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 161.

⁶⁷⁴T Sowell *Affirmative Action Around the World: An Empirical Study*, (2004) 125.

⁶⁷⁵T Bates & D Williams “Does Preferential Procurement Benefit Minority Business?” (1996) 86 *American Economic Review* 294.

⁶⁷⁶M Sweets “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 162.

MBE programmes is the construction industry.⁶⁷⁷ Construction is one of the development divisions of government contracting in a position to support minority groups and avoid a “majority contractors’ business monopoly”.⁶⁷⁸

In addition, there are also federal procurement opportunities for businesses in the Small Disadvantaged Business Programmes (SDBs).⁶⁷⁹ These programmes are an extension beyond the individual efforts to deliver on the old promise of equality of economic opportunity. The provision for MBE is contained in the Public Works Employment Act of 1977 (PWEA). This Act was built on the Small Business Act of 1953, which has been subjected to criticism over the years. Section 8(a) of the Small Business Act (SBA) allows the “setting aside” of federal contracts for small businesses (8(a)s) which are at least 51 per cent owned and operated by one or more individuals from groups which are both socially and economically disadvantaged.⁶⁸⁰ Businesses that are not in fact socially or economically disadvantaged are excluded from government affirmative action contracts. Such a criterion for federal contracting contributes towards elimination of barriers, which is what the aims of substantive equality explored in the previous section seek to achieve.

Evaluation of beneficiaries and disadvantage

Sowell argues that affirmative action in the USA has made blacks, who have largely lifted themselves out of poverty, look like people who owe their rise to affirmative action and other government programmes.⁶⁸¹ This perception is confined to whites as well as black politicians

⁶⁷⁷See L Nay & L Jones “Equal Employment and Affirmative Action in Local Government: A Profile” (1989) 8 *Law and Inequality: Journal of Theory and Practice* 103; G La Noue “The Impact of Croson on Equal Protection Law and Policy” (1997) 61 *Albany Law Review*. 1.

⁶⁷⁸M Sweets “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 165.

⁶⁷⁹See M Fauntroy “Disadvantaged Business: A Review of Federal Assistance” Congressional Research Service report for Congress January 2002, available at liberman.senate.gov/documents/crs/disadvantagedbiz.pdf. (accessed on 10/09/2013). See also C Dale “Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues”

Congressional Research Service report for Congress, February 2006, available at digital.library.unt.edu/govdocs/crs/permalink/meta-crs-10846:1 (accessed 16/05/13).

⁶⁸⁰S Fredman “Facing the Future: Substantive Equality Under the Spotlight” in O Dupper & C Garbers (eds) (2009) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 33. The socially and economically disadvantaged are defined as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as members of a group without regard to their individual qualities. On the other hand, economically disadvantaged individuals in the SBA are defined as “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged”. All federal departments within the executive branch with procurement authority are obliged to take the necessary legal steps to increase contracting between the Federal Government and SDBs, 8(a)s, and MBEs.

⁶⁸¹T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 164.

and civil rights activists, “who seek to claim credit for the progress so as to solidify a constituency conditioned to be dependent on them as well as on government.”⁶⁸² Wilson asserts that the main beneficiaries of affirmative action have not been the black professional-managerial class but the black working class.⁶⁸³ Without affirmative action, the African-American (and Latino) working class would have extreme difficulties in getting employed “in the previous racially-exclusive craft unions and civil and uniform services. Some of these jobs were always accessed via kinship ties or patronage and political connections.”⁶⁸⁴ This confirms affirmative action as a policy which facilitates removal of barriers, thus increasing the chances of achieving full social participation. In addition, the sentiments give affirmative action leverage as a vehicle for social inclusion.

According to Sweet, there is a lack of a valid and reliable research method for adducing the purposes of affirmative action.⁶⁸⁵ The empirical studies on the impact of government affirmative action contracting programmes rarely address the goals of such programmes. However, there are studies that have increased knowledge on the impact of government “set asides”. MBEs had led to the provision of jobs, uplifting the lives of some poor neighbourhoods in the USA. A study was carried out by Boston in Atlanta in which he discovered that MBE programmes help with income and employment in the most distressed urban areas.⁶⁸⁶ His study revealed that firms located in the economically worst-off neighbourhoods had more employees and higher revenues than firms located elsewhere. i In comparing the growth rate of black-owned businesses in cities with MBE programmes to cities without MBE programmes from 1982 to 1987 and 1987 to 1992, Boston discovered that in the 76 cities with MBE programmes black businesses grew at a slightly higher rate than in the 12 cities without.⁶⁸⁷

Bates and Williams conducted a similar study, but divided cities according to the presence of a black mayor.⁶⁸⁸ They discovered increased sales for black businesses in cities with black

⁶⁸²T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 164.

⁶⁸³See W Wilson (1978) *The Declining Significance of Race* as noted by J M Schwartz *The Future of Democratic Equality: Rebuilding Social Solidarity in a Fragmented America* (2009) 167.

⁶⁸⁴See J Schwart *The Future of Democratic Equality: Rebuilding Social Solidarity in a Fragmented America* (2009) 167.

⁶⁸⁵M Sweet “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 166 – 167.

⁶⁸⁶T Boston *Affirmative Action and Black Entrepreneurship* (1999) 16.

⁶⁸⁷T Boston (1999) *Affirmative Action and Black Entrepreneurship* 16.

⁶⁸⁸T Bates & D Williams, “Racial Politics: Does it Pay?” (1993) *Social Science Quarterly* 74 (3) 507- 522 507.

mayors and they argued that black mayoral support of MBE programmes may account in part for some of this growth. These studies give only moderate support to the argument that government affirmative action programmes create new MBEs. This study by Bates and Williams suggests having a black mayor is an affirmation of the existence of varied identities in American society. The attribution of the growth of black businesses to black mayoral support suggests the existence of a connection between identity politics and (economic) participation. As noted earlier, political participation and political rights have often determined the level of economic integration and the rights that come with it. This indicates that when a peer from a disadvantaged group becomes part of a decision-making process, opportunities open up for his/her disadvantaged counterparts and also it invigorates democratic change in society (as argued in the previous section). In addition, as the black businesses who gain from federal contracting are required (inevitably so) to employ other minorities, this reveals affirmative action *breaking cycles of disadvantage and promoting the dignity, identity and full social participation* of those who gain business opportunity and employment from the process.

The efficacy of government set asides (the MBEs and SDBs) in achieving their goals has been questioned.⁶⁸⁹ Betancur and Gills argue that strong black businesses do lead to economic development, but the current practices and policies that are geared towards facilitating business development do not show expertise.⁶⁹⁰ They describe federal contracting policies as leading to the relative expansion of national middle classes, although there is no clarity as to which nationalities are in question.⁶⁹¹ They further argue that policies to assist MBEs are an “individualist compromise” and they do not address the groups that the policies are intended to serve. They also view “dispersal” and “role models” as “non-solutions” to the group-based economic oppression of minorities. However, La Noue notes that MBE programmes are not bad in themselves with regard to their goals but are bad in

⁶⁸⁹“A study by a random sample of minority beneficiaries of government contracts set aside by the Small Business Administration showed that more two-thirds of these beneficiaries have net worths of more than a million dollars each. These include a black businessman in a position to offer to arrange a buy-out of the multibillion dollar Viacom media conglomerate. This entrepreneur had previously been a government official at the Federal Communications and thus knew from the inside how minority set-asides worked in media. These programs also benefited wealthy black athletes like Lou Brock, Julius Erving and O.L Simpson. Yet when some members of Congress publicly opposed such programs, Congressman Charles Rangel from Harlem compared them to Hitler and depicted any attempt to roll back affirmative action as an attack on all blacks” (T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 121).

⁶⁹⁰J Betancur & D Gills “Race, Class in Local Economic Development” in R Bingham & R Mier (eds) *Theories of Local Economic Development Perspectives from Across the Disciplines* (1993) 198.

⁶⁹¹J Betancur & D Gills “Race, Class in Local Economic Development” in R Bingham & R Mier (eds) *Theories of Local Economic Development Perspectives from Across the Disciplines* (1993) 198.

implementation.⁶⁹² La Noue prefers race-neutral programmes and states that race-conscious ones do not strictly support the targets and are prone to racial benefaction.⁶⁹³

6.2.3 Mechanisms to ensure benefits reach the targets

a) Standard of review

The judiciary in the USA employs one of three standards of review or scrutiny in analysing the constitutionality of disputed legislation or policy. These include strict scrutiny, intermediate scrutiny and rational basis review. These standards are within the judiciary's proportionality mechanism of establishing the legitimacy of the aims of the measure and how the aims of the measure "fit".⁶⁹⁴ The US courts have structured the proportionality analysis in the narrowest terms due to the "underlying hostility to the substantive equality values" behind positive measures.⁶⁹⁵ The analysis entails:

- a legitimate state interest;
- demonstration of a pressing social need; and
- the measure must be narrowly tailored to that end.⁶⁹⁶

In simple terms, "[c]onsistent with notions of equity, the extent of the remedy must fit the identified problem."⁶⁹⁷ This means the number of people who benefit from the remedy must be generally equivalent to the number of suitably qualified applicants.

b) Socio-economic status as a criterion

The usage of class to qualify for federal contracting is an indication of a step towards a more nuanced approach towards alleviation of socio-economic disadvantage. MBE and SDB

⁶⁹²G La Noue "Follow the Money: Who Benefits from the Federal Aviation Administration's MBE Program?" (2008) *The American Review of Public Administration* 38(4), 480 – 500. There are various results that have demonstrated how far the reality of affirmative action departs from its rationale of remedying past discrimination. Minority immigrants do qualify for affirmative action, although they have not suffered 'past discrimination' in United States. This has seen the affluent Fanjul family from Cuba receiving government contracts for minority businesses. The family has a fortune exceeding 500 million dollars. (See T Sowell, *Affirmative Action around the World: An Empirical Study* (2004)121; see also S Diaz-Briquets & J Perez-Lopes "The Role of the Cuba-American Community in the Transition" (2003) Institute for Cuban and Cuba-American Studies, University of Miami). A number of European businessmen from Portugal have received the majority of the money paid to MBEs in Washington D.C in the construction industry during the period 1986 to 1990 (T Sowell *Affirmative Action around the World: An Empirical Study* (2004) 121).

⁶⁹³G La Noue "Race-neutral Programs in Public Contracting" (1995) *Public Administration Review* 55(4), 348-356.

⁶⁹⁴S Fredman "Facing the Future: Substantive Equality Under the Spotlight" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 24.

⁶⁹⁵S Fredman, "Facing the Future: Substantive Equality Under the Spotlight" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009)25.

⁶⁹⁶S Fredman, "Facing the Future: Substantive Equality Under the Spotlight" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 25.

⁶⁹⁷R Tomasson, F Crosby & S Herzberger *Affirmative Action: The pros and Cons of Policy and Practice* (1996) 51.

policies are regarded as going beyond simply the prevention of discrimination or inclusion in business opportunities.⁶⁹⁸ They are rooted in a sense of justice, sustained by claims that they strengthen economic development and empowerment. If groups that have been historically excluded are offered a fair share of business opportunities, that group or groups of individuals will be collectively better off than if there was no policy.⁶⁹⁹ These policies are part of an economic development strategy to assist a disadvantaged group.⁷⁰⁰ Therefore the federal contracting programme initiatives bring to the fore the connection between status and socio-economic disadvantage.

6.2.4 Some observations

It seems the US Supreme Court embraces the concept of equality of opportunity as a “stagnant” version of the premise of equality. It treats affirmative action as any other exception to the principle of equality. Affirmative action, especially in favour of minorities, is considered to be contentious thus controlled through procedural toll of strict scrutiny. Given the intensity of this judicial medium, positive measures are particularly open to constitutional reviews with a mere possibility to constantly test the ‘standard of review’ by the judiciary.⁷⁰¹

⁶⁹⁸M Sweets, “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 161.

⁶⁹⁹M Sweets, “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 161.

⁷⁰⁰M Sweets, “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation” (2006) *Journal of Law and Society* Vol. 33 No. 1. 160 – 180 161.

⁷⁰¹In *Fullilove v Klutznick* 448 US (1980) the intermediary scrutiny test was mentioned with regard to the MBE clause in the PWEA. In this case, the MBE clause in the PWEA and the question as to which groups should be included in affirmative action programmes came under scrutiny. The Court held that the MBE policy clause in the PWEA requiring 10 per cent of certain federal construction grants to be awarded to MBEs was valid (Section 103(f)(2) of the Public Works Employment Act). Recognising that racial classifications warranted “close examination” and that Congress should receive “appropriate deference”, the Court held that if a legislature passed a legislation that differentiated on the basis of race and if the intention was to benefit racial minorities, it would be subjected only to intermediary scrutiny. The judiciary using this standard of scrutiny for benevolent differentiation of legislation made it more likely that such statutes would be upheld as constitutional, while invidious racially discriminatory legislation that burdened racial minorities would certainly violate the Constitution’s equal protection guarantees. The Court also held that the Congress had reasonably determined that the prospective elimination of these barriers to minority-firm access to public contracting opportunities generated by the PWEA was appropriate to ensure that these businesses were not denied an equal opportunity to participate in federal grants to state and local government(at 2775). However, the Court did not follow the strict or intermediary test, but held that the MBE could pass either of these tests. According to Graham, the *Fullilove* decision liberally endorsed MBE policy (H Graham “Unintended Consequences: The Convergence of Affirmative Action and Immigration Policy” (1998) 41 (7) *American Behavioral Scientist* 898- 912 905). In *City of Richmond v Croson* 488 US 494 (1989) the Court could not find a “compelling state interest” nor legislation “narrowly tailored” to a legitimate interest and ruled an MBE programme in Richmond unconstitutional. Narrow tailoring was utilised by the Court in the Michigan case *Gratz v Bollinger* 515 US 200 (1995), where a strict admission policy was challenged according to which a number of variables had to be taken into account for deciding admission (these included high school grades, entry test results, quality of graduating high school, curriculum vitae, the geography of the origins of applications, the relations of candidates with university alumni, leading capacities and race.) The Court applied the strict scrutiny test and

Nonetheless, the government's affirmative action contracting policy brings to the fore the issue of affirmative action as a strategic element of substantive equality. The MBE programme is targeted at minorities, *affirming their identity*, to pave a way for them to participate in the USA's economic system (thereby increasing their *full social participation*). As the programme is targeted at the socially and economically disadvantaged, it is a step towards *breaking cycles of disadvantage* within communities, families and to some extent the system as well. This establishes affirmative action as a vehicle for a substantive conception of equality.

6.3 Canada

6.3.1 Aims and purpose of affirmative action in Canada

Canada's becoming a signatory to both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political rights (ICCPR) influenced the enactment of human rights legislation in the country. The Canadian government acknowledged that not every individual had benefited from the existing social structure and that the state has an active role to play in remedying this situation.⁷⁰² The understanding of positive measures in Canada is based on experience within a work or organisational context. There is a general consensus that positive action is ensuring equal access, full participation and advancement in all aspects of Canadian society: social, political, economic and cultural. The term "employment equity"⁷⁰³ is used in Canada as an attempt to distance its positive measures from the hard-core affirmative action reform in the United States, which in effect is synonymous with positive discrimination.⁷⁰⁴ Affirmative action in Canada has its foundation

accepted that securing diversity within an academic environment constituted a compelling public interest and therefore some measures could be taken in favour of this goal. However, the Court held that the strict admission policy was not narrowly tailored to achieve the legitimate goal and ordered the striking down of the policy.

In another Michigan case, *Grutter v Bollinger*, 539 US 306 (2003) the University of Michigan's "flexible" admission policy was challenged. The Court placed emphasis on the fact that the policy in question did not award direct benefits to candidates, but merely set out criteria assessment, thus allowing for an overall evaluation of all candidates. The Court found that the flexible admission policy was not drafted in generic terms, but was narrowly tailored to serve the compelling public interest of diversity in the academia.

⁷⁰²H Orton "Section 15 and Benefits Program and Other Benefits at Law: The Interpretation of Section 15 of the Charter Since Andrews" (1990) 19 *Manitoba Law Journal* 288 – 302 288.

⁷⁰³The term "employment equity" (rather than "affirmative action" used in the United States) was inspired by Justice Rosalie Abella's *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services, 1984 (hereafter the Abella report). Abella's influential report was part of a broader recognition of and enquiry into significant and persistent patterns of inequality in employment affecting women, members of racialised groups ("visible minorities"), persons with disabilities and Aboriginal people.

⁷⁰⁴C Bacchi "Policy and Discourse: Challenging the Construction of Affirmative Action as Preferential Treatment" (2004) *Journal of European Public Policy* 11 (1) 128 - 146.

in a substantive conception of equality embraced by its legislative framework. Legislation is a powerful driver for affirmative action in Canada. The Canadian Human Rights Act of 1978 (hereafter the Human Rights Act) permits organisations and enterprises to engage in affirmative action programmes but only on a voluntary basis.⁷⁰⁵ Section 16 (2) of the Human Rights Act states:

“It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed *to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are likely to be suffered by, any group of individuals when those disadvantages would be or are based on and related to the race, national or ethnic origin, colour, religion age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group*” (italics added).

In this way, the Act specifies the areas of disadvantages which may be targeted by affirmative action and how such action should be dealt with. Another legislative provision pertaining to affirmative action is found in the Canadian Charter of Rights and Freedoms of 1982 (hereafter the Charter), which forms part of the Constitution Act. Section 15 of the Charter holds:

(1) every individual is equal before and under the law and has the right to the equal protection⁷⁰⁶ and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;⁷⁰⁷

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

Section 15 therefore confirms both a formal (dismantling of unfair discrimination) and a substantive conception of equality (affirmative action measures). In addition to section 15, section 6(4) of the Charter authorises affirmative action in the provinces of Canada. They may develop laws, programmes or activities intended to ameliorate the conditions of

⁷⁰⁵Section 16(1) Human Rights Act.

⁷⁰⁶The inclusion of “equal protection” echoes the 14th Amendment of the United States Constitution.

⁷⁰⁷Section 15 (1) differs from the relevant provisions of the South African Constitution. The two aspects of equality which include i) equality “before” the law and “equal protection” and “benefit” of the law (section 9(1) and ii) the prohibition on discrimination (section 9(3)) are contained in two separate subsections. Section 9(3) nonetheless has more grounds for covering, over and above the nine grounds in section 15(1) of the Charter, gender, mental status, pregnancy, sexual orientation, conscience, belief culture, language and birth.

disadvantaged people and whose employment rate is below the national average. Moreover, the Charter provides both for federal, provincial and territorial government commitment to promoting “equal opportunities” for the wellbeing of Canadians⁷⁰⁸ and to promoting economic advancement to reduce disparities in opportunities.⁷⁰⁹ Charbursky points out that the affirmative action clause of the Charter was included in reaction to the controversy arising from the *Bakke case* in the USA.⁷¹⁰ The affirmative clause was intended to ensure that the legislature would not be discouraged from taking affirmative action measures to enhance equality.⁷¹¹ According to Fudge, the language of the equality provisions in the Charter is open-textured.⁷¹² Critical concepts such as discrimination and reasonable accommodation are expressed in general terms. She further argues that this places on the judiciary the burden of informing which inequalities matter.⁷¹³

The rationale underlying section 15(2) is often linked to the concept of substantive equality. With the constitutionalisation of affirmative action, section 15(2) “reinforces the important insight that substantive equality requires positive action to ameliorate the conditions of socially disadvantaged groups.”⁷¹⁴ The Canadian approach to equality was adopted by the Supreme Court of Canada with *Andrew v Law Society of British Columbia*.⁷¹⁵ This case was the first to interpret section 15 of the Charter and this approach “offered significant direction and laid indispensable foundations for a substantive approach to application of section 15”⁷¹⁶ by rejecting formal procedural analysis calling for a contextual approach.⁷¹⁷ Furthermore, the Supreme Court of Canada in *R v Kapp*⁷¹⁸ held that:

⁷⁰⁸Employment, health and education in Canada, are predominately under the jurisdiction of provincial governments. In employment, federal laws apply to approximately 10 per cent of the nation’s workforce.

⁷⁰⁹Section 36 (1) (a); 36 (1)(c) of the Charter.

⁷¹⁰*Regents of the University of California v Allan Bakke* 438 U.S 265(1978) ; 98 S. Ct 2733. See also *Lovelace v Ontario* (2000) par 51. L Charbursky “The Employment Equity Act: An Examination of its Development and Direction” (1992) *Ottawa Law Review* 24 (2)305 - 361 324.

⁷¹¹Hon R Sharpe, Hon K Swinton & K Roach *Essentials of Canadian Law: Charter of Rights and Freedoms* (2002)247.

⁷¹²J Fudge “The Supreme Court, Substantive Equality, and Inequality at Work” in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2006) 42.

⁷¹³J Fudge “The Supreme Court, Substantive Equality, and Inequality at Work” in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2006) 43.

⁷¹⁴C Sheppard (1993) “Litigating the Relationship between Equity and Equality” (1993) A Study Paper, Toronto: *Ontario Law Reform Commission* 28.

⁷¹⁵(1986) 27 DLR 4th 600.

⁷¹⁶S McIntyre “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in F Faraday, M Denike & M K Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter*(2006) 100.

⁷¹⁷See Chapters 1 and 3 of this study for more on the formal analysis and contextual approach.

⁷¹⁸2008 SCC.

“Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s 15 as a whole. Section 15 is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s 15 and analogous grounds. This is the way of combating discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s 15(2), the Charter preserves the right of governments to implement such programs, without fear of challenge under s 15(1). This is made apparent by the existence of s 15(2). Thus s 15(1) and s 15(2) work together to confirm s 15’s purpose of furthering substantive equality.”⁷¹⁹

However, some academics then argue that section 15(2) mandates the government to implement measures which divide society into ‘have’ and ‘have-not’ groups.

Another legislative basis for affirmative action in Canada can be found in the Canadian Employment Equity Act of 1995 (hereafter CEEA). The CEEA aims to remedy past discrimination against women, person with disabilities, Aboriginal peoples and members of the visible minorities. This was to give effect to the principle that employment equity means more than treating persons in the same way, but also requires special measures and the accommodation of differences, thereby reinforcing a substantive conception of equality. The CEEA applies to federal public authorities and federally regulated employers with more than 100 employees. These organisations are required to draw up employment equity plans.⁷²⁰

From the legislative framework mentioned above, there is no question about the constitutional guarantee of affirmative action programmes in Canada and their purpose. In addition, a substantive conception of equality is profoundly embraced in Canada. In affirmation of this fact the Abella report states:

“Equality under the Charter, then, is a right to integrate into the mainstream of Canadian society based on, and notwithstanding, differences. It is acknowledging and accommodating differences rather than ignoring or denying them. This is the paradox at the core of any quest for employment equity because differences exist and must be respected, equality in the workplace does not, and cannot be allowed to, mean the same treatment for all. In recognition of the journey many have yet to complete before they achieve equality and in recognition of how the duration of the journey has been and is

⁷¹⁹*Her Majesty the Queen V John Michael Kapp* 2008 SCC 41, 2 SCR 48316 (this case is commonly known as *R V Kapp*).

⁷²⁰The Act’s rationale and many of its fundamental elements, as well as the legislative purpose of creating a policy response to the problem of systematic discrimination in employment was inspired by the Abella report (Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984).

being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints.”⁷²¹

In other words, the overall purpose of Section 15 is to protect disadvantaged groups. This places affirmative action as both a benevolent and protective measure in Canada. From the legislative framework above, affirmative action programmes in Canada are aimed at *removing systematic discrimination* and *promoting employment equity*. The Abella report indicates that the differences in unemployment rates and incomes between groups should be understood as “social indications” of work discrimination and that, furthermore, such discrimination can be characterised as systematic. How the system affects individuals or groups determines whether or not a remedy is justified. Remedial measures of a systematic kind, which is the object of employment equity and affirmative action, were meant to improve the situations for individuals who, by virtue of “belonging to” and “being identified” with a particular group, found themselves unfairly and adversely affected by certain systems or practices.⁷²² The Abella report suggested that intervention to adjust such systems was both justified and essential to accommodate a more heterogeneous workforce.⁷²³ The purpose of such intervention was to open up competition to all who would have been eligible, if it was not for the existence of discrimination. Further, “[e]mployment equity is a Canadian designed response to discrimination”⁷²⁴ to address inequality in access to employment, inequalities in income, and inequalities in occupational status between groups.⁷²⁵ The effect of the intervention would be the end of exclusion and the “beginning of equality”.⁷²⁶ Thus inclusion or integration of people previously excluded was thus the main aim of affirmative action.

⁷²¹Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984 13).

⁷²²Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity* Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984 13).

⁷²³Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity* Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984 9).

⁷²⁴G Galabuzi “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection” Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa 10-13 November (2005) 10.

⁷²⁵Seven provinces have employment equity policies: British Columbia, Manitoba, Saskatchewan, Quebec, Nova Scotia, New Brunswick and Prince Edward Island. Most of these policies apply to the public sector and only British Columbia has employment equity legislation. Ontario has taken major strides in attempting to implement employment equity with its Employment Equity Act of 1993. A mandatory programme provision is included in the Act, which covers the public sector and all workplaces with 50 or more employees.⁷²⁵ The Act also focuses on data collection, employment systems reviews, reporting and setting targets for building representative workplaces. Nonetheless, the Act was repealed in 1995 before its impact was established (as above at 10).

⁷²⁶G Galabuzi “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection” Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa in 10 – 13 November 10.

6.3.2 Beneficiaries and types of benefits

In Canada there are four categories or groups of beneficiaries for affirmative action benefits: women, persons with disabilities, Aboriginal peoples⁷²⁷ and members of the visible minorities. These categories of people also disproportionately comprise the group of poor people in Canada and have higher rates of poverty than average. According to Brodsky and Day, the economic, social and political inequality of members of these groups is part of the “fall out” from complex and deeply entrenched forms of discrimination.⁷²⁸ They further point out that it is imperative to tackle poverty as an aspect of sex, race and disability discrimination, as it also deepens the inequality of members of already disadvantaged groups.⁷²⁹ The Abella report found the economically disadvantaged status of the designated groups to be compelling.⁷³⁰

The Abella report further illustrated that if the Courts are ultimately left to decide what “disadvantage” meant, it would be consistent with the spirit of section 15 of the Charter to assume as “disadvantaged” all individuals who were members of a group “found” to be disadvantaged.⁷³¹ The Charter makes a clear allusion to systematic discrimination and its approval of systematic remedies, and the group-based approach to disadvantage was therefore endorsed.⁷³² At the time the Abella Commission was investigating, Canada’s disadvantaged people were disproportionately assumed to be women, Aboriginal people, visible minorities and the disabled.⁷³³ Some distinctions had been made and possibly overlooked in the past that had resulted in the disproportionate representation of these groups. It was time to reverse the trends with the provision of access to pave way for equality. The Abella report pointed out that unless arbitrary distinctions were rejected, the four designated groups would unjustifiably

⁷²⁷ ‘Aboriginal’ is the term used to describe Canada’s indigenous population, who comprise 3.5 per cent of Canada’s population. They include First Nations (historically called Indians, Inuit and Métis, who are mixed nations, and European Heritage).

⁷²⁸ G Brodsky & S Day “Women’s Equality is an Equality Violation” in F Faraday, M Denike & M Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 330.

⁷²⁹ G Brodsky & S Day “Women’s Equality is an Equality Violation” in F Faraday, M Denike & M Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 330.

⁷³⁰ Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984) 2.

⁷³¹ Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984) 15.

⁷³² Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984) 2.

⁷³³ Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984) 2.

remain in perpetual “slow motion”.⁷³⁴ According to the report, for all designated groups equality would require an effective communications network, the commitment of educators, employers and government to revise practices that unfairly impede the employment opportunities of these groups, an end to patronising, and reducing stereotyping.

Federal contracting programme

There is a federal contracting programme (hereafter FCP) in Canada which eventually became law in 1986. It requires that companies with 100 or more employees that wish to bid for federal contracts for goods or services worth \$250 000 or more implement an employment equity programme.⁷³⁵ Contractors are required to sign a certificate of commitment to design and carry out an employment equity plan. The contractors are required to file an employment equity plan with the government, as a commitment to develop and implement such a plan subject to on-site compliance reviews by employment equity offices from Human Resources Development Canada (HRDC). Failure to meet commitments would ultimately lead to exclusion from future government contracts.

According to the *Evaluation of the Federal Contractors Program* of 2002,⁷³⁶ the programme was seen as reflecting important goals as well as addressing the needs of the designated groups. The Evaluation indicated that there is still higher unemployment and poverty among designated group members and they have not been able to attain equal representation in the broader economy. The results also showed that there was continued discrimination against the designated groups in the FCP workplaces. Findings regarding positive impacts where FCP steps were implemented more fully pointed to the noteworthy potential impacts of the programme on representation, if it were more effectively implemented.

Employment equity provisions

As indicated by the *Women in Canada: A Gender-based Statistical 2005 Report* (hereafter *Women in Canada (2005)*), the number of women moving into the paid labour force has increased, but with no equality guarantees in earnings, access to non-traditional jobs and

⁷³⁴Justice Rosalie Abella’s *Report of the Royal Commission on Equality of Employment Opportunity*, Equality in Employment Vol. 1 (Ottawa; Minister of Supply and Services 1984) 5.

⁷³⁵See A Thomas & H Jain “Employment Equity in Canada and South Africa: Progress and Propositions” (2004) *International Journal of Human Resource Management* (15 (1) 36 – 55 39 – 41.

⁷³⁶At <http://www.hrsdc.gc.ca/eng/cs/sp/hrsdcedd/reports/2002-000615/page04.shtml>.

managerial positions,⁷³⁷ or in benefits.⁷³⁸ However, the extreme manifestation of women's economic inequality is women's disproportionate poverty.⁷³⁹ Targeting women for affirmative action benefits implies taking them seriously as employees and not assuming that their main interests lie outside the workplace.⁷⁴⁰ This also means the active recruitment of women into the fullest range of jobs; equal pay for work of equal value (appreciating their worthiness as human beings just like their male counterparts and thereby *promoting their human dignity and affirmation of their identity*); fair consideration for promotion to more senior positions; participation in decision making regarding corporate policy (increasing their *full social participation*); accessible child care of adequate quality; paid parental leave for both parents; and equal pension and other benefits.⁷⁴¹ With regard to the disabled, the Abella report recommended that, in accommodating differences in respect of disabled people, there had to be "as full accommodation as possible and the widest range of human and technical supports."⁷⁴² As for the Aboriginal people, five needs were identified: effective and relevant education and training; accommodation in respect of cultural and geographic realities; a primary voice in the design of education, training and funding programmes for their benefit; meaningful support systems; and the delivery of services through native-run institutions.⁷⁴³ For visible minorities, three needs were identified: adequate language training; mechanisms for fairly assessing the qualifications, experience, credentials and education of foreigners; and regard for whether employers were unreasonably making Canadian experience a job requirement. The facets of the employment equity mentioned above in regard to each of the categories – education, employment, economic opportunities, social participation, pay equity, among others – are directly or indirectly related to socio-economic rights.

⁷³⁷The *Women in Canada* (2005) report notes that "the majority of employed women continue to work in occupations in which women have traditionally been concentrated. In 2004 67 per cent of all employed women were working in teaching, nursing and related health occupations, clerical or other administrative positions and sales and service occupations." The report also indicates that "women continue to account for large shares of total employment in each of these occupational groups. In 2004 women made up 87 per cent of nurses and health-related therapists, 75 per cent of clerks and other administrators, 65 per cent of teachers, 57 per cent of those working in sales and services." The report also indicates that "women tend to be better represented in lower-level positions as opposed to those at more senior levels. In 2004 women made up only 22 per cent of senior managers, whereas in 1996 the figure had been 27 per cent" (at 113).

⁷³⁸Statistics Canada, *Women in Canada 2005: A Gender-based Statistical Report* (Ottawa: Statistics Canada) at 103.

⁷³⁹G Bordsky & S Day "Women's Equality is an Equality Violation" in F Faraday, M Denike & M Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 329 – 330.

⁷⁴⁰*Women in Canada* (2005) Report 113.

⁷⁴¹*Women in Canada* (2005) Report 113.

⁷⁴²Abella Report 38- 46.

⁷⁴³Abella Report 38- 46.

The literature indicates that the effects of affirmative action measures in Canada vary from one designated group to the other. According to Jain and Verma, women have made significant progress, while Aboriginals, visible minorities and persons with disabilities have not made much progress.⁷⁴⁴ Women, Aboriginal people and persons with disabilities remain underrepresented in firms covered by CEEA relative to their availability in the labour force.⁷⁴⁵ Although there have been improvements in the employment representation picture in Canada, it is clear that employment equity has not been able to produce a representative workforce for all four designated groups in organisations covered by the CEEA.

Agocs and Osborne point out that there is lack of accountability and the CEEA does not impose sanctions for failure to comply.⁷⁴⁶ They also argue that the policy is undercut by the weak mandate and limited by the constitutional separation between federal and provincial jurisdictions with respect to employment matters. They also assert that less than 5 per cent of the workforce falls within the federal sector covered by the Act; most employees work within the provincial jurisdiction and are not covered by federal employment equity legislation. They further indicate that since the dominant cultural narrative in Canada claims diversity, multiculturalism and equality of opportunity as primary values, this raises the question of why the provinces have not established effective employment equity frameworks. In addition, the employment equity programme has been undercut by inadequate resources.⁷⁴⁷

⁷⁴⁴H Jain & A Verma “Managing Workforce Diversity for Competitiveness: The Canadian Experience” (1996) *International Journal of Manpower* Vol. 17 Issues 4/5 14 – 29.

⁷⁴⁵Representation of women in private sector firms decreased for the period between 2001 and 2006. Women’s presence in senior management increased to 22 per cent in 2006, but their representation was still below their labour force availability of 25 per cent for this job class. For visible minorities in the federally regulated private sector improved from 11.7 per cent in 2001 to 14.9 per cent in 2006, which exceeded their official availability rate of 12.6 per cent.⁷⁴⁵ In the federal public sector they remained underrepresented compared with their availability in the labour force, while the other three designated groups were present in proportions greater than availability.⁷⁴⁵ The Aboriginal people’s share of jobs and hiring remained stable and well below their official available rate.⁷⁴⁵ For persons with disabilities, representation remained less than availability in the private sector, but exceeded this target in the federal public service (see Human Resource Development Canada, Annual Report 2007 19; *Canadian Human Rights Commission 2007 Annual Report* 9, 19).

⁷⁴⁶The rest of the paragraph draws heavily from C Agocs & B Osborne “Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions?” (2009) *Canadian Public Policy*, Vol. 35 No 2. See also A Bakan & A Kobayashi “Employment Equity Policy in Canada: An Inter-provincial Comparison” (2000) Ottawa: Status of Women Canada 13 – 23 available at <http://www.swc-cfc.gc.ca/> (accessed 12/09/2013)..

⁷⁴⁷A Bakan & A Kobayashi “Employment Equity Policy in Canada: An Inter-provincial Comparison” (2000) Ottawa: Status of Women Canada 13 – 23 available at <http://www.swc-cfc.gc.ca/> (accessed 12/09/2013).

A number of federal programmes that assisted women and Aboriginal people have been eliminated as political strategies.⁷⁴⁸ Resources have been cut for employment equity. The advocacy for human rights and equality for women, visible minorities, persons with disabilities has lost its support and influence. Public policy now reflects the interests of business corporations in the context of global competitive market. Abu-Laban and Gabriel argue that mandatory employment equity designed to address systematic discrimination has given way to the individualised and voluntary “diversity management” approaches favoured in the current business climate.⁷⁴⁹ Galabuzi indicates that the restructuring of Canada’s economy and the emergence of flexible labour markets “has increasingly stratified labour markets along racial lines, with the disproportionate representation of racialised group members in low-income sectors and low-end occupations”.⁷⁵⁰ There are also several characteristics that deepen the visible minorities’ conditions of poverty.⁷⁵¹ Furthermore, economic restructuring has intensified the racialisation and feminisation of labour market segregation, resulting in occupational and sectoral segregation with poor working conditions and low levels of unionisation.⁷⁵² Inequality in access to employment between the designated groups and the rest of the Canadian born still persists. The main argument here is that the designated groups experience higher rates of unemployment than the average Canadian. Those who are employed earn considerably less than the average Canadian. In the light of the above, employment equity in Canada has not had plausible poverty-alleviating benefits for the targeted groups. To some extent this is a form of indignity, because access to employment and the benefits that come with it (equal pay for equal work) constitutes part of the minimum conditions for a “dignified life”. It is the nature of such a socio-economic benefit itself that makes its denial a violation of dignity.⁷⁵³

⁷⁴⁸C Agocs “Systematic Discrimination in Employment: Mapping the Issue and the Policy Response” in C Agocs C (ed) (2000b) *Workplace Equality: International Perspectives on Legislation Policy and Practice* chapter 1.

⁷⁴⁹See Y Abu-Laban & C Gabriel *Selling Diversity: Immigrations, Multiculturalism, Employment Equity and Globalisation* (2002) chapter 1.

⁷⁵⁰G Galabuzi, “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection”. A Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa, November (2005) 11.

⁷⁵¹A double-digit racialised income gap; higher than average unemployment; disproportionate exposure to low income; differential access to housing leading to neighbourhood racial segregation; disproportionate access with the criminal justice system; and higher health risks (G Galabuzi, “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection”. A Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa, November (2005) 16).

⁷⁵²G Galabuzi “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection”. A Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa, November (2005) 16.

⁷⁵³See part 5.4.2.2 of this dissertation for more on dignity and employment.

6.3.3 Mechanisms to ensure benefits reach the targets

a) Implementation of target-oriented programmes

There are some initiative programmes that have been implemented in Canada to afford the designated groups access to opportunities. Some programs that have been initiated pertain specifically to Aboriginals.⁷⁵⁴

- The Aboriginal Skills and Employment Partnership programme (ASEP) which addresses both skills and employment deficiencies. It was initially developed in 2003.⁷⁵⁵ Each project under ASEP has a collaborative approach to a comprehensive Aboriginal training and employment plan that links skills development to specific job opportunities on major economic developments across Canada with large employment impacts. The partnership provides both immediate access to jobs and continuous skills development.
- The Aboriginal Skills and Training Strategic Investment fund (ASTSIF), which is targeted at helping Aboriginals, acquire the specific skills they need to benefit from economic opportunities, including those generated by the federal stimulus package. The fund also supports individuals who face barriers to employment, such as low literacy and a lack of essential skills.
- The Aboriginal Skills and Employment Training Strategy (ASETS) is an integrated approach to Aboriginal labour market programming that links training to labour market demand and ensures that Canada's Aboriginal people can fully participate in economic opportunities. Under this strategy, Aboriginal Agreement Holders design and deliver employment programmes and services best suited to the unique needs of their clients. ASETS focuses on three priorities: supporting demand-driven skills development; fostering partnerships with the private sector and the provinces and territories, and placing emphasis on accountability and results.
- Aboriginal Fisheries Strategy, which was introduced in 1992 as a mechanism to promote Aboriginal involvement in commercial fishing. The strategy includes a pilot

⁷⁵⁴See the Human Resource and Skills Development Canada at www.hrsdc.gc.ca/eng/employment/aboriginal_training/index.shtml (accessed 22/04/11).

⁷⁵⁵The Minister of Human Resource and Social Development has the authority to implement a renewed ASEP, according to section 7 of the Department of Human Resources and Skills Development Act. Section 7 provides that the Ministry may, in exercising the powers and performing the duties and functions assigned by the Human Resources and Skills Development Act, establish and implement programmes designed to support projects or other activities that contribute to the development of human resources of Canada and the skills of Canadians, and the Minister may make grants and contributions in support of the programmes.

sales programme. The objectives of the Strategy include: a) to provide a framework for the management of fishing by Aboriginal groups for food; b) to provide Aboriginal groups with an opportunity to participate in the management and enhancement of the resource; c) to contribute to the economic self-sufficiency of Aboriginal communities; d) to provide a foundation for the development of self-government agreements and treaties; and e) to improve the fisheries management skills and capacity of Aboriginal groups.⁷⁵⁶

b) The “narrow lens” approach (the *Law* test)

There are three factors considered by the Court in *R v Kapp*⁷⁵⁷ that partially serve as mechanisms towards ensuring that benefits reach the designated group(s): firstly, whether the affirmative action policy or ameliorative programme is properly and constitutionally protected (in other words, does the programme violate section 15(1)); secondly, whether the law or policy was designed to help improve the circumstances of disadvantaged groups or persons (the review here is directed at establishing the genuineness of the law or policy for the ameliorative purpose);⁷⁵⁸ and thirdly, the court considered the contextual factor established in the *Law v Canada (Minister of Employment and Immigration)*.⁷⁵⁹ This third factor requires a consideration of the ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group. The contextual factor is also termed the *Law* test, which the Supreme Court of Canada has repeatedly utilised to establish discrimination. The *Law* test conflates different conceptions which determine whether a particular instance of differential treatment amounts to unfair discrimination or treatment. These include:

- whether the claimant is part of a group that has suffered from past disadvantage or stereotyping;

⁷⁵⁶See “Fisheries and Oceans Canada” at www.dfo-mpo.gc.ca (accessed 22/04/13).

⁷⁵⁷ In 1998 a communal fishing license was issued to three First Nations in British Columbia, which allowed them to fish exclusively for a 24-hour period for food, social and ceremonial purposes, and to sell their catch. Some of the Aboriginal fishers who were designated to fish during this period were also licensed commercial fishers. A group of non-Aboriginal commercial fisheries, who were excluded from the fishery during this 24-hour period, conducted a protest fishery during the prohibited time in order to lodge a constitutional challenge against the communal license. They were charged with fishing at a prohibited time, and in defence, filed notice seeking declarations that the governing programme and regulations were unconstitutional under section 15 of the Charter, because they were discriminated against on the basis of their race. The Aboriginals in question were not ‘employees’ *per se*, but the fishing industry was their source of income. The fishing license was their access to the economic system through fishing – a step towards accessing the market system from which they were previously excluded (*R v Kapp* 2008 SCC 41).

⁷⁵⁸S Fredman, “Facing the Future: Substantive Equality Under the Spotlight” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 25.

⁷⁵⁹[1999] 1 S.C.R. 497 [Law].

- whether the ground of discrimination corresponds to the claimants' real needs and circumstances;
- whether the law in question improves the situation of a group that is worse off than the claimant; and
- the significance of the interest affected, both to the claimant and in constitutional or societal terms.⁷⁶⁰

To elaborate further, it was pointed out in *Lovelace v Ontario*⁷⁶¹ that

“The contextual analysis is a directed inquiry; it is focused through the application of contextual factors which have been identified as being particularly sensitive to the potential existence of substantive discrimination. Further, the determination of the appropriate comparator and the evaluation of the context must be examined from the reasonable perspective of the claimant. The question to be asked is whether, taking the perspective of a “reasonable person” in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim”, the law has the effect of demeaning a claimant's human dignity.”

Applying a contextualised approach has numerous advantages: i) it acknowledges the complexity of the way that people experience discrimination, and recognises that the experience of discrimination may be unique, and takes into account the social and historical context of the group; ii) it places the focus on society's response to the individual as a result of the confluence of grounds and does not require the person to slot into rigid compartments or categories; iii) it addresses the fact that discrimination has evolved and tends to no longer be overt, but rather more subtle, multi-layered, systematic, environmental and institutionalised. Justice L'Heureux-Dube, has summed up the benefits of this approach:

“... categories of discrimination may overlap, and ... individuals may suffer historical exclusions on the basis of both race and gender, age and physical handicap or some other combination. The situation of individuals who contract multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender oriented, misconceives the reality of discrimination as it is experienced by individuals.”⁷⁶²

Canada's contextual approach is a means for broadening affirmative action benefits. As clearly illustrated in the *Law* test, it serves as a mechanism for how other courts, especially in South Africa, can be open to ameliorative programmes that involve issues of redistribution. However, the above *Law* test does not constitute elements that must be made out in all

⁷⁶⁰S Moreau “The Wrongs of Unequal Treatment” in F Faraday, M Denike & M K Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 58.

⁷⁶¹2000 SCC 37.

⁷⁶²(*A.G. v. Mossop*, [1993] 1 S.C.R. 554 at 645-646.

cases.⁷⁶³ Fudge argues that this approach in *Kapp* leaves dominant structures and institutional practices in place, while according preference to disproportionately excluded groups.⁷⁶⁴

c) Comprehensive accommodation analysis⁷⁶⁵

In *Meiorin*⁷⁶⁶ the Supreme Court of Canada sent a clear signal regarding the heavy onus on employers to take active steps to avoid discrimination wherever and however possible. In this case the Court endorsed a comprehensive accommodation analysis, which provides for a principled framework for a consideration of whether or not an employer has carried out its positive duty to create equality in the workplace. The analysis is comprised of a three-step test:

- that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁷⁶⁷

Buckley argues:

“[T]he analysis delineates a deliberative and participatory process that encourages the parties involved to scrutinize underlying norms in a reflective manner. It integrates a consideration of the individual and systematic manifestations of discrimination. Further, it builds in consideration of equality norms into the reconstruction of

⁷⁶³S Moreau “The Wrongs of Unequal Treatment” in F Faraday, M Denike & M K Stephenson (eds) (2006) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 59.

⁷⁶⁴J Fudge “The Supreme Court of Canada, Substantive Equality, and Inequality at Work” in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 52.

⁷⁶⁵See M Buckley “*Law v Merion*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the *Charter*” in F Faraday, M Denike & M K Stephenson (eds) (2006) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 190.

⁷⁶⁶A name given to the case *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3. The *Meiorin* decision originated in a labour arbitration where the employer dismissed Tawney Meiorin, a female fire fighter, after she failed a running test. This test was a new aerobic fitness standard, designed to measure aerobic capacity. Ms Meiorin had worked as a fire fighter for a number of years without any problem. The Supreme Court of Canada concluded that the new standard was not justifiable and in its reasoning revolutionised the analysis and standards for accommodation and justification under human rights legislation.

⁷⁶⁷This third step is argued by Judy Fudge to be the innovative element of the comprehensive accommodation approach (J Fudge “The Supreme Court of Canada, Substantive Equality, and Inequality at Work” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 53).

workplace policies and practices. It articulates a ‘transformative ideal for equality law’ that is fully consistent with the norm of substantive equality.”⁷⁶⁸

However, while such an analysis is significant in directly challenging institutional practices, it is limited as it is deployed following successful employment litigation. Baker *at al* argue that to have a systematic impact, the duty to accommodate must be applied at the designing phase of the policy and practice.⁷⁶⁹ In addition, the individuals from groups that are ordinarily excluded from such processes should have an input.⁷⁷⁰

d) Linking positive measures to the right to dignity

The Supreme Court of Canada affirmed the determining role of dignity in *Law* in substantiating equality. Since *Law*, dignity has been used more often in finding substantive discrimination.⁷⁷¹ In *Eldridge v British Columbia (Attorney General)*⁷⁷² the Court ruled that in some circumstances section 15 requires governments to take special measures to ensure that disadvantaged groups are able to benefit from governmental services, including extension of the scope of a benefit to a previously excluded group. In *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur*⁷⁷³ the Court clarified that section 15 cases involving economic interests, economic disadvantages are not necessarily unrelated to a loss of dignity. In *Vriend v Alberta*⁷⁷⁴ the Court’s view indicates that “the need for governmental incrementalism is an inappropriate justification for Charter violations ... (G)roups that have historically been a target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move towards reform one step at a time.”⁷⁷⁵

The linking of the right to dignity to positive measures by the judiciary provides a platform for positive measures to be relevant to poverty issues. The link also allows affirmative action to be relevant in the advocacy for socio-economic rights for the poor. However, Hurley argues that the promise of movement towards affirming economic and social rights through

⁷⁶⁸M Buckley “*Law v Merion: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the Charter*” in F Faraday, M Denike & M K Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 190.

⁷⁶⁹J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 134.

⁷⁷⁰J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 134.

⁷⁷¹M C Hurley “Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions” (Ottawa: Parliamentary Information and Research Service (2005)) 6.

⁷⁷²*Eldridge v British Columbia (Attorney General)* (1997) 3 S.C.R 624.

⁷⁷³*Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur* (2003) 2 S.C.R. 504, 2003 SCC54.

⁷⁷⁴*Vriend v Alberta* (1998) 1 S.C.R 493.

⁷⁷⁵1 S.C.R 493.

the courts has lost some momentum and the courts remain highly ambivalent about whether the harm created by poverty is remediable by the Constitution.⁷⁷⁶

6.3.4 Some observations

The linking of the right to dignity to positive measures by the judiciary in Canada provides a platform for positive measures to be relevant to poverty issues. The link allows affirmative action to be relevant in the advocacy for socio-economic rights for the poor. It also elucidates the role of the judiciary in participating in the process of eradicating socio-economic disadvantage. As indicated earlier in the study, dignity is a relative concept which operates as the basis for the articulation of a universal entitlement to respect for that dignity. In this regard, “the distribution of concrete benefits can therefore be judged according to whether they are consistent with the respect each is equally owed.”⁷⁷⁷ This alludes to the development of a more comprehensive theory of equality which is enforceable through protection of constitutional rights.

Some of the benefits of Canada’s affirmative action – education, employment, economic opportunities, social participation, and pay equity, among others – are directly or indirectly related to socio-economic rights. Some of these benefits allow the beneficiaries to afford a decent standard of living, thereby standing a chance to break some individual cycles of disadvantage. For instance, most of the Aboriginals in Canada are impoverished and have suffered past disadvantage. Now the introduction of the three programmes (ASEP, ASTSIF and ASETS) that are targeted at Aboriginals affords them an opportunity to find better grounds to participate in the economic system through the fishing industry. The programmes also provide them with a platform to afford a decent standard of living, thereby standing a chance *to break some individual cycles of disadvantage* and vulnerability to poverty in their respective communities. The three programmes are also a reflection of how affirmative action can be ‘tailor made’ for a specific targeted group.

Consequently, Canada’s contextual approach is a means for broadening affirmative action benefits. As clearly illustrated in the *Law* test, the contextual approach serves as a mechanism

⁷⁷⁶See M C Hurley “Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions” (Ottawa: Parliamentary Information and Research Service, 2005).

⁷⁷⁷D Réaume “*Law v Canada (Minister of Employment and Immigration)*” (2006) available at www.the-court.ca/wp-content/uploads/2009/06/womenscourt-law.pdf 157 (accessed 09/10/13).

on how the judiciary can be open to ameliorative programmes that involve issues of redistribution.

6.4 India

6.4.1 Aims and purpose of affirmative action in India

Caste hierarchy has existed in India for over three thousand years. Local relationships and networks of fear, subordination and labour are structured through the caste relationships. A caste is described by Kroeber as a “system of social stratification, examples of ranked aggregates of people that are usually rigid, birth-ascribed, and permits no individual mobility.”⁷⁷⁸ Caste in India is more of a social structure, unlike race in the United States and South Africa, where it is a physical condition. There are various opposing views on the origins of the caste system in India, but most hold that caste is an ancient system that has led to immense inequalities in India. The great manifestation of such inequalities in India led to a growing awareness of the need for redress.⁷⁷⁹ Efforts to redress these inequalities were made on two fronts: a) social reformers attempted to change Hindu society to reduce discrimination against other castes; and b) the British government put in place a number of safeguards to “compensate” the victims of discrimination.⁷⁸⁰ The compensatory measures (affirmative action) increased both in scope and drive of implementation after India’s independence.

The terms ‘reverse discrimination’ or ‘positive discrimination’ are used in India for affirmative action, because this involves discrimination in favour of those who until recently had themselves been victims of discrimination. In working towards providing for all persons, India’s Parliament and the judiciary have endeavoured to move beyond formal equality to substantive equality on the ground. Sanakaran argues that the distinction between formal and substantive equality was not acknowledged as such by India’s Constitutional Assembly, but the need for affirmative action provisions was found acceptable.⁷⁸¹

⁷⁷⁸ A Kroeber “Caste” in Seligman (ed) *Encyclopedia of Social Sciences* Vol. 3 (1930) 254. The existence of the caste system is explained on the basis of many and varied theories, which include historical, religious and biological. Within the caste system a person regarded as a part or member of the caste into which he or she is born. Therefore a person remains within that caste until their death, although the exact standing of that caste may vary among regions of India and over time.

⁷⁷⁹ See C Anand *Equality Justice and Reverse Discrimination* (1987).

⁷⁸⁰ India was under British’s colonial rule, which sharpened the social stratification India experiences. Scheduled areas for tribal categorisation were created under the British government.

⁷⁸¹ K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 287.

India is a democratic country which recognises and provides for the right to cultural collectives, given its diverse population. These cultural collectives include diverse religious and linguistic communities, castes and tribes. The Indian Constitution (hereafter IC) developed a multi-layered concept of equality, which emphasises the importance of impact and context in interpreting equality.⁷⁸² Similar to South Africa, India has constitutional provisions that favour certain groups for the advancement of equality. Article 14 states that “the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” In Article 15 (1), the IC declares that the state could not discriminate against any citizen on the basis of caste, religion, race or place of birth. Article 16 (1) further elaborates that all citizens have equality of opportunity in matters relating to employment or appointment or office under the state. In Articles 38, 39 and the Preamble of the IC the primary obligation of the state is to remove economic and social inequalities and in particular economic inequalities. Assisting certain disadvantaged sections is a further function imposed by the state in addition to the primary obligation as a result of the socio-economic history of India. From the constitutional provisions above, the policy of affirmative action in India was given a decisive shape based on two significant approaches. One was the principle of “equality in law”, whereby the state should not deny any person equality before the law. The other principle was “equality in fact”, which gives the state an affirmative duty to remedy existing inequalities.

Furthermore, affirmative action measures in India have had as their primary target, the inclusion of groups which have been excluded by the caste system. This renders India’s affirmative action as a social inclusion policy.⁷⁸³ According to several authors, the caste system in Hindu custom has its foundation within the four *varnas*, which are categorical classifications ranked according to hierarchy. These include *Brahmin* placed on the top, *Kshatriya*, *Vaishya* and *Sudra* at the bottom. There is also a category of “outcastes” placed outside the *varna* categorisation who are now termed “scheduled castes” (SCs) and scheduled tribes (STs).⁷⁸⁴ The four classical castes or categories are fragmented into thousands of local

⁷⁸²K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 287.

⁷⁸³See K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 290.

⁷⁸⁴The expression *dalit* is often used by the groups themselves; see T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 24.

“castes” or *jatis*, which are what circumscribe people’s social life in India.⁷⁸⁵ They exist across India and each area may have dozens of such *jatis*, which are estimated to be between 2 and 3000.⁷⁸⁶ This hierarchical construction also impacts on and reflects the rising order of opportunities and India’s sliding order of disabilities.⁷⁸⁷ In addition, it is also a reflection of the existence of intergroup inequalities (a phenomenon which is also taking hold within South Africa’s African population). As a result there was, and continues to be, a majority of the Indian populace that is socially, economically, educationally and politically backward.

Dashpande elaborates the logic for affirmative action in India based on several points which include:

- The persistence of intergroup economic disparity;
- Dalits continue to suffer from a “stigmatised ethnic identity” because of their untouchability in the past and corresponding social backwardness. There is evidence to suggest that this stigma can affect economic performance adversely, thus perpetuating caste-based inequalities;
- If equality of opportunity between castes is the objective, then affirmative action is needed to provide a level playing field to members of SC and ST communities;
- Social policy ought arguably to compensate for the historical wrongs of a system that generated systematic disparity between caste groups and actively discriminated against certain groups; and
- Caste-based discrimination in labour, land, capital, and consumer goods markets (preventing SCs from entering, say, milk production and distribution) continues both in urban and rural areas. In the labour market this is manifested both as wage discrimination and job discrimination⁷⁸⁸

6.4.2 Beneficiaries and types of benefits

The beneficiaries of affirmative action (backward classes) in India are extraordinarily heterogeneous. They are comprised of scheduled castes (SCs) or *dalitis*; scheduled tribes

⁷⁸⁵“During the colonial times the British had a list or schedule drawn up of those castes which were considered untouchable. This was what led to the phrase ‘scheduled castes’ as a euphemism for ‘untouchables.’ The term untouchable originated early in the twentieth century and was banished from laws and polite discourse by the late twentieth century” (T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 28).

⁷⁸⁶A Dashpande “Equity and Development” *World Development Report* (2006)2.

⁷⁸⁷A Dashpande “Equity and Development” *World Development Report* (2006)2.

⁷⁸⁸A Dashpande “Equity and Development” *World Development Report* (2006)6-7.

(STs) or *adivasis*, and other backward classes (OBCs).⁷⁸⁹ They are victims of entrenched backwardness and disadvantage. The IC also permits the state to make special policy provisions for socially and educationally backward classes (SEBCs), women and children.⁷⁹⁰

SCs and STs (both also known as untouchables) are an accumulation of castes whose defining feature is untouchability. They were identified and scheduled to render them eligible for certain benefits and safeguards. Sowell argues that discrimination against India's untouchables has been among the worst against any group in any society.⁷⁹¹ The untouchables have been outcastes by not being one of the four classified categories of castes and by their occupation, such as working with leather, which is against the tenets of Hinduism.⁷⁹² Untouchability was abolished in the 1950s by the IC. Prior to the abolition of untouchability, discriminatory practices varied considerably.⁷⁹³

The scheduled castes and tribes are specially categorised in the IC and the state is directed to take special care to promote their interests. This constitutional provision was based on the understanding that disabilities derived from caste were the most prominent barriers to equality. Moreover, that intervention was deemed necessary to ensure that social structures of inequality did not reflect in an unbalanced and unequal participation of these disadvantaged sections in the political process and public sphere. However, caste stratification extended beyond the SCs and STs and the Mandal Commission advocated preferential treatment

⁷⁸⁹There are three dimensions linking caste and tribe to socioeconomic status in modern India: geography, occupation and income. STs have tended to live in forests and have been concentrated in rural areas and states that have lower education attainment and are relatively inaccessible. Demographically, tribal habitations are small and sparsely populated and hence the lack infrastructural facilities. Secondly, historically the caste system was occupationally driven; and finally, SC and ST households have substantially lower per capita consumption expenditure than upper castes (see S Desai & V Kulkarni "Changing Educational Inequalities in India in the Context of Affirmative Action" (2008) *Demography* Vol. 45 No. 2 245 – 270). Historically the SCs or *dalits* would be the benchmark for backwardness and any other group claiming affirmative action benefits would be required to prove their backwardness. Conversely, it is now accepted that other backward classes need not be those whose backwardness is equal to that of the *dalits* (K Sankaran "Towards Inclusion and Diversity: India's Experience with Affirmative Action" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 290).

⁷⁹⁰Article 15 (3) of the Indian Constitution.

⁷⁹¹T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 24 – 25.

⁷⁹²T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 25.

⁷⁹³According to the British census of 1941, over 48 million residents of India were considered untouchables, more than 12 % of the population of colonial India (which included what are now the nations of Pakistan and Bangladesh as well as parts of Burma). The discriminatory practices they suffered include: denial of access to public facilities such as wells, schools, post offices and courts; prohibition of entry into Hindu temples; exclusion from professions and profitable occupations; residential segregation, typically outside the village boundaries; denial of access to services such as restaurants, theatres and barbershops; Prohibition from using horses, bicycles, umbrellas, footwear or wearing jewellery; and restrictions on movement by requiring prescribed distance from persons of higher caste while on the roads and streets (M Galanter *Competing Equalities: Law and the Backward Classes in India* (1984) 15).

benefits for other backward classes (OBCs).⁷⁹⁴ This category is located above the *dalitis* but significantly below the upper castes in terms of socio-economic achievements.⁷⁹⁵

India has various affirmative action schemes to offset the inequalities of its society. The most commonly used is a policy of reservations. Recognising the insufficiency of equal treatment to ameliorate past disadvantage suffered by the lowest social groups, the constitution provided “reservations” for the scheduled castes and scheduled tribes. These “reservations” exist in the following areas:

- Representation in parliament (political reservations) – such reservations are only for the benefit of the SCs and STs but not for OBCs. According to Galanter, political reservations are written into the Constitution and the provisions make known the certainty of the drafters of the IC as well as of policy makers in modern-day India.⁷⁹⁶ Both SCs and STs are entitled to representation in all legislatures in proportional numbers;
- Job reservation – SCs and STs are entitled to representation in all jobs in government. This category of reservations is very controversial and also extends to OBCs. Some of the controversy has emanated from the argument whether or not the wholesale expansion of job reservations for the OBCs is in harmony with the will of the IC or not. Unlike political reservations, provisions for job reservations are not obligatory as the IC states that the state may take such measures as necessary for the special benefit of the OBCs.⁷⁹⁷ However, OBCs collectively enjoy 27% of job reservations in India;

⁷⁹⁴ The Government of India appointed the second Backward Classes Commission under the chairmanship of Mr B.P Mandal. The task of the Commission (Mandal Commission) was to “determine the criteria for defining the socially and educationally backward classes and to recommend steps to be taken for the advancement of backward classes so identified. The Commission submitted a report (the Mandal report). The Commission concluded that most of the socially and educationally backward castes were the backward classes and they formed 52 per cent of the Indian population, excluding the SCs and the STs, who were 22.5 per cent of the total population). The report listed over 3,500 separate groups, broken down by state, which qualified as socially and educationally backward according to its criteria. Although the majority of these groups were identified by traditional caste names, there are a number of indications that “low caste” and “backward class” were not co-extensive (Mandal Report, First Part Vol. 1 4, 23).

⁷⁹⁵ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 25.

⁷⁹⁶ See M Galanter *Competing Equalities: Law and the Backward Classes* (1984) 14 - 17.

⁷⁹⁷ There have been decades of experimentation in India with achieving a proper balance between caste identity and economic status in defining classes for affirmative action benefits, especially the OBCs. In 1961 a first national Backward Classes Commission Report was released from the federal government to the states. It suggested that “it would be better to apply economic tests than to go by caste” (Kalelkar Report conducted under the chairmanship of Kaka Kalelkar following a presidential order of 29 January 1953). This view was reinforced in the Balaji decision striking down the state plan in Karnataka (formerly known as Mysore) as overly dependent on caste identity and emphasising the importance of economic criteria (M.R Balaji v State of Mysore AIR 1963 SC 649). This resulted in the state of Karnataka abandoning reliance on caste identity in favour of economic criteria to define OBCs during the period of 1963 to 1972. In 1990 a report of the Third

- The third category is education reservation. Different states in India may grant concessions short of outright reservations to handicapped persons. According to Andrews, there is no legislation mandating the equal and fair representation of the disabled in the workforce.⁷⁹⁸

In addition to reservations, there is a quota system in India and the literature indicates that India is the country with the most extensive quota system in the world. It forms the greater part of the preferential policies designated for the social upliftment of the disadvantaged groups. Numerical targets are set for the reservation of seats and jobs for persons from disadvantaged groups in India.

The reasoning behind reservations in India is that special opportunities should be given for some over and above the general provision of opportunity for all. Such reasoning embraces the goals of substantive equality. “In the seventies, formal and substantive equality were no longer viewed as mutually opposing and special measures were seen as a facet of equality, thus permitting reservations to exceed 50%.”⁷⁹⁹ In the *Sawhey* case the court reiterated the 50% rule in affirmative action in dealing with reservations and quotas as a measure to handle vertical inequality such as along caste hierarchies. However, since the government was the major employer in the first decades of independence, the life chances of the SCs and the STs increased through the opportunities that opened up in the government, the judiciary and public enterprises. Such an increase had a direct impact on the beneficiaries’ inherent worth and the opportunities accorded to them through the reservation policy.

Several commentators argue that there has been too much dependence on “reservation” *per se* and it has not been matched by efforts to train the designated beneficiaries to actually benefit from access.⁸⁰⁰ Some argue that in spite of the existence of a constitutional directive for affirmative action, its implementation has had all kinds of negative effects, including

Backward Classes Commission by Justice O Chinnappa Reddy indicated that reliance on economic criteria resulted in a programme that “mostly benefited certain dominant communities.” However, “the poor of the upper castes easily beat the poor of the lower castes” in all the relevant tests for admission to educational and government employment (Karnataka Third Backward Classes Commission Report (1990) 17 – 18).

⁷⁹⁸Y Andrews “Affirmative Action: A Suspected Equaliser?” (1992)SAIPA: *Journal of Public Administration* Vol 27 34 - 43

⁷⁹⁹K Sankaran “Towards Inclusion and Diversity: India’s Experience with Affirmative Action” in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 294.

⁸⁰⁰V K Borooah, A Dubey & S Iyer “Has Job Reservations been Effective? Caste, Religion and Economic Status in India” (2005). A paper presented at the 2005 Annual Conference on Religion, Economics and Culture.

stigmatising the beneficiary groups.⁸⁰¹ As the caste system is breaking down, individual castes are becoming bigger and stronger, breaking down sub-caste barriers in order to compete more effectively with other similar caste combinations for access to benefits such as education, government jobs and political power.⁸⁰² The caste label remains, but the reality underlying it has changed and the goals have also changed. Hierarchical ideas have been challenged and weakened particularly in the cities, but in rural India to be part of SCs and STs is still a social burden.⁸⁰³

However, affirmative action has been relatively successful in India. Considerable gains were made in terms of bridging disparities in literacy and elementary and secondary education.⁸⁰⁴ As a result inequalities (especially educational inequalities) between SCs and STs and other groups declined.⁸⁰⁵ Desai and Kulkarni points out that “it is difficult to distinguish between changes that are associated with affirmative action vis-à-vis those that are secular in nature.”⁸⁰⁶ During a period of expansion, increases for all groups may result, particularly for the poor and the marginalised, as a result of increased construction and provision of services.⁸⁰⁷ The decline in education inequalities could be attributed to the construction of schools, midday meal programmes, increased parental demand for schooling, and growing educational requirements by employers.⁸⁰⁸

In their analysis Desai and Kulkarni found out that educational inequality in India between SCs, STs and upper-caste Hindus and other groups has declined over time.⁸⁰⁹ They noted a mild decline in inequalities during middle school and high school, although these improvements are modest in extent and not statistically significant. College inequalities have narrowed for STs males but for other groups, SC or *dalit* males and females, and ST females,

⁸⁰¹See T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 26 - 28; D Kumar “The Affirmative Action Debate in India” (1992) *Asian Survey* Vol. 32 No. 3 290 – 302.

⁸⁰²D Kumar “The Affirmative Action Debate in India” (1992) *Asian Survey* Vol. 32 No. 3 290 – 302.

⁸⁰³T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 25 .

⁸⁰⁴G Charlton & N Van Niekerk *Affirming Affirmative Action Beyond* (1994) 40.

⁸⁰⁵Information about the educational differences between SCs, STs and the general population comes from published tabulations of census and other government data or from cross-sectional analyses. Not much is known about the changes in these differences over time (S Desai & V Kulkarni, “Changing Educational Inequalities in India in the Context of Affirmative Action,” (2008) *Demography*, Vol. 45 No. 2 245 – 270 254).

⁸⁰⁶S Desai & V Kulkarni “Changing Educational Inequalities in India in the Context of Affirmative Action,” (2008) *Demography* Vol. 45 No. 2 245 – 270 254.

⁸⁰⁷See K Silva & A Hettihewage “Poverty, Social Exclusion and the Impact of Selected Legal Measures against Caste Discrimination in South Asia” in P Robson & A Kjonstad *A Poverty and the Law* (2001) 69.

⁸⁰⁸S Desai & V Kulkarni “Changing Educational Inequalities in India in the Context of Affirmative Action” (2008) *Demography* Vol. 45 No. 2 245 – 270 254.

⁸⁰⁹The rest of this paragraph heavily draws from S Desai & V Kulkarni “Changing Educational Inequalities in India in the Context of Affirmative Action” (2008) *Demography* Vol. 45 No. 2 245 – 270 267 – 269.

inequality seems to be widening rather than narrowing. Desai and Kulkarni assert that there is little evidence to support the fact that higher-income SCs and STs, the so-called creamy layer, are disproportionately capturing the benefits of affirmative action policies. Their results also reveal that with rising income, STs are more able than SCs to achieve parity in college graduation with upper-caste Hindus and others. Furthermore, the declining educational disadvantage of SCs and STs, who are beneficiaries of preferential treatment, suggest that affirmative action policies may have had some impact, although they continue to lag behind the upper castes.⁸¹⁰ On the other hand, the incidence of poverty amongst STs continues to be very high at 51.14 per cent. It is much higher when compared to 35.97 per cent in respect of general categories in 1993 – 1994.⁸¹¹

The inequalities between upper-caste Hindus and SCs/STs diminished during the 1990s, a period of intensified affirmative action directed at SCs and STs.⁸¹² The decline in inequality at the primary level may be associated with affirmative action in employment. The majority of the jobs in public sector enterprises in 1999 were categorised as Group C,⁸¹³ which often required education up to Grades 8 or 10, and Group D,⁸¹⁴ which required basic literacy. Citing Indiastat 2006, Desai and Kulkarni note that in 1999 29 per cent of the public sector employees in Groups C and D were from SC or ST groups. In addition, 13 per cent of these targeted groups who were at the higher level of education fell in this category, in spite of the mandated quota of 22.5 per cent. They further argue that it may be ambiguous that the changes they observed are the results of affirmative action.⁸¹⁵ STs and SCs critiques of affirmative action charge that these policies are poorly implemented and have had little effect.⁸¹⁶ Galanter notes that village schools continue to discriminate, which prevents the targeted groups from taking full advantage of these reservations at college level.⁸¹⁷ It is therefore necessary to ascertain whether there are mechanisms in India to ensure that benefits reach the targets.

⁸¹⁰S Desai & V Kulkarni, "Changing Educational Inequalities in India in the Context of Affirmative Action," (2008) *Demography* Vol. 45 No. 2 245 – 270 269.

⁸¹¹See Report of the Steering Committee on *Empowering the Scheduled Tribes for the Tenth Five Year Plan* (2002- 2007), Government of India Planning Commission New Delhi October 2001 49.

⁸¹²S Desai & V Kulkarni, "Changing Educational Inequalities in India in the Context of Affirmative Action" (2008) *Demography*, Vol. 45 No. 2 268.

⁸¹³Driver, technician, typist, mechanic, among others.

⁸¹⁴Food service workers, peon, sanitary workers, watchman, among others.

⁸¹⁵S Desai & V Kulkarni "Changing Educational Inequalities in India in the Context of Affirmative Action" (2008) *Demography* Vol. 45 No. 2 245 – 270 268.

⁸¹⁶S Desai & V Kulkarni, "Changing Educational Inequalities in India in the Context of Affirmative Action" (2008) *Demography* Vol. 45 No. 2 245 – 270 253.

⁸¹⁷See M Galanter *Competing Equalities: Law and the Backward Classes in India* (1984) 17.

6.4.3 Mechanisms to ensure benefits reach the targets

a) Backwardness as a criterion

The experience of using class alone as a criterion to identify beneficiaries of affirmative action has led to the development of a multi-factor approach utilised in the second Backward Class Report (Mandal Report). According to this approach, caste identity can be an important indication of backwardness, as economic status alone is not sufficient. The report drew on a variety of indicators to determine backwardness. Census data were utilised, which revealed that 52 per cent of the population was socially and educationally backward, and that the SCs and the STs comprised 25.5 per cent of the population.⁸¹⁸ The Mandal Commission made an evaluation of the groups' degree of backwardness based on caste as well as social,⁸¹⁹ educational⁸²⁰ and economic parameters.⁸²¹

In the *Sawhney* case the court rejected the government's effort to modify the Mandal report by adding a 10 per cent reservation based on purely economic criteria.⁸²² Sankaran points that the expression "classes" used in the IC was not used by the courts in a Marxist sense of economic backwardness alone, but stood for groups who could be treated as backward based on a multiple-factor approach.⁸²³ She further indicates that over the past twenty years the judiciary in India has affirmed the utilisation of caste as a starting point for providing reservations, even though it cannot be an exclusive identifier as it would go contrary to the non-discrimination clauses of the IC.⁸²⁴ According to Justice Jeevan Reddy, low caste, poverty and inferior kind of occupation go together.⁸²⁵ Some members of the designated group may be well off, but by and large they are disadvantaged. In this way, determining backward classes using castes is justified, as one can investigate a caste to find out whether it

⁸¹⁸K Sankaran "Towards Inclusion and Diversity: India's Experience with Affirmative Action" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 292.

⁸¹⁹Social parameters – perceptions held by others, extent of manual work, women's work participation rate; incidence of underage marriage.

⁸²⁰Educational parameters – school enrolment rate, incidence of matriculates, distance of school from community habitation.

⁸²¹Economic parameters – incidence of those living in temporary shelters, incidence of debt for consumption needs, asset levels.

⁸²²*Indra Sawhney v Union of India* AIR 1993 SC 477.

⁸²³K Sankaran "Towards Inclusion and Diversity: India's Experience with Affirmative Action" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 292.

⁸²⁴K Sankaran "Towards Inclusion and Diversity: India's Experience with Affirmative Action" in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 293. In the United States case *Regents of the University of California v Bakke*, 438 U.S 265 (1978), J Powell indicated that "in order to get beyond racism, we must first take account of race".

⁸²⁵See the Karnataka Third Backward Classes Commission Report (1990).

is backward socially, economically and educationally and then if it is found to be so, designate it as a backward class.

b) Creamy layering

In the Mandal judgement the Supreme Court of India affirmed the use of caste as a factor in ascertaining the eligibility of an individual for affirmative action benefits.⁸²⁶ The decision was held, while confirming that strictly economic criteria could not be the sole basis for identifying the “backward class” of citizens contemplated by the IC. The court held that OBC membership only created a rebuttable presumption that a member needs preferential treatment.⁸²⁷ To address the uneven distribution of benefits among the backward class, the Supreme Court directed the state to adopt an economic means test to screen out those advanced backward class members who are termed the “creamy layer”. These members did not require government assistance and this was a step towards defusing the contentious.

The creamy-layer criterion set by the government of India covers the well-to-do among the OBCs.⁸²⁸ The argument behind this is that since preferential treatment programmes have improved the life chances of some members of the designated groups, especially those who are now in the middle to upper classes, such policies should not favour them. It is the idea that affirmative action should be directed towards the poor or in essence the “more deserving”. Moreover, the fundamental aim is that socio-economic factors ought to be the measuring stick for who should have access to affirmative action.⁸²⁹ The exclusion of the creamy layer among OBCs would ensure the benefits of reservation reach the truly underprivileged among the backward classes. The effectiveness of the notion of the creamy layer is questionable, as it does not apply to STs and SCs.

⁸²⁶ *Indra Sawhney v Union of India* AIR 1993 SC 477.

⁸²⁷ See *Indra Sawhney v Union of India* AIR 1993 SC 358 – 360.

⁸²⁸ The children of the President and Vice-President of India, Judges of the Supreme Court and High Courts, the Chairmen and Members of the UPSC and the State Public Service Commission are excluded from the benefits of reservations. Constitutional authorities like the Chief Election Commissioner and the Comptroller and Auditor General of India, the direct recruits among Group A officers of All India Central and State services, those in comparable posts in PSUs, banks, insurance organisations, universities and private employment also come under the categorisation of “creamy layer”. Professionals like doctors, lawyers, financial and management consultants and wealthy agricultural land owners are also screened out. For the detailed criteria to identify the creamy layer see National Commission for Backward Classes website <http://ncbc.nic.in/html/creamylayer.htm> (accessed 11/04/11).

⁸²⁹ Several opponents of the current affirmative action policy in South Africa claim there is a growing polarisation between the small, new black elite class and the masses in South Africa (see S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2004) University of Natal Press 4 - 10).

6.4.4 Some observations

The utilisation of a multiple-factor approach to determine backwardness for OBCs is a significant development in India's remedial efforts. Disadvantage cannot be identified by one criterion as there are various factors that constitute disadvantage.⁸³⁰ Putting the policy within the context of the aims of substantive equality, this radical approach seems to have embraced the aims of substantive equality despite the empirical studies. In this regard, India provides a shift in thinking on how class can be utilised to find a more nuanced approach to distribute benefits. This to some extent allows for innovative idealism for dealing with the actual problems the targeted groups are facing.

The caste system had excluded the targeted groups, while the reservations serve fairly as a *recognition of individual, community and systematic cycles of disadvantage*. In addition, the reservations afford the designated groups an opportunity to be part of India's mainstream society, which not only *upholds respect for their dignity* but also *affirms their identity* and *paves the way for full social participation* for them. Affirmative action thus increases their chances of living a dignified life. As indicated earlier in the previous chapters, persistent inequalities and poverty impose limitations on affording a dignified life. This means that some benefits of affirmative action provide a platform for achieving a dignified life and social inclusion.

India's reservation policy reflects the *promotion of human dignity* and is a step towards *full social participation*. It also reflects the spirit of substantive equality – the removal of barriers to allow the disadvantaged the opportunity to advance in life. In addition, the reservations reflect India's ambitious approach to *breaking cycles of disadvantage* among the SCs, STs and OBCs. Considering that these beneficiaries form the majority of India's population, such an ambitious approach was integral to ensuring an integrated Indian society. It also reflects a legitimate attempt at political and social remediation of historical exploitation, denial of *equal respect for identity* and failure to *promotion of dignity*. Furthermore, it reflects a sensible political strategy to ensure the sustainability of India's constitutional arrangement. The political reservations resonate with the argument that political rights are vital for effective economic participation, as pointed out in the previous section. Consequently, the

⁸³⁰See Chapters 2 and 3 of this study on determinants of poverty and inequality.

reservations seek to confer socio-economic benefits on the victims of caste hierarchy in India, thereby giving weight to the usage of class as a criterion to benefit.

6.5 Conclusion

The implementation and concept of affirmative action continue to be debatable in several jurisdictions around the world. There is no general theory that can deal with the reduction of disparities among status groups and managing status conflicts at the same time.

In the USA it commenced in the 1960s with the issuing of an executive order to introduce the Committee on Equal Employment Opportunity. It was targeted at minorities and women. Minorities were defined in terms of race only to mean: Blacks, Hispanics, American Indian or Alaskan Native and Asian or Pacific Islander. Most affirmative action measures in the USA seek to promote the inclusion of marginalised groups in one of the three areas of education, employment and government contracting. The categorisation of beneficiaries for positive measures in the USA has been argued to be under- and over-inclusive. The judiciary in the USA employs one of three standards of review or scrutiny in analysing the constitutionality of disputed legislation or policy (such as affirmative action). These include strict scrutiny, intermediate scrutiny and rational basis review. Empirical evidence indicates that the impact of affirmative action on poverty and inequality is minimal.

In Canada, affirmative action aims to deal with systematic discrimination (ameliorating conditions of disadvantage) and promoting employment equity. There are four categories or groups of beneficiaries for affirmative action benefits: women, person with disabilities, Aboriginal peoples, and members of the visible minorities. These categories of people are also disproportionately composed of the group of poor people in Canada and have higher rates of poverty than average. The Abella report had an influence on the categorisation of these groups as well as on the development of affirmative action policies in Canada. There are significant mechanisms and opinions that have developed in Canada to ensure these groups benefit from affirmative action: a) the employment equity criteria; b) the “narrow lens” approach; c) viewing affirmative action within the international human rights framework; and d) linking positive measures to the right to dignity. However, the impact of

affirmative action policy on poverty and socio-economic inequality in Canada has been minimal.

India is the final jurisdiction this chapter explored. The terms ‘reverse discrimination’ or ‘positive discrimination’ is used in India for affirmative action; because it involves discrimination in favour of those who until recently had themselves been victims of discrimination. In working towards providing for all persons, India’s Parliament and the judiciary have endeavoured to move beyond formal equality to substantive equality on the ground. The policy of affirmative action in India was given a decisive shape based on two significant approaches. One was the principle of “equality in law”, whereby the state should not deny any person equality before the law. The other principle was “equality in fact”, which gives the state an affirmative duty to remedy existing inequalities. Affirmative action measures have had as their primary target the inclusion of groups which were excluded by the caste system. This makes India’s affirmative action policy a social inclusion policy.

The beneficiaries of affirmative action (backward classes) in India are extraordinarily heterogeneous. They comprise of scheduled castes (SCs); scheduled tribes (STs) and other backward classes (OBCs). India has various affirmative action schemes to offset the inequalities of its society. The most commonly used is a policy of reservations which include: political reservation; job reservation and educational reservation. In addition to reservations, there is a quota system in India. The literature indicates that India is the country with the most extensive quota system in the world. It forms the greater part of the preferential policies designated for the social upliftment of the disadvantaged groups. The reasoning behind reservations in India is that some should be afforded special opportunities over and above the general provision of opportunities for all. Thus backwardness is used as a criterion for benefits. To make sure benefits are awarded to the targeted group, the ‘creamy layering’ concept has been implemented and the judiciary has had an active role as well. Empirical studies indicate that social discrimination in India is still strong and pervasive. The next chapter will explore the affirmative action policy in South Africa.

CHAPTER SEVEN: AFFIRMATIVE ACTION IN SOUTH AFRICA

7.1 Introduction

In general, the post-apartheid era has focused heavily on redressing the injustices of the past in the wake of irresistible popular demands for rapid structural change. In the quest to govern the promotion of social justice and the eradication of inequalities, an active intervention was inevitable. Such quest and intervention feed on the attempt to advance persons who were previously disadvantaged to uplift themselves from poverty through education and joining the labour force, but “were thwarted by discrimination, prejudice and institutional lag.”⁸³¹ This saw the implementation of the affirmative action policy in South Africa as a way to purposefully promote those previously disadvantaged. The underlying principle for implementing affirmative action was that “mere equality of opportunity would not be equitable, as many workers would start with a handicap and that true equality and would be achieved only by strong measures ... and by the purposefully planned placement and development.”⁸³² The debate on affirmative action has recently moved to a critique of the outcomes which have resulted, particularly in relation to the increase in intergroup inequalities and widening of the poverty gap. The literature leaves little doubt about the serious concerns which have arisen on this score.

This chapter provides an overview of affirmative action policy in South Africa, highlighting the impact of the policy. Part 1 will explore the aims and purpose of affirmative action in South Africa. Following that, the legal defence of affirmative action policy in South Africa is discussed in part 2. Beneficiaries of affirmative action and types of benefits are explored in part 3, together with the race vs. class criterion debate. Part 4 contains some concluding remarks.

⁸³¹M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” (2003) *Southern African Business Review* Vol. 7 (1) 17 17.

⁸³²M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” (2003) *Southern African Business Review* Vol. 7 (1) 17 18.

7.2 Aims and purpose of affirmative action in South Africa

The apartheid regime left pervasive racial disparities whose effects will remain a part of South African society for generations to come. Race was made to be biologically real and neither was it any less real in social, political and behavioural terms.⁸³³ The National Party government, which ruled South Africa from 1948 to 1994, transformed the discrimination and segregation that prevailed under colonial rule into a politically and legally enforced reality.⁸³⁴ The Population Registration Act⁸³⁵ and its amendments required that all South Africans be classified by officially recognised racial categories and registered as such. In addition, a labyrinth of laws and policies ensured that black South Africans' access to resources through employment, access to property and other economic activity was severely circumscribed.⁸³⁶ Racial divisions between skilled and unskilled workers, apartheid wage gaps, poorly educated workers, dictatorial management styles and lack of protection for the most vulnerable workers were just some of the consequences.⁸³⁷ As a result of such a history, the protection of individual rights with restorative justice for the historically excluded groups was almost inevitable in post-apartheid South Africa.⁸³⁸ With the protection of individual rights, came along re-evaluation of former official state policies that overtly discriminated against racialised groups. The post-apartheid government was to use all legal means, including affirmative action, to achieve procedural as well as substantive justice. Affirmative action in South Africa became an explicitly legal and constitutional remedy to rectify race-based inequalities created by the apartheid regime. Furthermore, affirmative action was a policy strategy aimed at building a democratic and multiracial nation in which justice and equality were guaranteed to groups and individual citizens. Thus affirmative action in South Africa is generally conceptualised as the pursuit of equality and hence its justification is both to rectify past injustice and diversifying the future talent pool of the nation.

⁸³³See N Alexander "The Struggle for National Liberation and the Attainment of Human Rights in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 50.

⁸³⁴See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 4 - 17.

⁸³⁵30 of 1950.

⁸³⁶See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) and J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2006) 3.

⁸³⁷See S Terreblanche *A History of Inequality in South Africa 1652- 2002* (2002) 4 - 17.

⁸³⁸See D Featherman "Introduction: Twins Born at Different Times" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 9 – 24.

According to Sachs, the ANC formally tabled the notion of affirmative action as part of the negotiated settlement of the mid-1990s.⁸³⁹ There were two options before the drafters of the Constitution: a) to simply repeal all apartheid laws, adopt a new Constitution and incorporate the Bill of Rights; and b) to correct the injustices of the past by seizing and redistributing any wealth that had been accrued unfairly under apartheid. Priority was given to the cautious negotiation of an affirmative action strategy that would correct the imbalances of the past over time, acknowledging that the process of determining accessibility to opportunities would have to be a judicious one.⁸⁴⁰ As a result, in the new dispensation the judiciary has shaped the legal defence for affirmative action in South Africa, as the next section will show.

7.3 The legal defence of affirmative action in South Africa

Affirmative action is one form of redress that “has emerged as one of the most controversial and divisive issues in post-apartheid South Africa.”⁸⁴¹ Like the constitutions of many other countries, the South African Constitution confers the right to equal protection and benefit of the law, and the right to non-discrimination (s 9). However, what separates the South African Constitution from most of its counterparts around the world is the explicit endorsement of restitutionary or affirmative action measures.

Affirmative action in South Africa has been implemented with various goals in mind and as a result its justification lacks clarity.⁸⁴² The Constitution of South Africa aims to serve as a vehicle whereby inequalities may be minimised. One of its central goals is to transform society and ensure substantive equality.⁸⁴³ The constitutional provision allowing for

⁸³⁹See A Sachs (1995) “Affirmative Action and the New Constitution” (ANC Department of Information and Publicity).

⁸⁴⁰A Sachs (1995) “Affirmative Action and the New Constitution” (ANC Department of Information and Publicity).

⁸⁴¹O Dupper “Affirmative Action: Who, How and How Long?” (2008) 24 *SAJHR* 426.

⁸⁴²O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 187 -195.

⁸⁴³Section 9 of the Constitution declares that:

- 1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 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.
- 3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

affirmative action measures is found in section 9(2). A significant amount of generic and specific legislation has been passed to address racial, gender and disability discrimination. The new government set about transforming the whole legislative framework of labour relations to give fruition to the obligations contained in the Constitution. Recognising the importance of international labour standards and the obligations imposed by the Constitution, the ANC government espoused a new labour legislative framework.⁸⁴⁴

The rights found in these Acts are nonetheless subject to a limitation clause.⁸⁴⁵ The challenge, though, is to allow the rights to be limited only under strict conditions. If the Constitution's Bill of Rights simply allowed any kind of restriction, its very purpose would be undermined.⁸⁴⁶ As a result, section 36 of the Constitution, known as the limitation clause, lays down a test that any limitation must meet. The two central concepts in this test are reasonableness and proportionality. Any restriction on a right must be reasonable and proportional to the impact or extent of the restriction. In addition, the restriction must match the importance of the aim served by the limitation of the right.⁸⁴⁷ Rights can also be limited according to section 37 of the Constitution, which provides that rights can be suspended if necessary during a state of emergency.

The Employment Equity Act 55 of 1998 (EEA) is the main piece of legislation that regulates affirmative action programmes in South Africa in general and in the workplace in particular. The EEA addresses the legacy of job reservation and exclusion of Africans from high-level positions in the workforce. The "designated groups" specified in the EEA are all those previously discriminated against – Africans, women and people with disabilities. The Act stipulates that affirmative action measures should be instituted to the benefit of designated

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- 5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁸⁴⁴ Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997 (BCEA); Employment Equity Act 55 of 1998 (EEA); Occupational Health Safety Act 85 of 1993 (OHSA); Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA); Unemployment Insurance Act 63 of 2001 (UIA); and the Skills Development Act 97 of 1998 (SDA); the White Paper on Transformation on the Public Service (DPSA 1995); the White Paper on Affirmative Action in the Public Service (DPSA 1998); the 1997 White Paper on an Integrated National Disability Strategy; the Promotion of Administrative Justice Act 3 of 2000; the Broad Based Black Economic Empowerment Act (BBBEEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which also provides an affirmative action provision in section 14(1):

"It is not unfair discrimination to take measures designated to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons."

⁸⁴⁵ Section 36 of The South African Constitution.

⁸⁴⁶ The Limitation Clause www.concourt.gov.za/text/rights/bill.html (accessed on 17/04/13).

⁸⁴⁷ The Limitation Clause www.concourt.gov.za/text/rights/bill.html (accessed on 17/04/13).

groups, including preferential treatment and numerical goals, but excluding quotas.⁸⁴⁸ The constitutionality of the EEA depends on how the affirmative action provision in section 9(2) of the Constitution is viewed in relation to the right not to be unfairly discriminated against.⁸⁴⁹ The EEA gives effect to this Constitutional provision and seeks to regulate affirmative action measures in employment.

In the *Brink*⁸⁵⁰ case the Court held that the equality provision could be used not only to prohibit discrimination, but also to remedy the effects of past discriminating practices. However, effective affirmative action proves to be challenging if a formal interpretation of the right to equality is adopted, since the positive discrimination against a particular individual would lead to the unequal treatment of that individual. Conversely, a substantive conception of equality recognises the inequalities of the past discrimination and therefore makes allowance for positive discrimination so as to achieve equality. Consequently, affirmative action should be seen as a means to enable the disadvantaged and the excluded to get a fair chance to compete competitively with their advantaged counterparts in society.⁸⁵¹ In simple terms, affirmative action is imperative in giving substance to equity for the disadvantaged through advocating for substantive equality.

Sheppard argues that whether affirmative action provisions are regarded as exceptions to, or interpretative of, equality clauses, they can have two legal implications.⁸⁵² She points out that if we see affirmative action clauses as exceptions to human rights, we might be inclined to interpret them narrowly in line with the notion that legislation conferring human rights should

⁸⁴⁸The EEA contains Codes of Good Practice whose purpose is to serve as a guide to employers, employees and trade unions to understand and implement the key principles of the EEA on the employment of the people across designated groups. There are 7 Codes:

- The “Preparation, Implementation and Monitoring of Employment Equity Plans”;
- The “Key aspects of HIV and AIDS Employment”;
- The “Employment of People with Disabilities”;
- The “Integration of Employment Equity into Human Resource Policies and Practices”;
- The “Code of Good Practice for the Basic Conditions of Employment and Pregnancy”;
- The “Code of Good Practice on the Handling of Sexual Harassment Cases”, and
- The “Code of Good Practice on the Arrangement of Working Time”.

⁸⁴⁹Van Eck B.P.S. “Some Thoughts on the Constitutionality of the Employment Equity Act 55 of 1998” (1999) *De Jure* Vol. 32 No.1 at 160 – 168.

⁸⁵⁰*Brink v Kitshoff* 1996 (4) SA 197 (CC).

⁸⁵¹See Department of Public Service and Administration Green Paper, 1997 – “A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service”, Notice 851 (Department of Public Service and Administration).

⁸⁵²C Sheppard “Litigating the Relationship between Equity and Equality” (1993). A Study Paper prepared for the Ontario Law Reform Commission 19 – 20.

be interpreted broadly and in favour of those rights.⁸⁵³ If equality is restrained by affirmative action, then section 9 of the Constitution should be strictly construed.⁸⁵⁴ 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 adopted. This equality clause thus authorises action to eradicate entrenched and systematic forms of social disadvantage.

Affirmative action policies in South Africa are not inherently unconstitutional, “not because they are exempt, but because they are not unfair.”⁸⁵⁵ The term “unfair discrimination” must also be viewed in connection with the “affirmative action” provision contained in section 9(2).⁸⁵⁶ The *Van Heerden* judgement brought conceptual clarity to the Court’s earlier jurisprudence on affirmative action and its legal justification. This case is explored further below.

The Van Heerden case

Mosoneke J, on behalf of the majority, stressed that remedial measures are an essential part of the right to equality to redress existing inequalities, if they fall within the requirements of section 9(2) of the Constitution. He further states that the provisions of section 9(1) and section 9(2) are complementary, as both contribute to the constitutional goal of achieving equality to ensure “full and equal enjoyment of all rights.”⁸⁵⁷ Thus such measures are not presumptively unfair. The primary objective was to promote the achievement of equality and the hence differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination was warranted, provided the measures were shown to conform to the internal test set by section 9(2). The Court noted that it could not accept that the Constitution authorised measures but whilst also label them as presumptively unfair. The presumption of unfairness in regard to such measures requires that the judiciary second guess the legislature and executive concerning the appropriate measures to surmount the effect of unfair

⁸⁵³C Sheppard “Litigating the Relationship between Equity and Equality” (1993). A Study Paper prepared for the Ontario Law Reform Commission 19 – 20; See also N Smith “Affirmative Action Under the New Constitution” (1995) *SAJHR* 84 – 101.

⁸⁵⁴N Smith “Affirmative Action Under the New Constitution” (1995) *SAJHR* 84 – 101.

⁸⁵⁵See A Sachs “The Constitutional Principles Underpinning Black Economic Empowerment” in X Mangcu, G Marcus, K Shubane & A Hadland (eds) (2007) *Visions of Black Economic Empowerment* (2007) 9 – 17.

⁸⁵⁶For more on the interpretation of “unfair” discrimination by the Constitutional Court see: *Brink v Kitshoff*; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

⁸⁵⁷*Minister of Justice v Van Heerden* 2004 (6) SA 121 (CC) [30].

discrimination. The Court therefore held that the enquiry had to be limited to evaluating whether a measure fell within the ambit of section 9(2) of the Constitution.

The *Van Heerden* decision dealt extensively with the equality right and held that it included remedial or restitutionary equality. It had to be shown that measures purported to promote the achievement of equality had been designed to protect and advance persons disadvantaged by unfair discrimination. The Court firmly rejected the strict scrutiny test⁸⁵⁸ as applied in USA and which had appeared to be viewed as appropriate by certain authorities and judges. A new standard was established for qualifying legitimate and constitutional restitutionary measures which favoured a standard of rationality over reasonableness. The requirement of justifiable affirmative policies still remained, but the Court in *Van Heerden* employed a standard of rationality which was a departure from the standard of reasonableness which had been used in the previous cases.⁸⁵⁹ In earlier judgements the affirmative action measure had been analysed under section 9(3).⁸⁶⁰ This approach considered restitutionary measures to be discriminatory in nature, although the unfairness of the measure could be rebutted by the state with a covering justification in line with section 9(5).

The Court created a strict test according to which a measure is examined to determine whether it can pass under section 9(2):⁸⁶¹

a) It must target persons or categories of persons who have been disadvantaged by unfair discrimination – the majority decision confirmed that measures chosen had to favour a group or category designated in section 9(2), although it conceded that it would not be possible to precisely demarcate such groups or categories. However, the Court held that exceptions were insufficient and that the appropriate test for the legal value of the scheme was whether an overwhelming majority of members of the favoured class were persons designated as disadvantaged by unfair exclusion.

b) It must be designed to protect or advance such persons or categories of persons – the Court held that the remedial measures were directed at envisaged future outcomes and that therefore remedial measures must be reasonably capable of attaining those desired outcomes. If the

⁸⁵⁸ See part 6.2.3 of Chapter 6 of this dissertation.

⁸⁵⁹ See *Public Servants' Associations v Minister of Justice* (1997) 18 ILJ 241 (T).

⁸⁶⁰ See *City Council v Walker* 1998 (2) (CC).

⁸⁶¹ Para 37.

remedial measure could not qualify as being reasonably likely to achieve that outcome, then the measure would not satisfy the requirements of section 9(2) of the Constitution. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome would be to set a standard not required by section 9(2). Masoneke J held that section 9(2) did not set “a standard of necessity between the legislative choice and the governmental objective. Such a test would defeat the objective of section 9(2) of the Constitution, and render the remedial measure stillborn.”⁸⁶² However, if the measure was “arbitrarily capricious or displayed naked preference”⁸⁶³ it could hardly be said to be designed to achieve the constitutionally authorised end.

c) It must promote equality. This part of the test required a positive reception of the effect of the measure in the context of the broader society. The equality premise (as endorsed by the Constitution) has to be borne in mind. A measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits, to the extent that the long-term constitutional goal of equality would be threatened. The Court emphasised that a measure should not constitute abuse of power or impose such substantial and undue harm that long-term constitutional goals would be threatened. Brickhill notes that it is imperative that this third part of the test gives protection to the interests of the designated groups, because if the measure meets section 9(2) then the inquiry ends there, without proceeding to section 9(3) to consider whether it discriminates unfairly.⁸⁶⁴ This third part to some extent advocates for the weighing of the interests of those included against those excluded. It is not clear what the standard for this weighing should entail. Conversely, a substantive conception of equality would prohibit a measure that creates ‘new’ disadvantage with a potentially long-term effect. In this regard, it is arguable whether testing a measure against the aims of substantive equality could provide a ‘yardstick’.⁸⁶⁵

Satisfying the above threefold inquiry would render a positive measure a complete defence against any challenge suggesting a violation of the equality premise. It is interesting to note that the threefold inquiry resembles the factors considered by the Supreme Court of Canada

⁸⁶²Para 42.

⁸⁶³*Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) para 69.

⁸⁶⁴J Brickhill “Testing Affirmative Action under the Constitution and the Equality Act: Comment on *Du Preez v Minister of Justice and Constitutional Development* (2006) 27 ILJ (E)” 2004 2011.

⁸⁶⁵See Chapters 4 and 5 of this dissertation.

in the *Kapp* case.⁸⁶⁶ However, the Canadian judiciary has taken a further approach with the development of the *Law* test, which is a contextual approach that conflates different conceptions which determine whether a particular instance of differential treatment amounts to unfair discrimination or treatment.⁸⁶⁷ The contextual approach serves as a mechanism on how other Courts, especially in South Africa, to remedial measures that involve issues of redistribution.

However, Albertyn and Goldblatt conclude that the application of the contextual approach to individual cases on equality by the Court in South Africa is problematic.⁸⁶⁸ They argue that it often negates the group impact enquiry in favour of an individualistic human dignity inquiry. In other words, Courts have often failed to recognise the specific social and economic context in which impugned rules or actions have to be judged. It has failed to take into account the social and economic situation within which the complainant had to operate, a situation where social and economic factors placed the complainant in a disadvantaged position vis-à-vis other actors who were subject to the same rule or action.⁸⁶⁹ Additionally, it is a retreat to individualism. In Canada there is also a tendency to retreat to formal equality/neutral treatment by the lower courts.⁸⁷⁰ One commentator notes that “advocates find themselves pedaling to resist the dual tendencies for judges to first individualise claims with the result

⁸⁶⁶2008 SCC 41.

⁸⁶⁷See part 6.2.3 of Chapter 6 of this study.

⁸⁶⁸C Albertyn & B Goldblatt “Facing the Challenge of Transformation; Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 14 *SAJHR* 248 at 255; see also L’Heurex-Dube “Making a Difference: The Pursuit of Equality and a Compassionate Justice” 1997 13 *SAJHR* 335.

⁸⁶⁹There are various approaches that courts use in the interpretation and application of the law. Among these, with a close consideration of the equality jurisprudence in South Africa, there are two distinct approaches: the legalistic/literal approach and the purposive/liberal/contextual approach. (See *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Minister of finance and another v Van Heerden* 2004 (11) BCLR 1125 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *Brink v Kitshoff* 1996 (4) SA 197 (CC). The legalistic approach centres on the theory that law is a set of rules and principles independent of other political and social and economic factors and institutions. According to A Lyberaki, a legalistic approach is an effective mechanism for maintaining the status quo. It is natural in the legalistic approach, when a disparity occurs between intentions and results, to attempt rectification through enacting new laws. Lyberaki argues that this is “a self-fulfilling prophecy” that has been “paralleled to a bureaucratic spiral”. When an individual problem emanates, the legal approach attributes it to an explanation that the problem requires more regulation. This approach becomes a problem when faced with problems that “venture beyond the surface to seek more systematic explanations”, which “search for necessary explanations in order to avoid the particularities of sufficient ones” (A Lyberaki “Legal Form and Economic Substance: A Feminist Critique of Legalistic Formalism in Greece”. A paper presented at the International Association for Feminist Economics (IAFFE) 2009 Conference Simmons College, Boston, June 2009). Equality is such a case. In South Africa the socio-economic inequalities are structural in nature and require more systemic endeavours to deal with them. This requires a different interpretive tool.

⁸⁷⁰G Brodsky “Constitutional equality rights in Canada” in E Kalula & S Jagwanth *Equality Law: Reflections from South Africa and elsewhere* (2001) 248.

that discrimination becomes invisible”.⁸⁷¹ Apparently judges bend the cases so that “even the discrimination that is visible is never made the subject of a remedy because it is said to be either relevant, or therefore non-discriminatory, or justified”.⁸⁷² Judges who are not firmly committed to the substantive conception of equality become highly susceptible to defences calculated to defeat legitimate claims of serious socio-economic inequality.⁸⁷³ It is arguable that an individualistic approach to equality will not be conducive to a reduction of socio-economic inequality. The emphasis should be on steering the Court to an approach that accommodates and advances transformation and as such contributes to an understanding of the structural nature of inequality in our society.

Nonetheless, after *Van Heerden*, affirmative action is now regarded as a composite part of equality rather than derogation from it. Section 9 now appears as a more internally consistent provision giving substantive equality a more prominence status as a core and foundational value.⁸⁷⁴ The Court clearly adopts the view that South Africa’s equality jurisprudence differs substantively from other countries’ approaches to equality and affirmative action. One aspect that reveals South Africa’s unique approach is the Court’s preference for the term “remedial or restitutionary equality” and not import inapt foreign equality jurisprudence.⁸⁷⁵ The chapter now turns to a discussion on the beneficiaries and types of affirmative action in South Africa.

7.4 Beneficiaries and types of affirmative action benefits

7.4.1 Affirmative action in employment

The broad definition of affirmative action is provided in section 15 of Chapter III of the EEA. It does not only include what is considered “strong affirmative action”, namely ensuring equitable representation in organisations, but also includes measures that are relatively uncontroversial and would fall into the category of “weak affirmative action”, namely i)

⁸⁷¹G Brodsky “Constitutional equality rights in Canada” in E Kalula & S Jagwanth *Equality Law: Reflections from South Africa and elsewhere* (2001) 248.

⁸⁷²G Brodsky “Constitutional equality rights in Canada” in E Kalula & S Jagwanth *Equality Law: Reflections from South Africa and elsewhere* (2001) 248.

⁸⁷³Brodsky points out the three basic rhetorical reasons for the lack of a firm anchor: a) discounting the adverse effects complained of; b) deflecting responsibility away from government by breaking the cause and effect linkage between the challenged law, the detrimental effects complained of, and the ground of discrimination pleaded; and c) creating a hands-off designation for legislation categorised as social policy legislation. G Brodsky “Constitutional equality rights in Canada” in E Kalula & S Jagwanth (2001) *Equality Law: Reflections from South Africa and elsewhere* (2001) 248.

⁸⁷⁴See S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 128.

⁸⁷⁵See S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 128.

identifying and elimination of barriers;⁸⁷⁶ ii) promoting diversity;⁸⁷⁷ iii) reasonably accommodate; and iv) develop and train.

Affirmative action provisions found in Chapter III of the EEA apply only to “designated employers”, that is employers who employ 50 or more employees.⁸⁷⁸ However, according to Chapter III, employers who employ fewer than 50 employees may also be bound by the provisions of affirmative action in the EEA, if they have a turnover that is equal to or above the applicable annual turnover of a small business as set out in Schedule 4 of the Act.⁸⁷⁹ According to the Chapter III, employers are required to: implement affirmative action measures;⁸⁸⁰ ensure equitable representation of people from “designated groups”, that is black people, women and people with disabilities;⁸⁸¹ consult with employees on a range of matters pertaining to employment equity;⁸⁸² conduct an analysis of employment policies, practices, procedures and the working environment in order to identify employment barriers;⁸⁸³ prepare an employment equity plan;⁸⁸⁴ and report either annually or biannually to the Director-General of Labour on the progress made in implementing the employment equity plan.⁸⁸⁵ In addition, employers must discuss employment equity issues with their workers and must include different kinds of workers in the talks.⁸⁸⁶ When they discuss employment equity, employers must make sure they include workers from: all job categories and levels; designated groups (black people, women and people with disabilities); and workers who are

⁸⁷⁶To give clarity to the identification and elimination of some ‘real life’ barriers in South Africa, one should consider the determinants of poverty and inequality as a starting point (see Chapter 2 and 3 of this study).

⁸⁷⁷See Chapter 5 of this study for more on diversity.

⁸⁷⁸See the definition of “designated employer” in section 1 of the EEA.

⁸⁷⁹For the purposes of tracking change in workplace demographics, the Department of Labour classifies designated employers into nine main industrial sectors or occupational categories:

- agriculture, hunting, forestry and fishing;
- mining and quarrying;
- manufacturing;
- electricity, gas and water supply;
- construction;
- wholesale and retail trade;
- transport, storage and communication;
- financial intermediation, insurance, real estate and business services; and
- community, social and personal services.

⁸⁸⁰See section 15.

⁸⁸¹See the definition of “designated groups” in section 1.

⁸⁸²Section 16 and 17.

⁸⁸³Section 19.

⁸⁸⁴See section 20.

⁸⁸⁵See section 21. Submitting reports seem to be the only enforcement mechanism stated in the EEA. Some commentators argue that mandatory reporting does not mean mandatory affirmative action (see M Cohen “Employment Equity is not Affirmative Action” *Canadian Woman Studies/Les Cahiers De La Femme* Vol. 6, No 4 23–25).

⁸⁸⁶Section 16 of the EEA.

not from designated groups.⁸⁸⁷ These discussions should extend to issues concerning employment equity studies, plans and reports.

According to Bentley and Habib, evidence shows that actual implementation of affirmative action in the workplace prefers “race” over “gender” and “disability”, and “African” over “Coloured” and “Indian”.⁸⁸⁸ They further argue that this is not a surprise, as the ANC reiterated that the national question in South Africa is about the liberation of the African majority.⁸⁸⁹ As a result, the affirmative action debate has revolved around the exclusive emphasis on race. Such exclusivity denies the fact that disadvantage does not only follow the axis of race, but that it intersects with other status indicators such as class, gender and cultural divides.⁸⁹⁰ The current focus on race as the locus of positive measures is based on the assumption that the previous dispensation was driven by racial exclusivity and denying political and economic participation to the black population.⁸⁹¹

On the other hand, gender as a criterion is contentious. The inclusion of white women in the “beneficial pool” of affirmative action is arguably controversial. During the apartheid era white women enjoyed “the best of white privileges”. Some argue that white women have always had access to wealth and power through their white male counterparts.⁸⁹² White women are also argued to have always had access to good-quality education and lived a generally comfortable life, despite the patriarchal system that dominated apartheid South Africa.⁸⁹³ They are also said to be a highly educated and powerful group and need not to be seen as a group that has been “previously disadvantaged”.⁸⁹⁴

⁸⁸⁷Section 16 of the EEA.

⁸⁸⁸K Bentley & A Habib “Racial Redress, National Identity & Citizenship in Post-Apartheid South Africa” in K Bentley & A Habib (eds) (2008) *Racial Redress and Citizenship in South Africa* 12.

⁸⁸⁹K Bentley & A Habib “Racial Redress, National Identity & Citizenship in Post-Apartheid South Africa” in K Bentley & A Habib (eds) (2008) *Racial Redress and Citizenship in South Africa* 12.

⁸⁹⁰See Z Erasmus “A Future Beyond ‘Race’: Reflections in Equity in South African Higher Education” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 335 and section 7.4.3 of this chapter below.

⁸⁹¹G Maré “The State of the State: Contestation and Race Re-assertion in a Neoliberal Terrain” in J Daniel, A Habib & R Southall (eds) *State of the Nation: South Africa 2003-2004* (2003) 25.

⁸⁹²M Majavu “South Africa: The Ebony Ceiling and Affirmative Action” (2011) The South African Society Information Service (Johannesburg) available at <http://www.sacsis.org.za/site/article/747.1> (accessed 02/06/13).

⁸⁹³M Majavu “South Africa: The Ebony Ceiling and Affirmative Action” (2011) The South African Society Information Service (Johannesburg) available at <http://www.sacsis.org.za/site/article/747.1> (accessed 02/06/13).

⁸⁹⁴M Majavu “South Africa: The Ebony Ceiling and Affirmative Action” (2011) The South African Society Information Service (Johannesburg) available at <http://www.sacsis.org.za/site/article/747.1> (accessed 02/06/13).

More than a decade since the EEA was enacted some argue there is evidence suggesting that the number of people employed in South Africa rose from 9,557,185 to 11,157,818 during the period 1995 to 2002 – a period during which many affirmative action policies were already in place.⁸⁹⁵ Between 2000 and 2001 the proportion of black top managers increased from 12 per cent to 13 per cent and the proportion of senior managers increased from 15 per cent to 16 per cent. During the same period the skilled professionals and middle managers grew only by a marginal 0.2 per cent. The number of public enterprises owned by blacks increased from 3.9 per cent in 1997 to 9.4 per cent in 2002. In addition, the number of previously disadvantaged individuals identified to be in directorship positions grew from 14 in 1992 to 438 in 2002. In 2001 blacks comprised 61.4 per cent of persons in professional, associated professional and technical employment. The gender composition in top management has slightly changed, with an increase from 1 per cent to 13 per cent overall in 2000. Women also have an increased share of top management positions from – 1.7 per cent to 17.7 per cent from 1997 to 2001.

The above statistics reveal that the employment rates for those groups disadvantaged under apartheid have increased since the implementation of positive measures. Be that as it may, inequalities remain in the labour market institutions. A 2008 report by Bezuidenhout *et al* indicates that black people in South Africa are under-represented in every occupational category⁸⁹⁶ (except elementary occupations such as craft and related trade workers, shop and market sales workers, and plant and machine operators and assemblers – the low-end jobs.).⁸⁹⁷ Coloured people are fairly or over-represented in each occupational category except legislators, senior officials and managers, technicians and associated professionals, fishery workers and elementary occupations.⁸⁹⁸ Whites are substantially over-represented in all

⁸⁹⁵The rest of this paragraph draws from J February “Redress to Empowerment: The New South African Constitution and Its Implementation” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 75.

⁸⁹⁶A Bezuidenhout, C Bischoff, S Buhlungu & K Lewis (March 2008) “Tracking Progress on the Implementation and Impact of the Employment Equity Act Since Its Inception” Sociology of Work Unit, University of Witwatersrand. A research project commissioned by the Department of Labour, South Africa 28 – 35.

⁸⁹⁷A Bezuidenhout, C Bischoff, S Buhlungu & K Lewis (March 2008) “Tracking Progress on the Implementation and Impact of the Employment Equity Act Since Its Inception”, Sociology of Work Unit, University of Witwatersrand. A research project commissioned by the Department of Labour, South Africa 30.

⁸⁹⁸A Bezuidenhout, C Bischoff, S Buhlungu & K Lewis (March 2008) “Tracking Progress on the Implementation and Impact of the Employment Equity Act Since Its Inception”, Sociology of Work Unit, University of Witwatersrand. A research project commissioned by the Department of Labour, South Africa 30.

occupations except service and sales workers, crafts and trade-related workers, and elementary occupations.⁸⁹⁹

Impact and some critical opinions

The Employment Equity Act Reports indicate that the main focus of affirmative action is on the four uppermost top occupational levels: top management, senior management, professional qualified and skilled levels.⁹⁰⁰ The reports indicate that the labour market in South Africa remains highly inequitable.⁹⁰¹ The white minorities still dominate management positions and continue to be appointed and promoted in empowering positions in the workplace, while their black counterparts are constantly overlooked. The 10th Commission for Employment Equity Annual Report sharpens the debate on the successes and shortcomings of affirmative action implementation, particularly the fact that black South Africans are still substantially underrepresented in private sector management structures. The 11th Commission for Employment Equity Annual Report asserts that employers are more likely to employ white females and Indians from the designated groups at nearly all occupational levels. These employment practices maintain and entrench the racial hierarchy that defined the apartheid labour system.

It seems employment equity trends at low occupational levels are not yet much of a concern or rather they are still at the lower end of the “employment equity value chain”.⁹⁰² The employment equity reports seem not to extend to issues concerning development and training of those who want to, and can, advance in the workplace. The majority of the working previously disadvantaged people are at the lower end of the social and occupational tier. These are the persons whose suitability to advance depends on: coaching and mentoring in the workplace; and being afforded a chance to attend training workshops, employment courses or to start or finish tertiary education. It is argued that to give a genuine assessment of

⁸⁹⁹A Bezuidenhout, C Bischoff, S Buhlungu & K Lewis (March 2008) “Tracking Progress on the Implementation and Impact of the Employment Equity Act Since Its Inception”, Sociology of Work Unit, University of Witwatersrand. A research project commissioned by the Department of Labour, South Africa 30.

⁹⁰⁰Department of Labour. Commission for Employment Equity 11th Annual Report 2010/2011. Department of Labour. Commission for Employment Equity Annual Report 2006/2007; Department of Labour. Commission for Employment Equity Annual Report 2008/2009.

⁹⁰¹Department of Labour. Commission for Employment Equity 11th Annual Report 2010/2011. Department of Labour. Commission for Employment Equity Annual Report 2006/2007; Department of Labour. Commission for Employment Equity Annual Report 2008/2009.

⁹⁰²Department of Labour. Commission for Employment Equity 11th Annual Report 2010/2011. Department of Labour. Commission for Employment Equity Annual Report 2006/2007; Department of Labour. Commission for Employment Equity Annual Report 2008/2009.

the impact employment equity has had in the workplace, the focus should extend to the lower levels of occupation. It is further submitted that the focus on the top occupational levels tacitly implies that the current affirmative action policy is an assimilative exercise, leaving the transformation agenda in doubt. The implication of this is in turn that efforts to broaden the base of affirmative action assume increasing priority. If opportunities for those who are poor and of working age to access employment and better working conditions do not expand, “the risk is that the hopes that continue to be vested in redress policies such as affirmative action may dissipate and be replaced with increased disaffection.”⁹⁰³

There is a lack of capacity within the designated groups to effectively carry through the objectives of affirmative action and maintain proficient service delivery in South Africa.⁹⁰⁴ Such a lack of capacity could be argued to be the reason why certain crucial positions within the labour market have not been filled and also the reason behind some personnel taking up positions they are not qualified for. This could further be argued to have contributed to poor service delivery in South Africa. Terreblanche argues that the efficiency of the public sector has been harmed by affirmative action.⁹⁰⁵ In fact, the year 2009 was characterised by protests against local municipalities with deficits of skills or the capacity to deliver essential services to the community.⁹⁰⁶ Provisions were not made for the retention of skills during the transformation of the public sector, which led to the rising skills shortages.⁹⁰⁷ Numerous municipalities and local councils lack critical skills and as a result the lack of basic service delivery is a growing concern among communities.⁹⁰⁸ Affirmative action is imperative to ensure that opportunities open up for those previously disadvantaged, but sacrificing skills to achieve greater diversity has major implications for the state’s capacity to deliver on the promises of democracy.⁹⁰⁹ In a quest to empower the elite, the rights of the poor to receive proper public service are being undermined. This has intensified the socio-economic

⁹⁰³B Roberts, G Weir-Smith & V Reddy “Affirmative action” (2010) *Human and Social Science Research Council Review* Vol. 8 No.3 2.

⁹⁰⁴See S Terreblanche *A history of Inequality in South Africa 1652 – 2002* (2002) 120.

⁹⁰⁵S Terreblanche *A history of Inequality in South Africa 1652 – 2002* (2002) 120.

⁹⁰⁶J Burger “The Reasons Behind Service Delivery Protests in South Africa” (2009) www.polity.org.za/article/the-reasons-behind-service-delivery-protests-in-south-africa-2009-08-05 (accessed 05/05/13).

⁹⁰⁷J Burger “The Reasons Behind Service Delivery Protests in South Africa” (2009) www.polity.org.za/article/the-reasons-behind-service-delivery-protests-in-south-africa-2009-08-05 (accessed 05/05/13). See also *Mail & Guardian* 22 July 2009.

⁹⁰⁸J Burger “The Reasons Behind Service Delivery Protests in South Africa” (2009) www.polity.org.za/article/the-reasons-behind-service-delivery-protests-in-south-africa-2009-08-05 (accessed 05/05/13).

⁹⁰⁹M Ramphele *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 86.

vulnerability of the poor, who tend to endure the consequences of poor service delivery. Ramphele writes:

“South Africa is inflicting a double injury on itself. It is losing sorely needed essential skills in engineering, medicine and the humanities. It is also throwing away the significant investment made by tax payers in educating those young people. We behave like a person who is limping from an injury who then shoots himself in the other foot to even the score ... The unintended consequences of policies aimed at redressing the past injustices of racism are wreaking havoc in our society. The capacity to deliver public services to poor people who have no other recourse has been sorely lacking in most instances. Redress benefits for a political elite who do not deliver undermine redress for poor people, whose needs are greater.”⁹¹⁰

Ramphele further notes that the “mismatch between the desire to change the profile of the public service to reflect the diversity of South Africa’s people and the legacy of the skills base that overwhelmingly resides in white people creates major dilemmas.”⁹¹¹

Some critics argue that the enforcement of affirmative action has contributed to the increase in poverty among white South Africans. There are some white people who are as disadvantaged as their black African counterparts and they find themselves in a position where none of the adults or primary breadwinners in the family is able to find work. Consequently, there are also white people being denied the right to employment in jobs for which they are qualified, even if there are no African candidates competing for the same positions. Ramphele gives an example of the public health sector in some provinces where a “racial quota” for certain specialist jobs is in place. Critiquing the racial quotas, Ramphele argues that such practices amount to a denial of the rights of white people as citizens, which is a situation similar to the very racism that was apparent during apartheid.⁹¹² She further argues that this has led to a feeling of alienation among young white people, resulting in their emigrating.⁹¹³

Furthermore, Burger and Jafta found in their empirical research that the effects of affirmative action on employment wages have been marginal.⁹¹⁴ Their research also found that there was a small narrowing of the very top of the wage distribution, which may be the result of affirmative action legislation. They suggest that affirmative action may have helped

⁹¹⁰M Ramphele *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008)86 – 87.

⁹¹¹M Ramphele *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008)149.

⁹¹²M Ramphele *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 86.

⁹¹³See K Adam “The Politics of Redress: South African Style Affirmative Action” (1997) *The Journal of Modern African Studies* 35 231 232.

⁹¹⁴R Burger & R Jafta “Affirmative Action in South Africa: An Empirical Assessment of the Impact on Labour Market Outcomes” (2010) Working Paper No. 76.

individuals from the designated groups who already found themselves higher up on the skills ladder, but that these effects were too small and concentrated on too few individuals to have had an impact on the average previously disadvantaged individual.⁹¹⁵ According to Terreblanche, new legislation was necessary in principle to address the legacy of apartheid, but the policy of affirmative action has been driven too hard to improve the position of the emerging black elite and the lower middle class.⁹¹⁶ He further argues that these groups' socio-economic positions have been improved at the expense of the underclass: the illiterate and the rural poor.⁹¹⁷ Seepe argues that "formulated as it stands, affirmative action can only benefit those with the requisite skills to take advantage of the opportunities offered by the new dispensation."⁹¹⁸

7.4.2 Education

Affirmative action has also been instituted in higher education in South Africa, although there are no specific legislative provisions which provide for affirmative action in higher education. Attainment of equity in the composition of faculties and student bodies in higher education is identified as a goal in the Education White Paper 3 by the South African Department of Higher Education (1997). One of the ANC government's priorities in the post-apartheid era was the facilitation of access for the previously marginalised – black and women students and other socially disadvantaged groups. A loan scheme was established through the National Student Financial Aid Scheme (NSFAS) Act of 1999.⁹¹⁹ The government-funded loans are provided through the Scheme to academically able students who lack the financial resources to pursue tertiary education.⁹²⁰ The Scheme is open to all South Africans, with eligibility determined through a financial means test. Loans are repayable once students have graduated and in the workforce.

The historically English-speaking universities have established alternative admissions and academic support programmes to facilitate access for black students who would not normally

⁹¹⁵R Burger & R Jafta "Affirmative Action in South Africa: An Empirical Assessment of the Impact on Labour Market Outcomes" (2010) Working Paper No. 76.

⁹¹⁶See S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 120.

⁹¹⁷S Terreblanche *A History of Inequality in South Africa 1652 – 2002* (2002) 120

⁹¹⁸*Mail & Guardian*, 24 April 2007.

⁹¹⁹N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 270.

⁹²⁰N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 270.

qualify for entry under the standard criteria.⁹²¹ This is particularly in areas of study such as medicine, where numbers have to be restricted and the competition for spaces is intense. The majority of the places would be taken up by whites and Indians, who are already over-represented in the profession, if academic performance were the sole selection criterion. Universities have responded to this dilemma by identifying and recruiting talented African and coloured students who can be shown to possess the potential for success, but who may have earned lower marks in their school-leaving examinations than their white and Indian contemporaries. Similar to the situation in the United States, South Africa has challenges with regard to universities' selection policies and procedures.⁹²² Unlike in the USA, South Africa's higher education system has had recourse to a Constitution that makes provision for redress, which has allowed the system to defend its efforts.

The government has modernised its Further Education and Training (FET) colleges.⁹²³ These colleges are spread throughout South Africa and they provide students with relatively low-cost education and vocational training in areas such as information and communications technology, engineering, tourism, agriculture and design. The colleges are in partnerships with the relevant industries for curriculum development and the provision of student work experiences and internships.

The percentage of black students enrolled in South African universities increased from 32 per cent in 1990 to 60 per cent in 2000.⁹²⁴ In technikons (now called universities of technology) it rose from 32 per cent to 72 per cent over the same period. By the year 2000 African students were the majority in the universities, averaging 60 per cent and in technikons at 72 per cent. The composition of the student body at some universities has changed dramatically. Although student access to higher education seems to have increased, the transformation of

⁹²¹N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 9 – 24273.

⁹²²See *Regents of the University of California v. Bakke* 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003).

⁹²³N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 274.

⁹²⁴N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 274 - 275.

the race and gender composition in academic staff has been minimal.⁹²⁵ Structural inequalities have resulted in the meagre availability of suitably qualified black, women and disabled academics as well as senior management and administrative personnel. The government has made provision for scholarships and research opportunities and renewed investment in research through the establishment of research chairs, international partnerships and other programmes. This was in effort to respond to the challenges of staff equity in higher education. In addition, there has been some institutional redress which has seen radical and large-scale restructuring. There have been mergers and incorporations, which has reduced the number of institutions from 36 to 23.⁹²⁶ In an effort to address the inequalities of apartheid, a number of historically black and white institutions have merged, although the impact of the restructuring is yet to be fully assessed.⁹²⁷

It is also necessary to reflect on the fact that although the new dispensation's higher education and public sectors have been significantly deracialised, it has not been able to achieve general equity of access.⁹²⁸ Currently, post-apartheid higher education remains a small, if now deracialised, elite system. In this regard, any affirmative action and employment equity policies can only be implemented within this small elite system, and thus do not and cannot affect the masses that are unable to gain access to this system in the first place. In relation to general equity of access in higher education, André du Toit points that the university applicant pool of Africans with university-entrance matric passes has remained of the same order of some 50 000 annually.⁹²⁹

Leibbrandt *et al* point out various negative factors which to some extent derail affirmative action efforts in educational institutions.

⁹²⁵N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 274 - 275.

⁹²⁶N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 274 - 275.

⁹²⁷N Pandor & N Badsha "The First Ten Years: The Role of Public Policy in Shaping Post-Apartheid Higher Education in South Africa" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 274 - 275.

⁹²⁸The rest of this paragraph draws from A Du Toit "Social Justice and Post-Apartheid Higher Education in South Africa" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 104.

⁹²⁹A Du Toit "Social Justice and Post-Apartheid Higher Education in South Africa" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 104.

- a) Regulations have been implemented that prohibit children from continuing in a grade past certain ages, forcing many students to discontinue their education and join the labour force.
- b) There is low achievement of the certificate with endorsement, which is required for entry into university. A great number of students in poor-quality schools find themselves inadequately prepared for the national exam. This results in denying access to a university education to more than 70 per cent of those passing Grade 12.
- c) Standards of university education in South Africa are relatively high but the large variance in the quality of education received at the primary and secondary level results in a small percentage of the population being able to fully benefit.⁹³⁰

On the other hand, Du Toit argues:

“If the ... pool of Africans with university-entrance matric passes is not expanding but remains stable, then fiddling with admission procedures or ratcheting up admission targets is unlikely to produce demographic representativeness. To the extent that such affirmative action measures are to be effective, their impact must if necessary be confined within the small, deracialised elite system of higher education. That means that the beneficiaries of these ‘affirmative action’ measures will also decreasingly be individuals who themselves have been relatively disadvantaged: the black students in the first cohorts of entrants to post-apartheid higher education were likely to be the products of an elite secondary schooling system, the children of black middle-class parents, and, in an increasing number of cases, second-generation university students. If so, then affirmative action admission policies and employment equity staffing policies will increasingly reproduce the established black elite, rather than benefiting historically disadvantaged individuals or groups. Indeed, it could be argued that in these circumstances affirmative action policies couched in apartheid-derived racial categories now provide an ideological justification for privileging established black elite groups, at the expense of the African majority.”⁹³¹

He further concludes that the non-increase in qualified black applicants is an indicator that the current affirmative action policies have failed to produce the change foreseen by introducing the notions of redress and equity.⁹³²

Du Toit’s arguments also bring to the fore the issues of a “dependency syndrome” or a “culture of entitlement.” Some commentators argue that some African communities have

⁹³⁰M V Leibbrandt, I Woolard, H McEwen & C Koep *Tackling Inequality in Brazil, China, India, and South Africa: The Role of Labour Market and Social Policies* (2010) OECD 247 – 248.

⁹³¹A Du Toit “Social Justice and Post-Apartheid Higher Education in South Africa” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010)105.

⁹³²A Du Toit “Social Justice and Post-Apartheid Higher Education in South Africa” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 105.

become dependent on the state and affirmative action for their economic survival. For instance, Seepe critiquing the affirmative action policies, argues that:

“[T]he new black elite is spared the rigors of development. To demand excellence is regarded as blaming the victim and to deny the helplessness imposed by the heritage of oppression.”⁹³³

According to Seepe, the beneficiaries of affirmative action are given a free pass and not forced to bear the responsibility to uplift themselves. Seepe further points out that, because affirmative action policies impose a victim-versus-oppressor model, affirmative action tends not to nurture the competitiveness required to survive in the academic or professional world.⁹³⁴ He claims that such policies produce a new black generation lacking the competitive spirit and self-confidence necessary to compete academically, and thereby harm the very groups they are supposed to benefit. This new generation is also referred to as “black diamonds”, who are the first-generation beneficiaries of freedom of choice in education and training and unlimited career opportunities.⁹³⁵ While Seepe describes affirmative action as completing the cycle of entitlement, others believe that it completes the cycle of disadvantage by refusing to acknowledge that the disadvantaged are also entitled to the same educational opportunities as the rest of the population.⁹³⁶

In the light of the above, what is the best criterion to allocate benefits from affirmative action? The next section will focus on the criterion to benefit from affirmative action by exploring the race v class debate.

7.4.3 Race vs class criterion debate: some current arguments

The current race-based model of affirmative action presupposes a level playing field among the black population, which is in reality not the case.⁹³⁷ The reality of the matter is that inequality among blacks has grown over the past two decades and the wealthy fragment of the black population dominates the benefits of affirmative action initiatives. This has resulted

⁹³³S Seepe “Can Affirmative Action Be Rescued? I Think Not” *Sunday Times* 6 February 2005 available at <http://www.chet.org.za> (accessed 10/09/2013).

⁹³⁴S Seepe “Can Affirmative Action Be Rescued? I Think Not” *Sunday Times* 6 February 2005 available at <http://www.chet.org.za> (accessed 10/09/2013).

⁹³⁵See the study “Black diamond” in *New Study Explodes Myths about SA’s Black Middle Class* by Unilever Institute of Strategic Marketing, 27 February 2006/7.

⁹³⁶S Seepe “Can Affirmative Action Be Rescued? I Think Not” *Sunday Times* 6 February 2005 available at <http://www.chet.org.za> (accessed 10/09/2013).

⁹³⁷K Bentley & A Habib “Alternative Framework for Redress and Citizenship”(2008) in K Bentley & A Habib (eds) *Racial Redress & Citizenship in South Africa* (2008) 344.

in an increase of intra-racial inequality,⁹³⁸ and, consequently, debates on possible alternative criteria such as class or socio-economic disadvantage. The following section will discuss the *race vs class* debate.

The most controversial aspect of the current affirmative action policy is the way it relies on the race-based categories of the apartheid era to undo the legacies of apartheid injustice and inequality. André du Toit notes that although the intentions and objectives are quite the opposite, the policy instruments being employed are similar.⁹³⁹ In order to ensure equitability and eliminating the iniquitous legacies of apartheid, individuals need to be classified as “White,” “African,” “Coloured,” and “Asian”, which were the population registration categories during the apartheid years. Although the Constitution provides a basis for redress in general and affirmative action in particular, it does not require that remedial measures be conceived in terms of race-based categories. Such categories are strongly against the historical and political tradition of “non-racialism” that informed the making of the Constitution. According to Ramphela, the use of race as a defining criterion for beneficiaries creates serious dilemmas for redress strategies.⁹⁴⁰ She points out that the inequity we are wrestling with resulted from this same policy instrument.⁹⁴¹ She further poses a question: How can we use the same categories to frame policies to transform our socio-economic relationships?⁹⁴² Liberal humanists perceive the South African government’s attempt to address historical inequalities by using race as apartheid’s racial classification in a new disguise.⁹⁴³ According to Erasmus, “the liberal humanists’ emphasis on race’s scientific invalidity eclipses the historical associations between conventional definitions of merit and apartheid’s pigmentocracy, a relationship that has effectively racialised recruitment pools and networks and rendered the market less open than suggested.”⁹⁴⁴

⁹³⁸See Chapter 3 of this study.

⁹³⁹A Du Toit “Social Justice and Post-Apartheid Higher Education in South Africa” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 104.

⁹⁴⁰M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 249.

⁹⁴¹M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 249.

⁹⁴²M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 249.

⁹⁴³Z Erasmus “A Future Beyond “Race”: Reflections on Equity in South African Higher Education” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 335.

⁹⁴⁴Z Erasmus “A Future Beyond “Race”: Reflections on Equity in South African Higher Education” in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 335.

In addition, Bentley and Habib argue that redress may be having the unintended effect of heightening racial consciousness and alienating some people.⁹⁴⁵ Friedman and Erasmus state that white citizens are hostile towards racial redress.⁹⁴⁶ They further suggest that younger white respondents are most negative, thereby increasing the potential for attitudes to harden in the future.⁹⁴⁷ Ramphela says that some white people find it difficult to accept that they now have to live, collaborate and compete with black people as equals and fellow citizens.⁹⁴⁸ Such attitudes emanate from a perception that redress is “reverse racism”.⁹⁴⁹ Some proponents of the current policy “ask why ‘race-based’ affirmative action cannot work for black people now, if it has worked for whites during the apartheid era.”⁹⁵⁰ But race-based redress may cause more racial animosity and schism than racial accord and is by itself not directly capable of creating a colour-blind society.

Race is not the only indicator of disadvantage. There are other various determinants of socio-economic disadvantage that intersect with race, such as gender, class, geographical location and education attainment.⁹⁵¹ Erasmus points out that “the impact of various inequalities and differences on people’s lives is best seen in the intersection of race, class, gender, nation, generation and sexuality.”⁹⁵² These determinants tend to complicate the disposition of socio-economic disadvantage and discrimination. The virtually exclusive emphasis on redress based on race refutes “this complexity and potentially excludes some of the most deserving beneficiaries from measures of redress.”⁹⁵³ Comparing the twentieth-century Japanese American redress movement with the twenty-first century African American reparations movement, Natsu Taylor Saito argues that most public debates on race-based redress and

⁹⁴⁵ K Bentley & A Habib “Alternative Framework for Redress and Citizenship” in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 344.

⁹⁴⁶ S Friedman & Z Erasmus “Counting on ‘Race’: What the Surveys Say (and Do Not Say)” in K Bentley & A Habib *Racial Redress & Citizenship in South Africa* (2008) 34 – 40.

⁹⁴⁷ S Friedman & Z Erasmus “Counting on ‘Race’: What the Surveys Say (and Do Not Say)” in K Bentley & A Habib *Racial Redress & Citizenship in South Africa* 34 – 40.

⁹⁴⁸ M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 17.

⁹⁴⁹ K Bentley & A Habib “Alternative Framework for Redress and Citizenship” in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 344.

⁹⁵⁰ M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 17.

⁹⁵¹ For more on the various indicators of disadvantage (poverty and inequality) see Chapters 2 and 3 of this study.

⁹⁵² Z Erasmus “A Future Beyond ‘Race’: Reflections on Equity in South African Higher Education” D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 334.

⁹⁵³ O C Dupper “Affirmative Action: Who, How and How Long?” (2008) 24 *SAJHR* 428.

reparations lack a nuanced understanding of the “diametrically opposed purposes”⁹⁵⁴ that redress and restitution can serve. She points out that:

“[Restitutions] purport to redress wrongs, but can quite easily end up reinforcing the structures that created those wrongs. The effect of redress hinges ... on how we frame the wrongs. Do we frame them as aberrations from a basically acceptable status quo, or do they reflect injustices intrinsic to the system? How we answer this question will determine the kinds of remedies we need to pursue.”⁹⁵⁵

Saito further points out that redress and reparations movements are ultimately inadequate if they do not address the role of racism in supporting the status quo of structural inequality.⁹⁵⁶

Some critics have suggested the use of socio-economic status or class to enable the masses at the bottom of the social structure to access opportunities regardless of their racial grouping. The report of the Presidential Commission to Investigate Labour Market Policy in 1996 by Nicoli Nattrass was the first to formally advance a class-based perspective on redress in South Africa. This report has been formulated by two distinct categories of stakeholders. The first one is described by Bentley and Habib as “the subversives”, whose interpretation of class-based strategy allegedly involves a charity-orientated intervention directed at alleviating poverty and not necessarily changing the structures that reproduce racial inequalities.⁹⁵⁷ The second category consists of progressive intellectuals or “the substitutionists”, who suggest that class-based affirmative action would be effective in achieving the Constitution’s desired ends. These intellectuals base their argument on the following points:

- a) Due to the significant overlap between race and class categories, a class-based strategy would primarily benefit black people, thereby overcoming the weaknesses of the race-based affirmative action;
- b) It would discourage the better-resourced elements within the black community to monopolise the benefits facilitated by the affirmative action programme as the material need would be the defining criteria; and

⁹⁵⁴N Saito “Beyond Reparation: Accommodating Wrongs or Honoring Resistance?” (2003) *Hastings Race & Poverty Law Journal* 27 (2003).

⁹⁵⁵N Saito, “Beyond Reparation: Accommodating Wrongs or Honoring Resistance?” (2003) *Hastings Race & Poverty Law Journal* 27 (2003).

⁹⁵⁶N Saito “Beyond Reparation: Accommodating Wrongs or Honoring Resistance?” (2003) *Hastings Race & Poverty Law Journal* 27 (2003).

⁹⁵⁷K Bentley & A Habib “Alternative Framework for Redress and Citizenship” in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 346.

- c) It would disenable the entrenchment or reification of racial identities, which could become an obstacle to the constitutional goal of a non-racial society.⁹⁵⁸

Bentley and Habib argue that this substitutionist class-based affirmative action has two weaknesses:

- a) It implicitly assumes that economic empowerment is the only element required in the affirmation of the previously excluded. But is not psychological liberation as essential as economic empowerment?
- b) Secondly, when implemented, class-based affirmative action will simply not deracialise particular sectors of the economy. Given the racial poverty profile of South Africa, it could deracialise the lower echelons of the class hierarchy, but one cannot assume that it will automatically do so for the upper echelons of the corporate structure.⁹⁵⁹

On the other hand, Ramphela argues that “focusing only on socio-economic status misses an important point. Race politics have left a deep imprint on our society, making ‘race’ matter much longer than many South Africans would like.”⁹⁶⁰ Neville Alexander in his paper entitled “Affirmative Action and the Perpetuation of Racial identities in South Africa” outlines the limitations of affirmative action policies with three coherent points.⁹⁶¹ Firstly, the use of racial categories is unnecessary. There are numerous other objective criteria such as class or language which are congruent with race in many instances, but which would allow for those who genuinely in need of redress strategies to benefit, rather than just a successful few. Secondly, such an approach would allow us to distance ourselves from the distasteful racial labelling and self-labelling that we ought to be trying to escape as a matter of constitutional priority. As Alexander argues:

“We need to examine each domain in which corrective action is to be undertaken in detail, so that we can identify the real sources of disadvantage suffered by the relevant individuals and groups. By using the shorthand of ‘race’, we not only give an advantage to middle-class Black people as against working-class people, we also

⁹⁵⁸K Bentley & A Habib “Alternative Framework for Redress and Citizenship” in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 346.

⁹⁵⁹K Bentley & A Habib “Alternative Framework for Redress and Citizenship” K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 347.

⁹⁶⁰M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 250.

⁹⁶¹A paper delivered at University of Fort Hare, 25 March 2006.

entrench – avoidably – the very racial categories that undermine the possibility of attaining a truly non-racial democratic South Africa.”⁹⁶²

Alexander’s third point is that those with the power to do so, such as state officials, should use every opportunity to distance themselves from racial categorisation in keeping with the spirit of the Constitution, and especially the non-racial vision spelled out in section 16(1). In the pursuit of constitutional values dealing with equality, some values are more fundamental than others. The focus on race or any other identity should be viewed as a question of setting priorities to bring out the democratic vision and overall constitutional imperatives. MacDonald argues that “respecting identities is one thing, but emphasising them amid spreading poverty and unabating economic inequalities is another. It not only lowers the priority of poverty, but spurs a conservative racial logic.”⁹⁶³

Should race be the chief determinant of access to affirmative action?⁹⁶⁴ If remedial measures were intended to redress past inequalities, should their application be dependent on the extent of past inequalities suffered by the individual in question? Smith points out that the interpretation that makes the most sense in the South African context is that nearly every black person has suffered some form of disadvantage and that each individual does not need to show personal disadvantage.⁹⁶⁵ Darcy Du Toit argues:

“It follows that, all things being equal, even relatively educated or prosperous black South Africans should be entitled to the benefit of affirmative action. The advantages that they enjoy were achieved despite the disadvantages imposed on them by apartheid. The presumption should remain, unless rebutted, that but for racial discrimination they are likely to have achieved even greater advantages. Similar presumptions should apply, *mutatis mutandis*, to women and people with disabilities in that they should not be required to prove facts which are not in any real dispute.”⁹⁶⁶

In concurrence with Du Toit, Dupper confirms that individual disadvantage as a requirement to benefit from affirmative action is not in line with the notion of substantive equality that underpins affirmative action provisions within the South African legislative framework.⁹⁶⁷

⁹⁶²N Alexander *Affirmative Action and the Perpetuation of Racial identities in South Africa*. A paper delivered at University of Fort Hare March 25 (2009)11.

⁹⁶³M MacDonald *Why Race Matters in South Africa* (2006) 173.

⁹⁶⁴See *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D).

⁹⁶⁵N Smith “Affirmative Action: Its Origin and Point” (1992) 8 SAJHR 234,243.

⁹⁶⁶A Du Toit “When Does Affirmative Action in Favour of Certain Employees Become Unfair Discrimination Against others?” Paper presented at a Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, January 2001 13.

⁹⁶⁷See O C Dupper “Affirmative Action and Substantive Equality: The South African Experience” (2002) 14 *South African Mercantile Law Journal* 275.

Due to the intricate relationship between race and class in South Africa, race-based affirmative action acts as a proxy for socio-economic disadvantage.⁹⁶⁸ “Has class therefore become the new determinant for access? And if so, is a race-based system of affirmative action inadequate to redressing inequality of access? Is it even fair?”⁹⁶⁹ In many other legal cases in South Africa, the applicant is not contesting the idea of formal affirmative action, but access to the benefits of those policies.⁹⁷⁰ Gilroy argues that the only way to address the inequalities and malpractice for which the racial category stands is to shift the focus from biology and the notion of racial membership into the political sphere.⁹⁷¹ “How does one make race a political matter?”⁹⁷² “How does one enable thought and living in defiance of both the category and its effects?”⁹⁷³ Erasmus answers these questions in five distinct points:

- a) It is important to recognise the historical and political conditions in which the concept emerged: European Enlightenment thought and the politics of 18th and 19th century imperialism. According to Erasmus, this history shows that the inequalities for which the concept stands were human made, and so can be unmade;
- b) It is important to recognise the present impact of this history of inequality on contemporary society;
- c) Our analyses of the concept should account for and illustrate the workings of power embedded in its various uses, abuses, denials and political effects, thus revealing dynamics of privilege, subordination and differential value;
- d) These analyses need to challenge such power in ways that can be translated into practical politics, whose actions are taken to build resistance to these operations of power. Examples of such actions include the creation and successful implementation of government and institutional policies specifically intended to intervene in the

⁹⁶⁸J February “From Redress to Empowerment” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 80.

⁹⁶⁹J February “From Redress to Empowerment” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 80.

⁹⁷⁰J February “From Redress to Empowerment” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 80.

⁹⁷¹P Gilroy *There Ain’t No Black in the Union Jack* (2005) London: Routledge, xx, cited by Z Erasmus “A Future Beyond ‘Race’: Reflections in Equity in South African Higher Education” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 338- 339.

⁹⁷²Z Erasmus “A Future Beyond ‘Race’: Reflections on Equity in South African Higher Education” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 338.

⁹⁷³Z Erasmus “A Future Beyond ‘Race’: Reflections on Equity in South African Higher Education” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 338.

operations of power with a view to enabling the participation of all adults as peers in social relations; and

- e) It is important that resistance strives towards unmarking both the inequalities for which the concept stands and the concept itself. A struggle to move out of racialised regimes of meaning towards new ways of seeing ourselves and thinking about the world – new repertoires for collective action – is vital.

Erasmus further points that the struggle towards the demise of race as a concept does not permit either our acceptance of race or our escape from it, and to conceptualise race as socially constructed is to enable political action aim at its demise.⁹⁷⁴ Erasmus thus argues for a progressive movement towards anti-racialism through political engagement with entrenched power. She views politics and power as issues that impede the implementation of equity as a bureaucratic process involving quotas, targets and similar concerns. Instead, she acknowledges that equity and anti-racial premises require interactive and dynamic interventions to allow new questions and new challenges to emerge.

7.5 Conclusion

A labyrinth of laws and policies ensured that black South Africans' access to resources through employment, access to property and other economic activity were severely circumscribed. Racial divisions between skilled and unskilled workers, apartheid wage gaps, poorly educated workers, dictatorial management styles and lack of protection for the most vulnerable workers were just some of the consequences. As a result of this history, protection of individual rights with restorative justice for the historically excluded groups was almost inevitable in the post-apartheid South Africa. The ANC government was to use all legal means, including affirmative action, to achieve procedural as well as substantive justice. Affirmative action in South Africa became an explicitly legal, constitutional remedy to rectify race-based inequalities created by the apartheid regime. What separates the South African Constitution from most of its counterparts around the world is the explicit endorsement of restitutionary or affirmative action measures. In South Africa affirmative action is practised in two domains: employment and education. The beneficiaries of affirmative action are Africans, women and people with disability. However, South Africa's

⁹⁷⁴Z Erasmus "A Future Beyond 'Race': Reflections on Equity in South African Higher Education in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 338.

model of affirmative action has been race-based. Inequalities may simply have shifted from being based on race or gender to being based on class, widening the poverty gap. Other critics argue that affirmative action should not be blamed for the widening gap, as the policy was not initially designed to benefit those not part of the working class. Nevertheless, neither the issue of the current policy having contributed to the widening up of the poverty gap, nor the fact that the majority of the Africans are yet to reap the benefits from the redress strategy can be ignored. Thus the perspective on affirmative action that this chapter propounds is forward looking insofar as it involves the claim that the affirmative action policy should be redesigned to pave way for structural integration or social inclusion and increase of human capacities.

Consequently, this study acknowledges that affirmative action, as a positive measure, is limited. It is not a panacea policy or the principal mechanism to redistribute wealth or to overcome poverty, as it can take different forms according to the prevailing circumstances. It is certainly not the answer to all of South Africa's social ills. Concerns have been raised with regard to how and when we will know that affirmative action is no longer necessary. The study concurs with those critics who argue that it is only when affirmative action is seen exclusively as an equaliser of opportunity and conditions that the idea of a time horizon becomes relevant.⁹⁷⁵ In this regard, the fundamental question this study seeks to address is: what can be done? Can the policy of affirmative action promote a more-broad based form of redress in South Africa to ensure coherence with a substantive conception of equality? In an attempt to answer this, the study turns to examining certain facets that may perhaps trigger a re-conceptualisation of affirmative action for the development of human capacities in South Africa.

⁹⁷⁵J February "From Redress to Empowerment" in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 85.

CHAPTER 8: A RECONCEPTUALISATION OF AFFIRMATIVE ACTION WITHIN THE REALM OF SUBSTANTIVE EQUALITY

8.1 Introduction

It was argued in the previous chapter that affirmative action should be redesigned to remedy the effects of the apartheid regime on the wellbeing of the disadvantaged— especially the limitations on acquiring the meritorious characteristics required to *suitably qualify* for opportunities. It is submitted that ‘employment equity’⁹⁷⁶ is not a synonym for ‘affirmative action’, but is one of the goals of affirmative action. Equity implies impartiality and fairness, and to those who believe that everything is truly fair when laws treat everyone equally, equity is a sufficient concept.⁹⁷⁷ However, the notion of affirmative action, within the realm of substantive equality, views fairness in a much broader sense. It focuses not only on equality in treatment, but equality in condition⁹⁷⁸ and results. It recognises that the disadvantages or privileges of the past will have a bearing on the present and will render the results unequal. It also recognises that if the corrective measure is instituted on the same basis as the conditions from which the discrimination emanated, the results will be affected as well. Instead of relying on mechanisms that place the onus for change on the victims of discrimination, affirmative action measures would require an active reversal of discriminatory practices to facilitate *the breaking of cycles of disadvantage, affirmation of identities, equal respect for dignity and full social participation* (the aims of substantive equality)⁹⁷⁹ to develop “meritorious characteristics” for the previously disadvantaged. It is suggested that such measures can be facilitated through a consideration of two aspects: an expansive view of affirmative action⁹⁸⁰ and utilising class as a ‘plus factor’⁹⁸¹ in the criteria for qualifying for

⁹⁷⁶This dissertation defines employment equity as the proactive employment practices to increase the representation of designated groups in the workplace.

⁹⁷⁷M Cohen “Employment Equity is not Affirmative Action” (1985) *Canadian Woman Studies/Les Cahiers De La Femme* Vol. 6 No. 4 23 23.

⁹⁷⁸Baker *et al* define equality of condition as the belief that people should be as equal as possible in relation to the central conditions of their lives. They further argue that equality of condition is not about making inequalities fairer or providing people a more equal opportunity to become unequal, but it is about ensuring “roughly equal prospects for a good life”. In elaboration Baker *et al* further note that “equality of condition aims at equalising what might be called people’s ‘real options’, which involves the *equal enabling and empowerment* of individuals” (See K Lynch & J Baker “Equality in Education: An Equality in Condition Perspective” *Theory and Research in Education* July 2005 Vol. 3 No. 2 131-164 132).

⁹⁷⁹See Chapters 4 and 5 of this dissertation for more on the aims of substantive equality.

⁹⁸⁰This refers to a view that embraces both the weak and strong types of affirmative action. Weak affirmative action merely involves efforts to ensure equal opportunities for members of groups that have thus far been subject to discrimination. Weak affirmative action, if put into practice, ensures that members of those groups who would qualify for positions under normal circumstances are not overlooked. Strong affirmative action is

affirmative action benefits. Furthermore, it is argued that these two aspects should be taken into account to restructure affirmative action policies within the realm of substantive equality. These aspects will be explored in part 2 of this chapter.

Evidence suggests that upward mobility in society is limited for the (working) poor and that privilege tends to perpetuate itself. While the government has made great progress in providing opportunities through social programmes, there are numerous ‘real life’ barriers that remain unaddressed by the current redress policy. One of them is inter-generational disadvantage.⁹⁸² How much generational mobility does affirmative action ensure? How many children of the working poor become affluent or, at least, lead a life better than that led by their parents?

This chapter will be organized as follows: Firstly, the chapter sets out the theoretical framework for the reconceptualisation of affirmative action – referred to as ‘the terrain’ in part 1. In part 2, the chapter explores the facets that could be taken into account to restructure affirmative action policies within the realm of substantive equality. As mentioned earlier, these facets necessitate an expansive view of affirmative action and a consideration of class as a plus factor⁹⁸³. Part 3 highlights certain relevant observations and part 4 offers some concluding remarks.

8.2 The Terrain

8.2.1 Causes and effects

It is submitted that the aims of substantive equality conceptualised in this study ensure a paradigm shift in the way that remedial measures are conceived. These aims recognise that a reconceptualisation of affirmative action is imperative if the policy is to facilitate the development of human capacities. As indicated earlier, affirmative action has the potential to alleviate poverty by, for example, securing job appointments and higher education

preferential treatment for opportunities (see Chapter 5, section 5.2 of this dissertation). In addition, this view is based on the fact that weak affirmative action measures are required to be the main focus, whilst strong affirmative action is utilised as a regulative refinement (to achieve the objectives of weak affirmative action measures in the context of South African history).

⁹⁸¹ In the context of this dissertation class as a ‘plus factor’ refers to an additional requirement, in the criteria for benefiting, tailored to meet a compelling interest – genuine redistribution of resources in South Africa. In this regard, the underlying argument of this dissertation submits that class should complement the criteria for benefiting as way to address the consequences created by utilising race exclusively for benefiting – such as intra-racial inequality. For more see Chapter 7 of this dissertation.

⁹⁸² See Chapter 4 of this dissertation.

⁹⁸³ See footnote 981 above.

placements for the previously disadvantaged. The securing of these affirmative action benefits is a way of dealing with the ‘effects’ of past discrimination mainly characterised by lack of representation as well as lack of opportunities and resources. On the other hand, it is not the lack of representivity, opportunity or resources *per se* that limits the majority of the intended beneficiaries from benefiting, but being *unsuitably qualified* to benefit from the policy itself. This means that one of the compelling aims of substantive equality, namely to break the cycles of disadvantage, requires an exploration of the causes of this cycle of disadvantage. Once this issue has been addressed, one can explore whether and to what extent affirmative action can address the causes. Furthermore, one is then provided with a rationale to stimulate ways of manipulating the existing disadvantaging cycle long enough to disrupt it. One is also forced to consider more specifically what causes or caused the lack of representation, opportunity or resources and suitable qualifications.

In light of the above, it is submitted that a ‘causes vs. effect terrain’ (hereafter, the terrain) is created within a substantive conception of equality. The terrain illuminates the flip sides (the effect side and the causality side) of social reconstruction strategies and all strategic elements of substantive equality (including affirmative action). The terrain further opens up the way to give content to affirmative action in order to ensure that the policy becomes more relevant in the fight against socio-economic disadvantage.

Does affirmative action have to stop at the effects front? What about the causes? First and foremost the research acknowledges that if affirmative action is to avoid having a merely distributive impact, it has to be more than just ‘window dressing.’ Furthermore, we cannot formulate the existence of affirmative action on the basis of legal reasoning only; it also needs to be based on political and moral discourse.

8.2.2 Considering causalities

Being *unsuitably qualified* for jobs and higher education has been the fate of many poor Africans in South Africa. As indicated earlier in the study, the causes lie in the inferior education that most Africans received under apartheid, or rather in the inaccessibility of education opportunities. As a result, many Africans were not (and still are not) able to compete for jobs and university admissions on the basis of individual merit.

Exploring the causes of this situation is a step towards building human capacity – developing the ‘suitability to qualify’. Exploring the ‘causes’ has the potential to shape affirmative action as a process-oriented policy. What does the process entail? Taking steps to promote education from grassroots level is vital for the designated groups to be in a better position to take advantage of the benefits that affirmative action may afford them later in life. When literacy levels rise, support for democracy and participation increases.⁹⁸⁴ Ensuring the development of skills is also part of the process of becoming *suitably qualified*. It opens up opportunities and counteracts the barriers that prevent the attainment of “suitable” qualifications. Furthermore, it is submitted that the link to the ‘causes’ should be made more explicit to facilitate genuine redistribution in social reconstruction policies. The study also submits that the main objective of the terrain is to bring to the fore the necessity to examine each domain in which corrective action is to be undertaken in order to identify and address the sources of disadvantage suffered by the relevant individuals and groups.

As argued in Chapter 5, the equality discourse in South Africa should embrace: a) *breaking cycles of disadvantage*, which requires that the roots of inequality and poverty be identified and opportunities be established to sever the causal links; b) the promotion of equal *respect for dignity* by increasing the provisions required to pursue a dignified life; and c) *affirm various identities and democratic participation* as “primary goods” to be capitalised on in workplaces, communities and state institutions. In this way, affirmative action is in principle afforded a platform to focus on the actual conditions of life of the disadvantaged. An assessment as to which background conditions of inequality require attention in our society is also called for. This argument elucidates the importance of mapping the terrain of disadvantage, which in turn highlights the need to uncover both the *causes* as well as the *effects* of such disadvantage.

It is submitted that for strategic elements of substantive equality (particularly affirmative action) to be responsive to the terrain, there is a need for policy makers (and the judiciary) to incorporate certain facets into their purview. These facets are: i) affording an expansive view to the policy of affirmative action;⁹⁸⁵ and ii) considering class as a ‘plus factor’⁹⁸⁶ in determining the beneficiaries of this policy. These facets are ‘positive reinforcers’ of the

⁹⁸⁴ A Krishna (ed) *Poverty, Participation, and Democracy: A Global Perspective* (2008) 148.

⁹⁸⁵ See footnote 980 above.

⁹⁸⁶ See footnote 981 above.

linkage between the aims of substantive equality and its strategic elements (particularly affirmative action). The identification of these ‘facets’ is critical for the realisation of the aims of substantive equality and for identifying innovative ways that allow the strategic elements to become more relevant in the fight against socio-economic disadvantage. These two facets are explored below.

8.3 Reconceptualising affirmative action: facets to consider within the realm of substantive equality

8.3.1 Introduction

The study argues that in order to reconceptualise affirmative action policy in South Africa, two aspects in particular will have to be considered. Firstly, affirmative action must be viewed in a more expansive manner. Secondly, social class should be utilised as a plus factor in determining the beneficiaries. However, the study is not suggesting that these facets will ‘fix’ the current affirmative action policy. These facets are meant to serve as channels for alternative ways of restructuring the policy. Most importantly, the facets seek to advance an expansive notion of equality that can lead to an expansive notion of affirmative action.⁹⁸⁷

8.3.2 Adopting an expansive view of affirmative action

The facet ‘expansive view of affirmative action’ was influenced by the affirmative action policies of Canada and the USA considered in Chapter 6 of this dissertation. Canada’s remedial measures include targeting innovative business programmes for beneficiaries, which arguably goes beyond conventional preferential treatment endpoints (employment appointments, admission placements).⁹⁸⁸ America’s federal affirmative action contracting programme is specifically designed to bring minorities into America’s business enterprise system. This, as was argued in Chapter 6, has a bearing on the argument that affirmative action is more than just employment equity. It is a policy that enables the development of programmes that can develop human capacities.

Empirical evidence suggests the available pool of previously disadvantaged persons suitably qualified to fill high-level jobs in South Africa is minute.⁹⁸⁹ Consequently, as that very small, “highly sought after group of candidates” develops, it is continually “poached by one

⁹⁸⁷ Furthermore, these facets were informed by the comparative study contained in Chapter 6 of this dissertation.

⁹⁸⁸ See Chapter 6 of this dissertation for more on Canada’s affirmative action programmes.

⁹⁸⁹ M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” *Southern African Business Review* (2003) 7 (1) 17 18.

organisation from another.”⁹⁹⁰ Only this elite group advances, while the rest of the black African population remains where it was before.⁹⁹¹ This is a practice of looking for “ready-made products” at the expense of developing persons for upward mobility in the organisation⁹⁹² and reinforces inequality. This runs counter to the way that affirmative action is conceptualised in the EEA⁹⁹³ and raises doubts about the commitment of employers to meeting the obligations that the legislation places upon them. These obligations include:

- a) The duty to remove any barriers inherent in an organisation’s policies and practices. The elimination of barriers is considered to be indistinguishable from ensuring true equal opportunity for all individuals. Some of the barriers to transformative affirmative action measures in workplace settings are related to recruitment procedures; advertising of positions; selection criteria; appointments; classification and grading; remuneration and benefits; terms and conditions; job assignments; promotions; transfers, demotions; succession and experience planning, among others,⁹⁹⁴
- b) The duty to develop and train employees in order to enhance their prospects for advancement and preferential promotion. It is submitted that the employer should adopt a holistic approach when selecting employees for training – considering various factors including obstacles faced, family background, geographical location etc. This is a way for the “deserving” working poor candidates from designated groups within the organisation to be given an opportunity to advance;⁹⁹⁵
- c) The duty to adopt measures to promote diversity in the workplace. For instance, developing a recruitment strategy to ensure that the organisation’s workforce reflects the community in which it is situated. The strategy would include making positions more compelling for job seekers by emphasising details that attract people from a

⁹⁹⁰M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” *Southern African Business Review* (2003) 7 (1) 17 18.

⁹⁹¹M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” *Southern African Business Review* (2003) 7 (1) 17 18.

⁹⁹²M Coetzee & L Vermeulen “When will employees perceive affirmative action fair?” *Southern African Business Review* (2003) 7 (1) 17 18.

⁹⁹³Section 15.

⁹⁹⁴See EEA2 Form at page 9. The EEA requires designated employers to send employment equity reports to the Department of Labour. The EEA2 is a form that gives the format for employment equity reports, incorporates the reporting requirements and contains the progress report that has to be completed. All designated employers in terms of the EEA, as well as employers that report voluntarily, are required to fill in this form.

⁹⁹⁵Several human resource specialists are of the view that there are insufficient development prospects for senior managers in South Africa. There is also a lack of commitment from employers to succession planning and executive coaching. This affects the trickledown effect of affirmative action measures. (See S Temkin “Employers Unable to Retain Top Talent”, November 2010 at <http://www.enterprisesa.com/za/?module=publish&submodule=displayarticle&articleid=554&magid=38magpage=> (accessed on 02/05/13).

more diverse candidate pool. These details could include: cultural sensitivity (accommodating cultural and religious holidays and other similar factors) when describing what makes the organisation an attractive workplace; and offering benefits such as onsite day- and child-care subsidies to allow those with young children to apply for positions. Establishing mentoring programmes to foster new friendships within the organisation can be another factor to attract and retain employees;

- d) The duty to reasonably accommodate members of the designated groups. This could include the modification or adjustment to a job or the working environment that will allow a person from a designated group to have access to or participate or advance in employment; and
- e) The duty to ensure “equitable representation” by funding of work-integrated learning and internships for groups not able to gain the skills required by the labour market. Different status groups must be considered and included in succession planning and coaching programmes.

Arguably, these measures include goods or benefits that each person within the designated groups is entitled to share in. If every person within the designated group is entitled to the satisfaction of her/his needs, then someone whose needs are not satisfied has not been treated equally.⁹⁹⁶ Furthermore, if every person is entitled to the means of subsistence, then someone who is lacking those means is not being treated equally.⁹⁹⁷ In this context, affirmative action should be based on redistribution of opportunities, which allows the distribution of the abovementioned entitlements in addition to the provision of the job itself.

The Canadian experience with affirmative action exemplifies this approach. As pointed out in Chapter 6, the Canadian government has implemented some target-oriented programmes for Aboriginal Peoples.⁹⁹⁸ One of these programmes is called the Aboriginal Skills and Employment Partnership programme (ASEP), which has a collaborative approach to a comprehensive Aboriginal training and employment plan that links skills development to specific job opportunities on major economic developments across Canada with large

⁹⁹⁶See D Réaume “Discrimination and Dignity” in F Faraday, M Denike & M Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 125.

⁹⁹⁷D Réaume “Discrimination and Dignity” in F Faraday, M Denike & M Stephenson (eds) *Making Equality at Rights Real: Securing Substantive Equality under the Charter* (2006) 125.

⁹⁹⁸See part 6.3.3 a) of Chapter 6 of this dissertation.

employment impacts.⁹⁹⁹ It is arguable such a programme is a development towards affording some previously disadvantaged groups to share in the ‘entitlements’, namely skills development and training.

As I have reflected in Chapters 4 and 5 of the study, the notion of substantive equality encompasses a variety of concepts as indicated in one of the aims of substantive equality – namely that of breaking the cycles of disadvantage. This aim embodies concepts such as: *inter-generational disadvantage, community vulnerability and systematic disadvantage*. These concepts ensure that affirmative action adopts a holistic approach towards disadvantage. The cycles are entrenched within different agencies – individual agency (inter-generational disadvantage); communal agency (community vulnerability); and systematic disadvantage (societal agency). This means that the poverty-alleviating benefits of affirmative action should be driven by all these agencies to have a genuinely redistributive impact. This is facilitated by an expansion of affirmative action endpoints from being individually oriented to empowering communities economically. For instance, in addition to admitting disadvantaged individuals to universities and affording them job appointments (individual agency), educational institutions and business operations can be established in communities that are vulnerable to poverty to increase the number of the most deserving beneficiaries. As these institutions and businesses become more established, the chances of the respective benefiting communities becoming connected to mainstream society increases. This will in turn increase the full social participation of this community and also increase the opportunities for the people from this community to pursue a dignified life. This stance certainly requires a holistic approach to affirmative action and an expansive view of affirmative action.

In elaboration, the decision of the Supreme Court in Canada in *R v Kapp*¹⁰⁰⁰ is a reflection of how affirmative action embraces concepts beyond the ‘traditional’ workplace setting. The Court dismissed the appellant non-Aboriginal fishers’ claim that the exclusive licenses awarded to Aboriginal fishers discriminated against them on the basis of their race. The dismissal was based on the fact that section 15(2) of the Charter enables governments to proactively combat discrimination by developing programmes aimed at helping disadvantaged groups improve their situation. The Court’s decision validated the awarding of

⁹⁹⁹See part 6.3.3 a) of Chapter 6 of this dissertation.

¹⁰⁰⁰(2008) SCC 41. For more on the *Kapp* case see part 6.3.3 b) of Chapter 6 of this dissertation.

licenses to the Aboriginals and could be viewed as a step towards social inclusion, breaking the cycles of disadvantage, diversifying the fishing industry in Canada and thereby affirming the ‘Aboriginal’ identity, and integrating the previously disadvantaged (particularly the Aboriginals) into Canada’s economic system, in turn promoting their full social participation. Furthermore, the decision has an element of recognition equality¹⁰⁰¹ and redistribution equality¹⁰⁰² through the identification of status and an attachment of a resource to that status (Aboriginals and the licenses). The *Kapp* case, then, serves to confirm the ‘expansive’ nature of positive measures.

A great deal of institutional accommodation is required in order to enable the disadvantaged to secure the advantages associated with affirmative action.¹⁰⁰³ Institutional accommodation refers to the process of engaging with deeper and more resilient aspects of the social structures of an institution to illuminate the dynamics of difference, with the intention to accept and align them to the characteristics and functioning of the institution.¹⁰⁰⁴

Specific institutional arrangements are required for any goals to be achieved sustainably in an organisation or society at large. Development requires capital formations and investment, neither of which are available in vulnerable communities.¹⁰⁰⁵ To some employers the reality of effective development strategies may be far from their ideal of mutual non-interference or involvement. In this regard, it takes effort to remove barriers and create genuine pathways to developing the previously disadvantaged, who often become stuck at entry-level and low-skill positions.

In the light of the above, evidently section 15 confers the duty to accommodate on employers. Some fundamental question arise: How does an organisation determine the nature and scope

¹⁰⁰¹See part 3.3.2 of chapter 3 of this dissertation.

¹⁰⁰²See part 3.3.3 of chapter 3 of this dissertation.

¹⁰⁰³Institutional accommodation is derived from institutional theory, which has captured the attention of a wide range of scholars across the social sciences and is employed to examine systems ranging from micro interpersonal interactions to macro global frameworks. The roots of institutional theory run richly through the formative years of the social sciences, enlisting and incorporating the creative insights of scholars ranging from Marx and Weber, Cooley and Mead, to Veblen and Commons. (For reviews of early institutional theory see J Bill & R Hardgrave Jr *Comparative Politics: The Quest for Theory* (1981); R Scott *Institutions and Organisations* (2001).)

¹⁰⁰⁴M Buckley “*Law v Merion: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the Charter*” in F Faraday, M Denike & M Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006) 179 – 192.

¹⁰⁰⁵The rest of this paragraph draws from O O’Neill *Faces of Hunger: An Essay on Poverty, Justice and Development* (1986) 113.

of each of the above duties given it is difficult to have a simple position on affirmative action strategy? Can there be a set framework in which organisations can determine the nature and scope of the duties or section 15 rather?

Organisations are different and it is impossible to have a ‘one size fits all’ position on how section 15 should be realised in individual organisations. It becomes advisable that each organisation should determine the nature and scope of their organisational duty to accommodate after a comprehensive analysis of the needs of the organisation in the context of its affirmative action strategy. Furthermore, it is submitted that the “comprehensive analysis” – approach adopted in the Canadian case of *Meiorin* becomes relevant in addressing the nature and scope of the duty to accommodate.¹⁰⁰⁶ In the *Meiorin* the court identified questions that can be utilised to establish the nature of the duty to accommodate:¹⁰⁰⁷

- Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose, or could standards reflective of group or individual differences and capabilities be established?
- Is there a way to do the job that is less discriminatory, while still accomplishing the employer’s legitimate purpose?
- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

It is submitted that the decision in *Meiorin* could serve as a benchmark for an expansive view of affirmative action strategies in organisations. Furthermore, *Meiorin* can advance an alternative approach to assessing affirmative action efforts especially in determining genuine impact and difference. In other words, affirmative action goals go beyond preferential treatment at the endpoint (employment appointments or admission placements). They extend

¹⁰⁰⁶See part 6.3.3 of Chapter 6 of this dissertation.

¹⁰⁰⁷*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at [65].

to other efforts required for accelerated human capacity advancement or development and creation of workplace environments that allow the designated groups to grow and develop on merit.

A critical success factor of an affirmative action strategy would be the development of highly skilled workforce which is empowered to participate in the economy as a means of redistribution equality. In this way, skills development and training is an imperative aspect of human capital development and an important intervention of the whole process of affirmative action in employment in South Africa. Large scale investment in human capital development is required and so does an adoption of a holistic and broad view of training programmes. This can include programs such as pre-employment training programs which is a mechanism which include graduate cadet programs which places talented individuals from designated groups with the objective of bringing trainees up to the level where as many as possible can compete successfully with other advantaged groups. Furthermore, certain meritorious characteristics required in job positions cannot be taught in lecture rooms and potential candidates have to be exposed to situations where acute observations and absorption of meritorious characteristics can take place.¹⁰⁰⁸

Based on the aforementioned, advancing the previously disadvantaged in the organisation, places an obligation to implement practices that reflect such an intention and a great deal of institutional accommodation.¹⁰⁰⁹ In addition, it is submitted that organisations should engage the aims of substantive equality within their affirmative action strategies. This engagement should be part of a comprehensive analysis of the organisation regarding its respective

¹⁰⁰⁸Exposure to situations that can lead to observation and absorption of meritorious characteristics is arguably linked to social capital - which refers is the social relationships that facilitate individual access to resources and social networks pivotal to social and academic development. Mentorship and career coaching programmes allows exposure to new occupational and social networks. Mentors can use their influence to facilitate the advancement of their protégés rapidly. By creating and implementing effective facilitated mentoring programmes organisations can extend the benefits of mentorship and career coaching to a wide cross section of promising previously disadvantaged employees including inexperienced entry level employees. As the beneficiaries of these programmes succeed they remain linked to their vulnerable communities and can facilitate the inflow of resources to these communities.

¹⁰⁰⁹Implementation of practices that advance affirmative action requires establishment of support structures in organisations to ensure that affirmative action efforts are sustained to such an extent that the set objectives are met. These support structures include managerial commitment on different levels – top management and operational level; set of employment standards that reflect affirmative action in recruitment and selection, promotion, decision making processes, remuneration, working hours. Visible support of top management is indispensable.

implementation of an affirmative action strategy. The analysis should involve strategic probing questions:¹⁰¹⁰

- How can the strategy break cycles of disadvantage?
- How can the organisation affirm identities?
- How can the organisation promote equal respect of dignity? and
- How can the organisation promote full social participation?

The above questions drive towards the formation of integrative mechanisms that open up ways of developing human capacities of the designated groups. It is thus submitted that there is a need for creative interpretations of the affirmative action measures in the EEA, which textually and otherwise already reflect an expansive view of affirmative action. The study now turns to the next facet – class as a “plus factor.”

8.3.3 Class as a plus factor

As pointed out in Chapter 1 of this study, current affirmative action policy in South Africa is race-based with the objective of increasing the participation of “black people” in the labour market. Some commentators point out that affirmative action has benefited the apex of the (black) class structure at the expense of the masses. “Has class therefore become the new determinant for access? And if so, is a race-based system of affirmative action inadequate to redressing inequality of access? Is it even fair?”¹⁰¹¹ The arguments in favour of supplementing a race-based approach with a class-based approach derive from the American and Indian approaches to affirmative action, both of which use socio-economic criteria to identify beneficiaries.

Applying general principles of justice to the contextual needs of particular parties is a challenge inherent in a democratic adjudication of specific policy and legal dilemmas. The treatment of equals and non-equals, according to their ‘relevant differences,’ is fundamental to the process of democratic judgment – and what constitutes ‘relevant differences,’ can only

¹⁰¹⁰The suggested questions were derived from the aims of substantive equality which are: (i) breaking the cycle of disadvantage; (ii) promoting respect for dignity; (iii) affirmation of identity; and (iv) facilitation of full social participation in society. (For more on the aims please see Chapter 4 and 5 of this dissertation.

¹⁰¹¹J February “Redress to Empowerment: The New South African Constitution and Its Implementation” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 80.

be determined through unrestricted deliberation.¹⁰¹² This is what a substantive conception of equality seeks to achieve – acknowledging difference. Contextualising differences is in line with an *expansive view of affirmative action*¹⁰¹³ and the idea of accommodating others in institutions. In this context, the use of class in the process of identifying beneficiaries is an attempt at forming “cross-class coalitions programmatically and allowing a radical redistribution of power, resources and opportunities”¹⁰¹⁴ to fulfil the constitutional imperatives and achieving equality. This has been the case in India with its ambitious approach to *breaking cycles of disadvantage* among the SCs, STs and OBCs.¹⁰¹⁵ The “backwardness” criterion in India has allowed a radical distribution of power, resources and opportunities. Although the level of success proves difficult to ascertain, the principle behind using class has allowed India to embrace the spirit of substantive equality.¹⁰¹⁶

However, defending the usage of a particular identity or status indicator ought to be approached carefully. It has to acknowledge the fact that intolerance of other forms of identities threatens the spirit of solidarity and justice.¹⁰¹⁷ Such tolerance is somewhat determined by the nature of social capital and social networking. In other words, tolerance of other identities is reflected in how people network across communities and in organisations. Once such conceptual and strategic bridges have been crossed, the hard work of envisioning how to create a wide-reaching alliance that would not only fight for social policies that would preserve particular identities, but also enhance equality across lines of race, gender and class, could commence. Further enhancing equality would require being attentive to the disadvantage that is attached to the status lines. The US federal affirmative action contracting programme is relevant in this regard. The programme awards contracts to minority businesses that belong to socially disadvantaged individuals. It is acknowledged that the ability of these individuals to compete in the free enterprise system has been impaired because of diminished capital and credit opportunities compared to others in the same business area who are not socially disadvantaged.¹⁰¹⁸ The legacy of apartheid was (and still is) the prominent

¹⁰¹²See J February “Redress to Empowerment: The New South African Constitution and Its Implementation” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 80 – 82.

¹⁰¹³See section 8.3.2 of this chapter above.

¹⁰¹⁴See L Jacobs *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (2004) 123 - 124.

¹⁰¹⁵See part 6.4 of Chapter 6 of this dissertation.

¹⁰¹⁶See section 6.4.2 of Chapter 6 of this dissertation.

¹⁰¹⁷See A Brysk & D Wehrenfennig “My Brother’s Keeper? Inter-ethnic Solidarity and Human Rights” (2010) *Studies in Ethnicity and Nationalism* Vol. 10, No.1 1-18.

¹⁰¹⁸See section 6.2.2 of Chapter 6 of this dissertation.

impediment to equal opportunity because of its explicitly racial dimension. This means that race-based preference is still appropriate.¹⁰¹⁹ It can be argued that class-based preferences will benefit large numbers of black Africans and some poor whites. The poor and working-class whites would be included in the affirmative action programme not for reasons of historical compensation, but in order to recognise that the goal of affirmative action goes beyond historical compensation and is aimed at providing genuine equal opportunity and equality of condition for all South Africans. Class-based preferences combined with narrow and temporary race-based preferences would allow the policy to be of relevance in the fight against poverty. As argued earlier in the study, apartheid ensured that there is a strong link between discrimination and the socio-economic status of most black Africans. Those who suffered the worst kinds of discrimination are concentrated at the lower rungs of society. In addition, most of the poor are poor precisely because they have been scarred more deeply by the legacy of apartheid than other South Africans have. They have also been deprived of opportunities to develop the ‘meritorious characteristics’ required to become *suitably qualified* for opportunities. Some black Africans have had opportunities to acquire the *suitable qualifications* and, in most cases, affirmative action benefits have been awarded to this relatively small group of advantaged black South Africans.¹⁰²⁰

Class-based preference is relevant to the South African redress strategy as it embraces the integration rationale for affirmative action, which reflects a concern for those members from the designated groups who are marginal or excluded from privileged positions or opportunities in South Africa. Based on the integration rationale, affirmative action is justified as a means of integrating those members into the institutions and social networks that regulate privileged opportunities.¹⁰²¹ The targeted groups here are those that in a “stratified social structure have been left behind in the equitable distribution of the benefits of social life.”¹⁰²² In this sense, by helping the most disadvantaged Africans, class-based preference arguably does a better job of remedying past discrimination than an exclusively race-based affirmative action policy does. “The attraction of the integration rationale for affirmative action is precisely that it places those at the socio-economic margins of society at

¹⁰¹⁹See M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 250.

¹⁰²⁰See part 3.5.2.3 of Chapter 3 and part 2.4.3.5 of Chapter 2 of this dissertation.

¹⁰²¹L Jacobs *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (2004) 124.

¹⁰²²L Jacobs *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (2004) 124.

the forefront of its concern.”¹⁰²³ For a generation, affirmative action policies have benefited the middle class. It may be time for class-based preferences to supplement existing policies in order to benefit the poor and working class (South) Africans who were the most victimised under apartheid and colonialism.

In Chapter 7 of this study, I referenced a number of commentators who argue for a similarly nuanced approach to affirmative action – one that combines elements of race and class or other criteria. This study is sympathetic to these views and argues that it may be time for class to be used as ‘plus factor’ in the criteria for affirmative action benefits. Such an approach would recognise the intricate relationship between race and other status indicators, including class, in South Africa. From a historical perspective, the right to equality in South Africa was deployed to eliminate laws and social practices that discriminated against blacks because of the colour of their skin. In this regard, making class part of the criteria recognises that most black South Africans not only suffered from discrimination under Apartheid, but also experienced socio-economic disadvantages that still exist today. These South Africans are unable to benefit from the narrow race-based affirmative action policies because their disadvantage precludes them from attaining the qualifications necessary to be considered for jobs or educational opportunities that affirmative action facilitates.

It should be noted that class cannot be the only criterion in the reconceptualised version of affirmative action. As I pointed out in Chapter 7, an exclusively class-based approach has its own shortcomings. In the first place, it assumes that economic empowerment is the only element required in the affirmation of the previously excluded; and, secondly, that while class could deracialise the lower echelons of the class hierarchy, one cannot assume that it will automatically do so for the upper echelons of any organisational structure. It is submitted that a system of preferences for the socio-economically disadvantaged in education and entry level employment will achieve the legitimate goals of affirmative action, while avoiding the pitfalls associated with race- and gender-based preferences. Class will complement race to refine the selection of beneficiaries of affirmative action. Moreover, the continued use of race will arguably be a regulative refinement designed to ensure that racial groups are treated with greater fairness.¹⁰²⁴

¹⁰²³L Jacobs *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (2004) 124.

¹⁰²⁴See O Dupper “Affirmative Action: Who, How and How Long?” (2008) 24 *SAJHR* 426.

Attentiveness to the interaction between racism and class structure would enhance the arguments in favour of affirmative action.¹⁰²⁵ Most importantly, class as a plus factor will advance an expansive notion of equality that informs an expansive notion of affirmative action – and hence a more nuanced approach to affirmative action in South Africa. The next section will provide some observations derived from the two aspects explored above.

8.4 Some observations

It is evident that affirmative action is a top-down strategy meant to level the playing field for those who are capable of taking advantage of opportunities previously denied to them (the suitably qualified). For the underclass, an entirely different set of bottom-up strategies is called for. The two facets explored above tend to invoke a “redistributive consciousness” within the notion of affirmative action. They also allow affirmative action to provide for a genuine social reconstruction platform based on the following three principles:

Firstly, the explored ‘facets’ aid and enrich the affirmative action discourse by facilitating the achievement of not just equality of *opportunity* but also to achieve equality of *result* in pursuit of levelling the playing field. This is in line with President Johnson’s sentiments:

“You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, ‘you are free to compete with all the others’ and still justly believe that you have been completely fair.”¹⁰²⁶

As noted above, an expansive view of affirmative action requires the state and/or employers to fulfil the obligations imposed on them by section 15 of the EEA. Fulfilling these obligations ensure that those who once were – and still are – ‘hobbled by chains’ of apartheid and socio-economic disadvantage can properly compete for the spoils of affirmative action. By placing an obligation on employers to mentor employees, conduct performance appraisals with an intention to create development plans, or schedule training to improve skills, it ensures that the root causes of disadvantage are recognised and addressed as part of a more

¹⁰²⁵J Schwartz *The Future of Democratic Equality: Rebuilding Social Solidarity in Fragmented America* (2009) 100.

¹⁰²⁶“Affirmative action” article available at <http://www.civilrights.org/resources/civilrights101/affirmaction.html> (accessed 21/02/2014)

comprehensive and nuanced approach to affirmative action. A class-based approach ensures that those on the lower rungs of the social structure, who are arguably the most victimised and the most deserving, received recognition, while other criteria, particularly race, become regulative refinements designed to ensure targeted groups are treated with greater fairness. The refinement arguably equalises the conditions within which the benefits are accessed, which creates a more balanced playing field.

Secondly, this approach to affirmative action ensures that one remains cognisant of the obstacles faced by targeted beneficiaries. For example, in deciding between two applicants who have applied for a position or for admission to a competitive university, this approach would require employers to look beyond simply the past track record to consider the socio-economic barriers that each applicant has faced in their lives or careers. The creation of more equal starting places cannot be achieved by pursuing “employment equity” only; it calls for the realisation of all positive measures contained in section 15 of the EEA. It is clear that there is often a direct correlation between the obstacles that individuals face in life and their (socio-economic) class. As a result, a consideration of class (or socio-economic circumstances) in the implementation of affirmative action will afford poor individuals a much better opportunity to attain the benefits (like jobs or university admissions) that affirmative action is meant to deliver.

Taking into account the obstacles an individual has faced also means that one can make allowance for background injustice. Applicants or targeted groups are responsible for their own actions, but they are not responsible for their class or socio-economic status, or for the disadvantages that stem from that status (for instance, inter-generational disadvantage). Some cycles of disadvantage faced by the working poor are not in any sense of their own making, hence a policy to compensate for that unfair condition is morally defensible. Those who benefit, as pointed out earlier, can become sources of social capital for their friends, relatives and neighbourhoods and facilitate the flow of resources into communities to which they are linked.

Thirdly, the facets trigger a commitment to the provision of social resources within organisations (using affirmative action as a yardstick). These social resources include facilitating a discussion with an individual to gain a holistic view of past experience and future aspirations, as well as identifying necessary actions in order to achieve milestones. In

these discussions employers would: a) consider whether they are able to provide an employee with an opportunity to work on a special project; b) explore the individual's interests and values; c) define the individual's skills to discover if there are skills they would like to see strengthened and developed; and d) explore creative opportunities for growth by for instance considering projects that match the individual's interests and help him or her to acquire new skills. Once the discussions are complete, an individual development plan should be drawn up. In this plan the employer could outline the suggested next steps and gets agreement from the individual on the recommended course of action. This will ensure the development of meritorious characteristics arguably required by those disadvantaged to advance within organisations. This resource is part of an expansion of the notion of equality.¹⁰²⁷ It is an active effort to equalise starting places in organisations. It is also a step towards expanding the notion of affirmative action from merely changing the colour composition of an organisation to defining and removing structural and endemic barriers to the advancement of the disadvantaged.

8.5 Conclusion

The socio-economic reality of South Africa compels one to consider what causes or caused the current lack of representation, opportunity, resources and/or qualifications of the disadvantaged. It is submitted that for the strategic elements of substantive equality (particularly affirmative action) to be responsive to this reality, there is a need for policy makers (and the judiciary) to (i) adopt a more expansive view of affirmative action, and (ii) adopt a more nuanced approach to affirmative action – one that supplements the current race-based system with a class-based one. Each will be summarised in brief:

i) *An expansive view of affirmative action.* It is imperative to give content or substance to the various affirmative action measures contained in s15 of the EEA in an effort to expand the view of the policy itself. Section 15 of the EEA defines affirmative action as a multifaceted policy; one that not only makes provision for preferential treatment, but also one that seeks to identify and eliminate barriers to advancement, promote diversity, ensure reasonable accommodation, and develop and train members of the disadvantaged groups.

¹⁰²⁷The disadvantaged in this context are those who lacked opportunities in the past to acquire the education and skills required for better-paying positions, and those whose limitations can be attributed to inter-generational disadvantage or communal vulnerability, but managed to get an affirmative action entry-level job appointment.

An expansive view of affirmative action also involves a great deal of institutional accommodation to secure advantages. Specific institutional arrangements are required for the sustainable achievement of the goals of affirmative action. To some employers, the reality of effective development strategies may be far from their ideal of mutual non-interference or involvement. In this regard, it takes commitment to remove barriers and create genuine pathways to developing the previously disadvantaged who are often confined to entry-level and low-skill positions. The implementation of effective means to ensure that equity values are incorporated into administrative decision-making is fundamental in the realisation of substantive equality.

ii) *Class as a plus factor*. The legacy of apartheid was (and still is) the most prominent impediment to equal opportunity in South Africa. It is arguable that class preferences will benefit large numbers of black Africans and some poor whites. Class preferences combined with other status indicators would allow affirmative action to be relevant in the fight against poverty. Class preferences embrace the integration rationale for affirmative action, which reflects a concern for those members from the designated groups who are marginalised or excluded from privileged positions or opportunities in South Africa.

From the discussion in this chapter and the study thus far, a fundamental point that has emerged is that the lives of the poor should inform the principle of accommodating differences among members of society. This principle informs the understanding of substantive equality as indicated in Chapters 4 and 5. Furthermore, the poor are the primary victims of the ‘causes’ of inequalities. These two facets drive an expansive notion of equality to address cycles of disadvantage as well as to engage with the causes of disadvantage. In other words, the facets can assist in restructuring affirmative action to reach the aims of substantive equality for the sake of those who are ‘different’ – those entangled in the threads of disadvantage. Furthermore, they authenticate the promise that substantive equality holds, which is that it is not status *per se* which is problematic, but the disadvantage attached to it. The next chapter will conclude the study by providing a summary of the dissertation and suggesting the way forward.

CHAPTER 9: CONCLUSION AND THE WAY FORWARD

9.1 Summary of the study

This chapter will provide an overview of the dissertation, consisting of a summary of the main arguments contained in the preceding chapters. The following part will map the way forward based on proposed idea thought patterns that should trigger a reconceptualised notion of affirmative action.

The main objectives of this dissertation were to examine: i) to what extent the notion of substantive equality facilitates the adoption of strategies (such as affirmative action) to address patterns of disadvantage, socio-economic inequality and social exclusion; ii) the extent to which substantive equality facilitates the adoption of affirmative action as a weapon in the fight against poverty and inequality and, if so, whether this has the potential to advance socio-economic equality, non-discrimination and social inclusion; and iii) whether a paradigm shift is necessary in order to reconceptualise affirmative action as a policy that does not only focus on advancing equitable representation, but also on processes that provide for the development of human capacities.

In Chapter 2 of the dissertation I indicated that poverty and inequality have become synonymous with socio-economic disadvantage.¹⁰²⁸ These two issues are deeply entrenched in South Africa and addressing them is a broad and ambitious task. Defining poverty is not a clear-cut matter and neither is measuring it. It is a multidimensional phenomenon covering many aspects ranging from hunger, unemployment, race, education, gender, access to clean water, housing, and health care. Poverty is also closely linked to inequality, social exclusion and vulnerability to crisis. One can conceptually distinguish between different types of (in-)equality including, among others, equality of outcome; equality of opportunity and equality of conditions. According to Baker *et al*, these inequalities are generated within societal systems, which include social, economic, cultural, political and affective systems.¹⁰²⁹ As illustrated in Chapter 3 of this study, these systems are distinct yet interrelated at a conceptual and an empirical level.

¹⁰²⁸This dissertation interchangeably employs the terms “two issues” and “poverty and inequality”.

¹⁰²⁹See more on this in Chapter 3 of this dissertation.

Chapter 3 set out to explore the way in which the distinct concepts of poverty and inequality overlap and interact with each other. Both result in status harm to an individual and are indicators of socio-economic disadvantage. In this regard, these two issues concretise the close connection between status and socio-economic disadvantage. According to Sandra Fredman, dealing with the close connection between low status and socio-economic disadvantage is one of the promises of substantive equality.¹⁰³⁰ Sustainable reduction of poverty cannot be achieved unless equality of opportunity and resources is ensured. A closer look at the several determinants of poverty and inequality in South Africa (race, gender, class, education attainment etc.) suggests that there is a connection between status and inequality (and poverty) which often leads to socio-economic disadvantage. The chapter confirmed that both influence the cycles of disadvantage that ‘feed’ their existence. At the end of the chapter, a fundamental question was posed: if poverty and inequality result in status harm and concretise the fusion of low status and disadvantage, does a substantive conception of equality speak to socio-economic disadvantage in South Africa? I turned to that question in Chapter 4.

Chapter 4 outlined the interrelationship between a substantive conception of (in-)equality and socio-economic disadvantage. Firstly, the chapter outlined that substantive equality can usefully be contrasted with the more conventional view of equality, namely the idea that likes should be treated alike, which is often referred to as the notion of formal equality. Based on the traditional understanding of equality, formal equality and substantive equality are the two distinct models that are often used to reflect on issues of equality and discrimination. Secondly, while the right to equality (conceptualised as substantive equality) has the potential to make a valuable contribution to some aspects of socio-economic disadvantage, it has not been sufficiently developed by the courts in general to address distributive inequalities in its own right. This is not surprising, given the complex nature of the phenomenon of poverty and the elusiveness of inequality as a concept.

What is therefore still underdeveloped is the judiciary’s attempt to define and give meaning to the aims of substantive equality. Sandra Fredman has identified the aims of substantive equality as follows: (i) breaking the cycle of disadvantage; (ii) promoting respect for dignity; (iii) affirmation of identity; and (iv) facilitation of full social participation in society. The

¹⁰³⁰See S Fredman, “Facing the Future: Substantive Equality under the Spotlight” in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 17 - 19.

chapter confirmed that these aims reinforce a link between substantive equality and alleviation of socio-economic disadvantage. Furthermore, the aims provide a platform from which substantive equality can begin to address the issues of poverty and socio-economic inequality. Through these aims, it is argued, substantive equality embraces dimensions that are relevant to the fight against poverty and socio-economic inequality. These dimensions include: a) a recognition of diversity, difference, disadvantage and discrimination, and affirmation of the equality of everyone; b) the encompassing of both *de jure* and *de facto* equality; c) correction of the environment that causes the disadvantage; and d) the levelling of the playing field which would lead to equality of opportunities, equality of outcome, and equality of access to opportunities.

Chapter 5 introduced affirmative action as a strategic element of substantive equality. One of the central assumptions of this study is that the notion of substantive equality facilitates the adoption of strategies to address patterns of socio-economic disadvantage. The aim of Chapter 5 was to evaluate whether and to what extent the policy of affirmative action is a strategic element of substantive equality, and whether the policy is or can be aligned with the specific aims of substantive equality (namely breaking the cycle of disadvantage; promoting respect for dignity; affirmation of identity; and facilitation of full social participation in society), which would, in turn, enable it to play an important role in the alleviation of poverty. The chapter advanced the view that there is a close fit between affirmative action and these aims, and that affirmative action could play an important role in the fight against socio-economic disadvantage. The aims of substantive equality provide a basis from which affirmative action can assist victims of disadvantage to develop ‘potentially meritorious characteristics.’¹⁰³¹

Firstly, in order to begin to break the cycles of disadvantage, measures such as education and skills training for the disadvantaged (which all fall under the rubric of “affirmative action” as defined in this study) would help the disadvantaged to acquire ‘meritorious characteristics’ that would enable them to access the opportunities available (for example, jobs and/or placements in education institutions). Secondly, through the potential benefits that affirmative action provides (job appointments and education placements), it can promote the second aim of substantive equality, namely promoting respect for equal dignity. These potential benefits

¹⁰³¹ See Chapter 5, section 5.4.2.3 of this dissertation.

allow the recipients to acquire that which they need to achieve a dignified standard of living (with a job, a source of income is created which enables a recipient to acquire the basic commodities required to live a decent and dignified life). Thirdly, affirmative action facilitates the affirmation of identity, which is the third aim of substantive equality. A substantive sense of equality requires that measures be taken that would ensure that (socio-economically) disadvantaged individuals from all sections of society have an equal chance to gain access to a particular social good (such as jobs and places at university) without discrimination. Often, the injury of poverty and inequality is aggravated by stigma. Those whose identities are associated with poverty and socio-economic disadvantage may (or usually do) develop low self-esteem as a result of stigmatisation. Consequently, they often fail to challenge their position in society and this results in a skewed distribution of social goods and resources in general. The study argued that affirmation of identity is an integral aspect of recognition which goes beyond mere affording of equal respect to an individual but accepting individuals as they are. It seeks to promote equality of recognition, which demands that instead of adhering to the principle of like treatment for all, different identities should be accommodated and respected. This has to be reflected through facilitation of full social participation – the final aim of substantive equality. Full social participation demands that every individual be allowed to participate in all systems of society. The lack of participation in key activities of the society in which an individual lives often results in social exclusion. As established earlier in the study, key social activities are found within systems, such as the democratic and the legal system, the labour market, the welfare state system, and the family and community system. These systems represent outcomes considered to be important in alleviating socio-economic disadvantage. For instance, if the economic system becomes accessible to individuals (for example, through employment), it exposes them to a new set of social networks and tools which would facilitate their integration into society. Furthermore, individuals experience social justice through the democratic and legal system, which provides them with the opportunity to pursue their access to social goods. Although debatable, the advent of the post-apartheid government (democratically elected) and the new legal system in South Africa have provided many black South Africans with an opportunity to access and acquire opportunities denied to them during the apartheid era. This is arguably a step towards facilitating full social participation for the black population.

Chapter 6 constitutes a comparative study on affirmative action. The chapter explored three jurisdictions that address socio-economic inequalities among groups by means of affirmative

action. The jurisdictions chosen were the United States, Canada and India. The indicators that were used to compare the jurisdictions were: (i) the aims and purpose of affirmative action; (ii) the beneficiaries and types of benefits; (iii) the impact of affirmative action on reducing disadvantage; and finally (iv) the mechanisms to ensure that the benefits of affirmative action reach the targeted beneficiaries. Although race is the dominant basis for affirmative action in United States, its federal affirmative action contracting programme use socio-economic disadvantage as the basis for the selection of the beneficiaries of the programme. This brings to the fore the issue of using class as a criterion for affirmative action benefits. Unlike India and Canada, a formal and not a substantive notion of equality has been adopted in the United States. Canada openly embraces a substantive notion of equality. The choice of Canada as a jurisdiction was also informed by the fact South Africa's EEA is to a large extent based on the Canadian EEA.¹⁰³² In addition, Canada's approach to the justification for affirmative action, as well as its approach to the demarcation of beneficiaries, echoes the South African approach. India was selected for two main reasons. The first is that India embraces a substantive approach to equality. The second is the fact that affirmative action in India is based on socio-economic criteria rather than race as is the case in the other jurisdictions under review.

Affirmative action measures in USA seek to promote the inclusion of marginalised groups in three areas: education, employment and government contracting. It is particularly in the area of government contracting that affirmative action is most closely aligned with the aims of a substantive notion of equality. Government contracting policy is targeted at identified minorities, *affirming their identity*, thereby paving a way for them to participate in the USA's economic system (thereby increasing their *full social participation*). The socio-economic criterion (it is specifically targeted at the most disadvantaged of the disadvantaged groups) is arguably a step towards *breaking cycles of disadvantage* and, most importantly, the removal of barriers for the benefit of the minorities. Federal contracting in the USA arguably helps the most disadvantaged within the disadvantaged groups and provides a more nuanced and targeted approach to redressing the effects of past discrimination than an exclusively race-based affirmative action policy does.

¹⁰³² Canadian Employment Equity Act of 1995.

In the United States members of working-class minority communities would face significant employment barriers in the absence of a policy of affirmative action.¹⁰³³ The US labour market prior to the introduction of affirmative action was governed by racially exclusive craft unions. In addition, many jobs could be accessed only via kinship ties or patronage and political connections. In addition, without the federal contracting affirmative action programme, black people in America would have difficulty acquiring government business contracts.¹⁰³⁴

Canada's affirmative action policy facilitates socio-economic benefits that are related to socio-economic rights. Such benefits include access to education and employment, increased economic opportunities, the facilitation of social participation, and the promotion of pay equity, among other things. Nonetheless, to ensure that the benefits of affirmative action reach the targeted beneficiaries, Canada has implemented a number of measures that may prove instructive in the search for a more targeted approach to affirmative action in South Africa.

These include the following:

a) *The implementation of target-oriented programmes* such as the Aboriginal Skills and Employment Partnership programme (ASEP) (which addresses both skills and employment deficiencies); the Aboriginal Skills and Training Strategic Investment fund (ASTSIF) (which is targeted at helping Aboriginals get specific skills they require to benefit from economic opportunities); the Aboriginal Skills and Employment Training Strategy (ASETS) (which is an integrated approach to Aboriginal labour market programming that links training to labour market demand and ensures that Canada's Aboriginal people can fully participate in economic opportunities); and, finally, the Aboriginal Fisheries Strategy (which was introduced in 1992 as a mechanism to promote aboriginal involvement in commercial fishing);

b) *The 'narrow lens' approach*, which judges discrimination by factors such as whether the claimant is part of a group that has suffered from past disadvantage or stereotyping; whether the ground of discrimination corresponds to the claimants' real needs and circumstances; whether the law in question improves the situation of a group that is worse off than the

¹⁰³³ J Schwart *The Future of Democratic Equality: Rebuilding Social Solidarity in a Fragmented America* (2009) 167.

¹⁰³⁴ J Schwart *The Future of Democratic Equality: Rebuilding Social Solidarity in a Fragmented America* (2009) 167.

claimant; and the significance of the interest affected, both to the claimant and in constitutional or societal terms);

c) *Comprehensive institutional accommodation*, which obliges employers to take active steps to avoid discrimination wherever and however possible. It is based on a three-part analysis: that the employer adopted the standard for a purpose rationally connected to the performance of the job; that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose; and

d) *Linking the right to dignity to positive measures*. The judiciary in Canada clarified that matters brought before the court questioning the provision of positive measures (involving economic interests and economic disadvantage) are often related to a loss of dignity.¹⁰³⁵ In *Kapp* the Canadian government introduced a measure specifically targeted at specific bands of Aboriginals to afford them increased opportunity to participate in the economic system through the fishing industry. The court's decision to uphold the measure in *Kapp* somewhat legitimises the fact that affirmative action can be 'tailored' for a specifically targeted group or groups to increase their chances of acquiring a decent standard of living in pursuit of a dignified life.

India is the third jurisdiction explored in the comparative study. The utilisation of a multiple-factor approach to determine 'backwardness' for 'other backward classes' is a significant development in India's remedial efforts because – as was made clear in this dissertation – disadvantage is complex and multifaceted, and cannot be identified by one criterion only. In this regard, India provides a paradigm shift in the debates about developing a nuanced approach to criteria for benefiting from affirmative action, and illustrates how class can be utilised to establish a more nuanced approach to distribute benefits. 'Reservations' (as affirmative action is referred to in India) afford the designated groups an opportunity to be part of India's mainstream society, which not only *upholds respect for their dignity* but also *affirms their identity* and *paves the way for their full social participation*. The beneficiaries of affirmative action in India are heterogeneous. They consist of scheduled castes (SCs); scheduled tribes (STs) and other backward classes (OBCs). India has various affirmative

¹⁰³⁵ *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur* (2003) 2 S.C.R. 504, 2003 SCC 54.

action schemes and the most commonly used is a policy of reservations, which include political, job and educational reservations.

India has adopted a number of unique measures to ensure that affirmative action benefits reach the targeted beneficiaries. These include: (i) setting up special commissions mandated to conduct discussions and investigations that give legal impetus to affirmative action; (ii) utilising the criterion of ‘backwardness’, which is assessed on the basis of a variety of socio-economic and educational criteria; and iii) the concept of the ‘creamy layer’ – the idea that the privileged strata within the disadvantaged groups should not reap the benefits of affirmative action. As in India, the benefits of affirmative action in South Africa are being enjoyed by a few at the expense of the majority of the population. In this regard, it is at least arguable that some version of the ‘creamy layer’ concept should be introduced in the South African context, one that perhaps uses an income threshold to determine eligibility for affirmative action.

The case studies indicated that affirmative action serves a very strong recognition function. However, the ability of affirmative action to serve a transformative distributive function is doubtful unless a paradigm shift occurs – a departure from the conventional view points of affirmative action. For example, in Canada the members of designated groups still experience higher rates of unemployment and poverty than the average Canadian.¹⁰³⁶ As noted earlier in the study, economic restructuring in Canada has resulted in the disproportionate representation of racialised group members in low-income sectors and low-end jobs. Even in India, where affirmative action is applied in a more nuanced and targeted manner, members of the ‘other backward classes’, scheduled tribes and scheduled castes nevertheless lag behind upper-caste Hindus in respect of their socio-economic status and levels of education.¹⁰³⁷ This raises serious questions about the redistributive benefits of affirmative action measures.

Chapter 7 provides an overview of South Africa’s affirmative action policy. Affirmative action in South Africa is a constitutionally mandated and legally regulated remedy to rectify race-based inequalities resulting from colonialism and apartheid. As in the USA and India,

¹⁰³⁶See G. Galabuzi, “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection” (November 2005). Paper presented at The National Anti-Racism Council of Canada National Conference Ottawa 11- 16.

¹⁰³⁷S. Desai & V. Kulkarni “Changing Educational Inequalities in India in the Context of Affirmative Action,” (2008) *Demography* Vol. 45 No. 2 245 – 270, 269.

affirmative action measures have been instituted in the areas of both employment and education.

The EEA is the main legislative instrument that regulates affirmative action programmes in South Africa's employment sector. The EEA addresses the legacy of job reservation and exclusion of especially Africans from high-level positions in the workforce. The targeted beneficiaries as defined in the EEA are Africans, women and people with disabilities. The constitutionality of the EEA depends on how the affirmative action provision in section 9(2) of the Constitution is viewed in relation to the right not to be unfairly discriminated against. In *Van Heerden* the Court created a three-part test in terms of which the constitutionality of an affirmative action measure would be measured. The test includes the following requirements: a) the measure must target persons or categories of persons who have been disadvantaged by unfair discrimination; b) the measure must be designed to protect or advance such persons or categories of persons; and c) the measure must promote equality. Satisfying the three-fold inquiry would render a positive measure a complete defence against any challenge suggesting a violation of the equality premise. *Van Heerden* confirmed that affirmative action is now regarded as a composite part of equality rather than derogation from it.

The almost exclusive emphasis on race has had dire consequences. While the participation rates of designated groups in the economy have increased since the introduction of affirmative action measures, inequalities in the labour market nevertheless remain a reality for most of these groups – especially those of African descent. Chapter 6 illustrated that African people in South Africa are still significantly under-represented in every occupational category except in low-end positions, while conversely Whites are still substantially over-represented in all occupations except service and sale workers, crafts and trade-related workers and elementary occupations. Whites also still dominate management positions and continue to be appointed and promoted at a disproportionate rate. What is thus clear is that affirmative action measures in South Africa have (to some extent) deracialised the top occupational levels, while leaving untransformed the elementary positions in which black people have traditionally been over-represented. The focus on top occupational levels tacitly implies that the current affirmative action policy is merely an assimilative exercise.¹⁰³⁸ In

¹⁰³⁸This echoes Nancy Fraser's critique of affirmative action that it does not change the underlying structures, thus limiting its ability to serve as a genuine redistributive policy.

addition, the failure to take efficiency concerns into consideration when implementing affirmative action in the public service has negatively affected service delivery, which ironically impacts most severely on the poor, who are most reliant on the government for the provision of free electricity, water and other amenities.

Chapter 7 confirmed that affirmative action in employment and education entrenches a cycle of disadvantage along racial and inter-class lines. This is mainly because employment and higher education opportunities are mainly confined to a few within the black population. The most controversial aspect of the current affirmative action policy is its reliance on the race-based categorisation of the apartheid era to undo the legacies of apartheid injustice and inequality. Although the intentions and objectives are quite the opposite, the policy instruments being employed are similar. While it is clear that affirmative action was not originally designed specifically to benefit the poor, Chapter 7 made it clear that the policy of affirmative action should not be blamed for the widening gap within the black population as it was not designed to benefit the lower levels of the class structure. However, I argued that neither the fact that the current policy has contributed to the widening poverty gap, nor the fact that the majority of the Africans are yet to reap the benefits from the redress strategy can be ignored. It is submitted that the policy of affirmative action should be redesigned to more effectively remedy the effects of apartheid policies – in particular the limitation that such policies placed on the acquisition of the ‘meritorious characteristics’¹⁰³⁹ required to access employment and educational opportunities. This study acknowledges that affirmative action has limited utility, and that it is by no means the principal mechanism through which wealth is redistributed or poverty reduced.

In Chapter 8 the dissertation explored whether a redesigned policy of affirmative action – one that is more closely aligned with a substantive notion of equality – would ensure a more broad-based form of redress in South Africa. It was argued that the aims of substantive equality place the fight against socio-economic disadvantage within a ‘causes and effects terrain’ (the terrain). This invokes a paradigm shift on how the strategic elements of substantive equality (particularly affirmative action) can contribute towards this fight. The terrain illuminates the flip sides (effect side and the causality side) of social reconstruction strategies and all strategic elements of substantive equality (including affirmative action). It

¹⁰³⁹ See Chapter 5 section 5.4.2.3 of this dissertation.

was argued that it is imperative to map the terrain of disadvantage to highlight the need to uncover both the *causes* as well as the *effects* of such disadvantage. Exploring the ‘causes’ is a step towards building human capacity – developing the capacity of the disadvantaged to qualify for opportunities and participate fully in society. Furthermore, the chapter submitted that It is submitted that for strategic elements of substantive equality (particularly affirmative action) to be responsive to the terrain there is a need for policy makers (and the judiciary) to adopt certain facets within the realm of substantive equality. These facets are ‘positive reinforcers’ of the linkage between the aims of substantive equality and affirmative action. Identifying these ‘facets’ is critical for the realisation of the aims of substantive equality and for making the strategic elements of substantive equality (particularly affirmative action) more relevant to the fight against socio-economic disadvantage. Two ‘facets’ of the reconceptualised idea of affirmative action, within the realm of substantive equality, have been identified in order to facilitate a paradigm shift on how affirmative action can contribute towards poverty alleviation. In the first place, it is imperative that a more expansive view of what constitutes affirmative action be adopted. Secondly, social class should be utilised as a plus factor in determining the beneficiaries of affirmative action. The dissertation is not suggesting that the ‘facets’ will ‘fix’ the current affirmative action policy. The ‘facets’ are meant to serve as ‘channels’ for alternative ways of restructuring the policy.

Adopting an expansive view of affirmative action is the first proposed facet of reinforcing a reconceptualised affirmative action policy. This facet brings to the fore the need to establish and implement section 15 of the EEA in its entirety. Section 15 of the EEA places obligations on employers to: a) identify and eliminate barriers to acquiring opportunities or advance in the workplace; b) promote diversity; c) ensure reasonable accommodation; and d) develop and train employees. The study argued that these measures constitute goods or benefits that each person within the designated groups is entitled to share. The measures seek to allow a barrier-free and diversified workplace, ensure reasonable accommodation of members of disadvantaged groups, and promote skills development and training. The chapter submitted that it is imperative to give content or substance to all the different elements that constitute affirmative action measures. It is clear that affirmative action, as defined in section 15 of the EEA, constitutes much more than preferential treatment.

As pointed in Chapter 4 of the study, there are different cycles of disadvantage that are operational in South Africa. namely:

- a) inter-generational disadvantage – which is the disadvantage that is passed on within families from one generation to the other. Tackling this type of disadvantage would require an individual agency form of solution;
- b) communal vulnerability – which is the disadvantage that is community oriented – communities lacking vital amenities needed to pursue a dignified life. These include lack of good educational facilities, community investment injections, among other things which reflect a communal agency solution; and
- c) systematic disadvantage – prevalent practices, laws or attitudes that are viewed as impartial and sometimes acceptable, but that entrench inequality and disadvantage experienced by certain groups of people in society. This would require systematic agency of solutions.

The different levels of solutions (individual, communal and systematic) required to tackle cycles of disadvantage imply that a holistic approach to affirmative action is essential for it to have a genuinely redistributive impact. This is facilitated by an expansion of affirmative action endpoints from being individually oriented to economically empowering communities. In addition to admitting disadvantaged individuals to universities and affording them job appointments (individual agency), educational institutions and business operations can be established in communities that vulnerable to poverty to increase the number of the most deserving beneficiaries (communal agency). As these institutions and businesses become more established, the chances of the respective benefiting community becoming connected to the mainstream society increase. This will in turn increase the full social participation of this community and also increase the chances of the people from this community being able to pursue a dignified life. When the state and/or employer has the intention to advance the previously disadvantaged in the organisation, there is an obligation to implement practices that reflect such intention and a duty to accommodate. A holistic approach to redress ensures that the measures adopted go beyond the ‘traditional’ workplace setting. The approach is aligned with the expansive notion of equality – substantive equality – that in turn informs an expansive notion of affirmative action.

Class as a ‘plus factor’ is the second facet of reinforcing the reconceptualising of affirmative action. The idea of using class as a ‘plus factor’ in the implementation of affirmative action is based on the acknowledgement that disadvantage does not only follow the axis of race, but that it intersects with other status indicators, including class. For example, the ‘backwardness’ criterion in India has allowed a radical distribution of power, resources and

opportunities. This has allowed affirmative action in India to have a very strong recognition function. The pursuit of equality in this context would require being attentive to the disadvantage that is attached to the status lines. The US federal affirmative action contracting programme has attempted such a pursuit. Federal affirmative action contracts are allocated to minority businesses which belong to socially disadvantaged individuals. It is argued that these individuals' ability to compete in the free enterprise system has been impaired as a result of diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

9.2 The way forward

The aforementioned sentiments are advocating for the expansion of equality to address cycles of disadvantage, to accommodate difference, and to engage with the causes of disadvantage. This section will provide an outline of a reconceptualised notion of affirmative action (that may not be comprehensive but would at least ignite a conversation).

It is imperative to make a self-conscious effort to embrace a substantive notion of equality in the process of screening people for employment, places in academic institutions and internal development training opportunities. This would involve a commitment of social and financial resources on the part of all stakeholders. In employment it calls for practical efforts such as pre-promotion training to foster the development of skills through training schemes relevant to occupations of the future, and developing specific measures, particularly as regards training, for occupations in which the previously disadvantaged are under-represented. This approach moves away from the traditional formal approach to equality towards the notion of substantive equality. Furthermore, it is arguable that this would require deconstructing the principle of merit to suit the environment in which the respective positive measures are being instituted. In other words, the principle of merit should be in alignment with the idea of allowing affirmative action to sufficiently target the most deserving disadvantaged. This requires the adoption of an expansive view of affirmative action – a facet of reconceptualising affirmative action.

If opportunities are to be genuinely distributed in South Africa, it will require implementation of affirmative strategies that respond to: i) the constraint of the mismatch between where the

unemployed live and where the formal sector jobs are to be found. This might include transportation subsidies, housing policies and infrastructure investment; and ii) the constraints of the mismatch between the skills set of the unemployed and the skills required in the labour market. This might include educational reform, training programmes and training subsidies, including establishing industrial hubs in distressed communities. Instead of an individual becoming a targeted beneficiary, a vulnerable community becomes the target. This involves a deliberate attempt to locate points of production in communities vulnerable to poverty. This has financial implications but the longer-term returns are high in terms of secondary spin-offs such as: a) supply chains with services required by the poor; b) job creation; c) an alternative way to afford the benefiting community becoming part of mainstream society (full social participation). This is also a way of not leaving the poor to their own devices in terms of access to jobs and quality services. It will provide a symbol of solidarity. This ‘community agency type’ of affirmative action is just another remedial effort seeking to secure advantages for the disadvantaged on a different scale – which is the whole essence of positive measures – securing advantages for the disadvantaged. The creation of industrial hubs in poor communities can be part of restructured and refocused affirmative action. Furthermore, business entities can adopt schools in vulnerable communities – where promising students from disadvantaged background can be identified and be placed in a pre-employment mentorship programme facilitated by the business entity. These students get an opportunity to have their innate abilities nurtured to mould their meritorious characteristics so required for future success.¹⁰⁴⁰ As part of the mentorship program, the business entity can give the beneficiaries bursaries to complete their education up to tertiary level. Conditions can be placed on the beneficiaries including that they remain linked to their communities; facilitate community development projects. This is advancing an expansive notion of equality (substantive equality), which informs an expansive notion of affirmative action. Canada’s target-oriented programmes mentioned in Chapter 6 are relevant in this regard.

Demarcation of beneficiaries has fuelled the race vs. class debate in South Africa. The non-consideration of other status indicators in the criteria to benefit has left out those at the lower end of the apex structure from benefits of redress. The fusion of class in the criterion for awarding federal contracts in the USA has created a platform where minority businesses which belong to socially disadvantaged individuals can stand a chance to compete in USA’s

¹⁰⁴⁰ See footnote 1008 and section 8.3.2 of Chapter 8 of this dissertation at 218.

enterprise system – a step towards full social participation. India's reservation system utilises a multiple-factor approach based on socio-economic indicators. This has allowed backward classes to access education and employment opportunities and political positions. As argued earlier in the study, in the light of the aims of substantive equality, it is possible to argue that South Africa should consider utilising class as a plus factor in the criteria for benefiting from affirmative action.

It is arguable that class-based preferences will benefit large numbers of black Africans and some poor whites. This would serve as a mechanism to increase the number of beneficiaries and ensure that the most deserving receive the benefits. In turn, this will increase the size of the middle class. The goal is broader than merely compensating for past discrimination. It includes the grander aim of providing genuine equality of opportunity and equality of condition for all South Africans. There are authors who argue for a more nuanced approach which combines elements of race and class or other criteria.¹⁰⁴¹ This study concurs with these authors and submits that class should be used as a 'plus factor' in the criterion for affirmative action benefits because of the intricate relationship between race and class in South Africa. There has been a recent development in the US Supreme Court through *Fisher v University of Texas*,¹⁰⁴² leading to a shift towards acknowledgement of class as a barrier to opportunities. Support for racial preferences in the USA is wearing down because of the existence of "evidence that quality higher education is tilting towards the already-wealthy."¹⁰⁴³ The decision in *Fisher* reflects the judiciary's openness to the inclusion of socio-economic standing within the framework of anti-discrimination laws. However, it would be interesting to follow how this decision would impact on USA's judiciary's standard review of positive measures. The judiciary and the law in general are not in a position to answer questions concerning the nature and scope of positive obligations that are imposed by remedial measures or any other socio-economic policy. Clearly questions of institutional competence are essential to progress on these issues. It then becomes arguable that, ideally, a principled

¹⁰⁴¹ See J February "From Redress to Empowerment" in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010); Z Erasmus "A Future Beyond 'Race': Reflections on Equity in South African Higher Education in D Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 338; K Bentley & A Habib "Alternative Framework for Redress and Citizenship" in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 346; M Ramphela *Laying Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008)

¹⁰⁴² 579 U.S. – 2013.

¹⁰⁴³ See Justin Pope "Supreme Court Decision on Affirmative Action Looms" available at http://www.huffingtonpost.com/2013/06/16/supreme-court-affirmative-action_n_3450218.html (accessed 13/08/13).

framework for analysing the nature and scope of positive obligations under anti-discrimination laws is required to overcome this judicial concern in South Africa. In this regard, *Fisher* provides a platform to start reflecting on this judicial concern as well.

As indicated in Chapter 6, Canada's employment equity efforts seem to have been discarded by the new economic climate (globalisation). South Africa is no exception when it comes to the effects of globalisation on its policy frameworks. Because of this new economic climate, states and relevant stakeholders are forced to find a balance between dealing with changes brought on by globalisation on how, on the one hand, they should accomplish their assignments and, on the other hand, deal with issues of redress and restitution. In other words, considerable effort is required on South Africa to make sure redress efforts do not take 'a back seat' in the face of the current global changes.

Affirmative action, in the light of the aims of substantive equality through the 'facets' of a reconceptualised affirmative action, can go beyond preferential treatment endpoints (employment appointments, admission placements). Employers are called on to implement human capital development strategies as a social resource. As mentioned in Chapter 8, this may involve conducting development discussions with employees, and developing toolsets that assess individual performance and potential. Potential improvement plans should be implemented and timelines should be set for evaluation of the progress of these plans. This may be construed as an unfair attempt at transferring the costs of social 'problems' to employers or labour market institutions through affirmative action. Moreover, some commentators argue that the difficulties encountered by various groups in attaining *the suitability to qualify* "in meeting market expectations are traceable to their own problematic attributes rather than to the unequal structures bolstered by the operation of capitalist economies."¹⁰⁴⁴ More research is required to explore this line of thought further.

With regard to education, South Africa should consider developing legislative affirmative action provisions that focus on education. This will allow a legitimate evaluation of equity representation in higher education and possibly stimulate legislative ways of implementing the policy.

¹⁰⁴⁴J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* (2004) 131.

Another strong aspect to consider moving forward is the facilitation and promotion of social capital. Social capital is ensured through connections and networks across different societal systems (political, social, cultural and economic). Some of these networks open the way for targeted beneficiaries to secure opportunities. As illustrated by the USA's federal contracting programme, an empirical study revealed that the growth of some black MBE businesses can be attributed to the black mayoral support.¹⁰⁴⁵ Those targeted by remedial measures remain linked to social networks of family, neighbourhood and friendship. They serve as sources of *social capital* for their less advantaged counterparts. This is a lesson for South Africa in that there is more to affirmative action than the individual preferential treatment endpoints (job appointments and educational placements). Affirmative action can also bring with it an increase in the accessibility of services and the level of development in vulnerable communities where the beneficiaries come from. This is a 'community agency type' of affirmative action seeking to secure advantages for the disadvantaged on a different scale. South Africa's large business entities can contribute to the reconceptualised idea of affirmative action through embracing enterprise development¹⁰⁴⁶ with certain conditions attached that promote affirmative action. This can be facilitated through offering operational assistance and/or investing in smaller enterprises owned by those who come from socio-economically disadvantaged backgrounds. These large companies will then offer the assistance or investment with conditions that deliberately promote affirmative action. These conditions should include, among other things, defined strategies and plans of action for the implementation and realisation of affirmative action measures outlined in section 15 of the EEA.¹⁰⁴⁷ Through enterprise development, large enterprises can demonstrate a conscious responsibility and purposeful commitment to substantive equality for the good of South Africa by helping to create sustainable businesses for other socio-economically disadvantaged business aspirants. The demonstration may include giving socio-economically disadvantaged business owners and/or aspirants the necessary tools, knowledge and finance. In so doing, this could be a step towards building the capacity of these small companies, giving them ability to expand, afford the required experience and improve their profitability,

¹⁰⁴⁵T Bates & D L Williams "Racial Politics: Does it Pay?" (1993) 74 *Social Science Quarterly* 507.

¹⁰⁴⁶It is imperative to note that enterprise development is one of the elements of South Africa's Broad-Based Black Economic Empowerment (BBBEE) programme scorecard.

¹⁰⁴⁷To recap, these are: i) identifying and elimination of barriers; ii) promoting diversity; iii) reasonably accommodate; iv) ensuring equitable representation; and v) develop and train. (For more details, see Chapter 8 of this dissertation).

which in turn will lead to spin-offs such as the creation of employment for other disadvantaged people. This will also be an added platform for the affirmative action measures contained section 15 EEA to be applied (and realised).

The dissertation is not calling for a perfect connection between a benefit programme and the actual needs and circumstances of the designated group. The facets of a reconceptualised affirmative action explored in Chapter 8 reveal that substantive equality requires a fundamental reconceptualisation of a law or programme and the norms that underlie it. The facets also assert that the compelling interest of substantive equality and its aims is in much more than equality to access, results or opportunities. It is about forging relationships where they do not routinely exist today (to facilitate full social participation or parity of participation). It is also about understanding the structural inequalities that got South Africa historically to where it is today as a divided society (through using class as a ‘plus factor’). Moreover, it is about revealing South Africa’s common interests in overcoming those divisions for the legitimacy of its democracy (through adopting an expansive view of affirmative action). The practical pursuit of substantive equality entails moving from questions of access to opportunities and recruitment to issues about how to foster the causalities and understanding the nature of existing disadvantages (intergroup inequalities – one of the unintended consequences) that are mushrooming in South Africa’s social fabric. This practical pursuit is aligned to a properly implemented policy of affirmative action, which seeks to improve the conditions in the workplace, the education system and society at large.

In conclusion, it is submitted that substantive equality provides affirmative action with the leverage to be relevant in the fight against poverty. It also places affirmative action within a socio-economic rights paradigm. It is hoped the dissertation has portrayed affirmative action as a policy that “should be seen not only as a procedure, but also as a state of mind and an institutional and public commitment, essential to integration and our ability to tap individual opportunities and collective societal benefits that flow from it.”¹⁰⁴⁸

¹⁰⁴⁸N Canter & J Thomas “Affirmative Action and Higher Education in the United States and South Africa” in D L Featherman, M Hall & M Krislov (eds) *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* (2010) 118.

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