

The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique

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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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Erin Leigh Nel, december 2011, Stellenbosch

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SUMMARY

Affirmative action with its wide array of manifestations, ranging from BEE (Black Economic Empowerment) to special measures within the Public Procurement sector, was intended to aid South Africa in redressing past patterns of disadvantage and realising a more equal society and economic dispensation. Whether the present policy has achieved this goal or is capable of doing so has been the subject of much controversy.

The aim of my thesis is to rethink the justifications and limits of the current race-based affirmative action policy of South Africa in view of current debates, in which both its potential as a tool for eradicating inequality at the individual and systemic levels and the constitutionality and viability of different policy options are contested. In my thesis, a range of conceptual and theoretical tools are employed which are not only derived from the constitutional law literature, but also from jurisprudence, moral philosophy and political theory. Compensatory and distributive theories of justice are analysed and juxtaposed to each other, as are substantive and remedial conceptions of constitutional equality and recognition-based and redistributive notions of politics. Throughout, my focus is on the perspectives that these theories can bring to bear on the justifications and limits of affirmative action. It is also asked whether a re-crafted affirmative action policy would not be better able to reach the intended goals. With this end in mind, alternative affirmative action policies are analysed, namely, a class-based affirmative action policy which uses socio-economic standing as a measure for identifying beneficiaries and an affirmative action policy based on Sen's capability approach.

The thesis also contains a comparative analysis of the affirmative action policies of Malaysia, Brazil and India. The aim of this study is to ascertain whether there are any valuable lessons to be learnt from their respective successes and failures.

It is argued that affirmative action as currently applied has an assortment of negative consequences, ranging from stigmatization of beneficiaries as incapable individuals, the perpetuation of racial division and a detrimental impact on the South African

economy as a result of a loss in efficiency. These issues could possibly be better addressed if the specific beneficiaries of affirmative action are rethought. In this regard, it is suggested that, if a class-based affirmative action policy is thought to be too radical, South Africa should follow India's example of excluding the "creamy layer" from the current affirmative action beneficiaries. This should ensure that affirmative action benefits are not continually distributed and redistributed to the same individuals, whilst also ensuring that a wider range of individuals do in fact benefit. However, it must be borne in mind that transformation will always be stifled if educational resources and policies do not keep up with social and political policies.

OPSOMMING

Regstellende aksie met sy wye reeks manifestasies, wat strek van SEB (Swart Ekonomiese Bemagtiging) tot spesiale maatreëls in die voorkeurverkrygingsektor, is oorspronklik ingestel om 'n meer gelyke samelewing en ekonomiese verspreiding te verseker. Of die huidige regstellende aksiebeleid wel hierdie doel bereik het of in staat is om dit te bereik, is egter die onderwerp van heelwat kontroversie.

Die doel van hierdie studie is om die regverdigings en beperkings van die huidige rasgebaseerde regstellende aksie beleid van Suid Afrika te heroorweeg in die lig van debatte waarin beide sy potensiaal as hulpmiddel vir die uitskakeling van ongelykheid op individuele en sistemiese vlakke en die grondwetlikheid en lewensvatbaarheid van verskillende beleidsopsies, in geskil gestel word. Die studie maak gebruik van 'n reeks konseptuele en teoretiese hulpmiddels wat nie net vanuit die staatsregtelike literatuur afgelei word nie, maar ook vanuit jurisprudensie, morele filosofie en politieke teorie. Kompenserende geregtigheid (“compensatory justice”) en verdelende geregtigheid (“distributive justice”) word geanaliseer en naas mekaar gestel, sowel as substantiewe en remediële opvattings van konstitusionele gelykheid en erkenning-gebaseerde en herverdelende opvattings van politiek. Die fokus strek deurentyd op die perspektiewe wat hierdie teorieë kan bied met betrekking tot die regverdigings en beperkings van regstellende aksie. Dit word ook bevraagteken of dit nie moontlik is om die regstellende aksie beleid op so 'n manier te verander binne die raamwerk van die bogenoemde retoriek dat dit 'n groter kans staan om sy bedoelde uitkomst te bereik nie. Met hierdie doel in gedagte word alternatiewe vorme van regstellende aksie beleid, naamlik klasgebaseerde regstellende aksie en 'n beleid gebaseer op Sen se “capability” benadering, geanaliseer.

Naas hierdie teoretiese raamwerk word daar ook 'n regsvergelijkende studie gevolg deur ag te slaan op die regstellende aksie beleide van Maleisië, Brasilië en Indië. Die uiteindelige doel hiervan is om vas te stel of daar enige waardevolle lesse te leer is uit hierdie nasies se welslae en mislukkings.

Die studie argumenteer dat die regstellende aksie beleid soos wat dit tans toegepas word 'n wye reeks negatiewe gevolge het, wat strek van stigmatisering van begunstigdes as onbekwame individue, tot die voortbestaan van rasse verdeeldheid en die nadelige impak op die Suid Afrikaanse ekonomie as gevolg van die verlies aan doeltreffendheid. Hierdie kwessies kan moontlik beter aangespreek word indien die spesifieke groep begunstigdes herbedink word. In hierdie verband word daar voorgestel dat, indien 'n klasgebaseerde regstellende aksie beleid as te drasties gesien word, Suid Afrika dit moet oorweeg om Indië se voorbeeld te volg en die "romerige laag" ("creamy layer") van die groep regstellende aksie begunstigdes uit te sluit. Dit behoort te verseker dat regstellende aksie voordele nie deurentyd aan dieselfde individue verdeel en herverdeel word nie, en dat 'n groter groep individue daarby baat. Dit moet egter in gedagte gehou word dat transformasie altyd belemmer sal word indien opvoedkundige bronne en beleid nie tred hou met sosiale en politieke beleid nie.

ACKNOWLEDGEMENTS

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Chapter 1: Introduction and broad overview of affirmative action in South Africa

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1.1 Scope of research problem

“I can predict when SA’s “Tunisia Day” will arrive. Tunisia Day is when the masses rise against the powers that be, as happened recently in Tunisia. The year will be 2020, give or take a couple of years.”¹ This contentious statement was made by Moeletsi Mbeki, the brother of former South African president Thabo Mbeki. It refers to the recent social upheavals and general revolt that occurred in Tunisia as a result of decades of oppression and dictatorship under the rule of President Zine El Abidine Ben Ali. In his opinion piece, Mbeki states that the BEE (Black Economic Empowerment) and affirmative action strategies chosen by the post-apartheid government are detrimental to the nation as a whole and only serve the interests of an exclusive, elite class of individuals. Furthermore, he predicts that upheavals similar to those that occurred in Tunisia would occur in South Africa if the necessary reform does not take place. Mbeki’s views, while controversial, draw attention to the deeply contested nature of the government’s affirmative action policies. Signs of unrest and discontent with the slow pace of transformation suggest that affirmative

¹ M Mbeki “Wealth creation: Only a matter of time before the hand grenade explodes” (10-2-2011) *Business Day* <http://www.businessday.co.za/articles/Content.aspx?id=133902> (accessed 15-2-2011).

action *per se* is a limited tool for effecting social change and that the empowerment of a relatively small black elite through BEE and affirmative action will do little to pacify the expectations and grievances of those who feel that the transition to a non-racial democracy has done little to redress centuries of deprivation and exploitation under colonialism and apartheid.²

It is against this background that I will examine the justifications and limits of affirmative action. Despite its controversial nature, I believe that affirmative action is still a policy without which South Africa cannot do. The aim of my thesis is to rethink the justifications and limits of affirmative action in view of current debates, in which both its potential as a tool for eradicating inequality at the individual and systemic levels and the constitutionality and viability of different policy options are contested.

My thesis employs a range of conceptual and theoretical tools, derived not only from the constitutional law literature but also from jurisprudence, moral philosophy and political theory. Compensatory and distributive theories of justice are analysed and juxtaposed to each other, as are substantive and remedial conceptions of constitutional equality and recognition-based and redistributive notions of politics. Throughout, my focus is on the perspectives that these theories can bring to bear on the justifications and limits of affirmative action. What light can these theories shed on current debates about affirmative action, and how do they enable us to rethink the possibilities, aims and beneficiaries of affirmative action, as well as the constraints to which it is – and should be – subject?

1.2 Outline of research project

Chapter one will consist of a brief overview of the affirmative action policy of South Africa, bearing in mind that the term “affirmative action” has its origin in the United States.³ Historically and within the academic arena, affirmative action has proven to

² Service delivery protests are a frequent occurrence within the informal sector and poverty-stricken communities.

³ R Dhani, J Squires and T Modood “Developing positive action policies: Learning from the experiences of Europe and North America” (2006) *Department for Work and Pensions: Research Report* No. 406

be highly contested – even at the definitional level. For the purposes of the current study, the following definition of affirmative action was constructed: “A programme designed to give preferential treatment to certain groups in order to redress the imbalances of the past, to facilitate the elimination of unfair discrimination and to create equal opportunities, with the eventual goal of creating a more equal society”. Along with an overview of the affirmative action legislation applicable to South Africa, this chapter also outlines the main justifications provided for such policies. The main justifications for affirmative action originate from two key considerations: the need to redress past disadvantage and past imbalances, and the vision of an egalitarian society. This is confirmed by the Constitutional Court’s interpretation of Section 9(2) of the Constitution.⁴ Which of these justifications is emphasised in a particular case, may have an important bearing on the construction of the scope and limits of affirmative action. This, in turn, will determine (or possibly even bypass) the possible negative consequences of the particular affirmative action policy.⁵

The two key considerations mentioned can also be categorized as either backward-looking or forward-looking. Redress is a backward-looking justification while the creation of an egalitarian society is a forward-looking justification. A backward-looking justification is premised on the notion that it is only through positive measures that deep structural inequalities resulting from past discrimination can be adequately addressed. It also holds that, in view of the historical events that took place, we as a society have incurred certain duties towards those who have been harmed.⁶ These duties are not only determined on a utilitarian basis. In other words, reparations are not owed just because of the good that it would do society, but because of their underlying *moral force*.⁷ We have to *tip the moral scales* in order to position them as they would have been had it not been for past injustices.⁸

<http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep406.pdf> (accessed 15 September 2007) 1 53.

⁴ *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC).

⁵ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 1 9.

⁶ TE Hill “The Message of Affirmative Action” in SM Cahn (ed) *The Affirmative Action Debate* (1995) 179.

⁷ TE Hill “The Message of Affirmative Action” in SM Cahn (ed) *The Affirmative Action Debate* 179. The *duties* referred to above include that of “fidelity, justice, gratitude, and reparation.”

⁸ J Kekes “The Injustice of Affirmative Action Involving Preferential Treatment” in SM Cahn (ed) *The Affirmative Action Debate* (1995) 197.

The forward-looking approach, on the other hand, essentially focuses on present day dilemmas facing South Africa – poverty; homelessness; inadequate healthcare; and unemployment, to name but a few.⁹ This view generally demands that a stronger form of distributive justice be adhered to in order to correct current inequalities.

These two approaches are not necessarily mutually exclusive. When attempting to justify affirmative action, one should bear in mind visions of the past, in order to adequately grasp the gravity of the harms done, whilst simultaneously envisioning the ultimate goal one seeks to achieve.

Several of the problems associated with affirmative action are identified in this chapter. It has been argued that affirmative action “benefits and harms the wrong people.”¹⁰ Certain groups who are not necessarily *previously disadvantaged* enjoy the protection and advantages of affirmative action programs. For this reason it is stated that affirmative action is *over-inclusive*. At the same time, this comes directly at the expense of others who are in need of redress, which effectively renders the policy *under-inclusive*.¹¹

Affirmative action policies can be described as extensions of equality. Chapter two illustrates the jurisprudential restrictions created by equality rhetoric in the South African courts. The equality jurisprudence of South Africa’s Constitutional Court relies primarily on the notions of substantive equality and remedial or restitutionary equality. Substantive equality acknowledges the fact that society is based on an unequal system; it recognises the structure for what it is and aims to identify the vulnerable groups. These groups are treated differently to ensure that they have the opportunity to reach their fullest potential and are capable of meaningful participation in society.¹² Substantive equality is particularly valued for its strong transformative

⁹ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 89 97.

¹⁰ J Rabe *Equality, Affirmative Action, and Justice* (2001) 356.

¹¹ O Dupper “Remedying the past or reshaping the future?” (2005) *International Journal of Comparative Labour Law and Industrial Relations* 89 112.

¹² C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 248 254.

potential.¹³ Transformation in this sense is to be understood as the shift from oppressive apartheid practices to policies aimed at creating an egalitarian society.

In this section a definition of remedial and restitutionary equality will be constructed as these concepts have, unfortunately, not received thorough academic analysis. The notion was first introduced in the well known case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,¹⁴ in reaction to the claim that the court's equality jurisprudence was incapable of addressing material inequality. The Constitutional Court asserted that if not expressly remedied, past injustices and unfair discrimination will continue to exist.¹⁵ The chapter will also contain an outline of section 9 of the South African Constitution, as well as a critical analysis of *Minister of Finance and Another v Van Heerden*.¹⁶

Chapter three will mainly focus on compensatory and distributive theories of justice. In South Africa, justice has been subverted due to oppressive apartheid policies imposed in the past and this aberration needs to be corrected. How one should go about doing so depends on which theory of justice one applies.

The overarching rationale behind compensatory justice is that justice is restored by the correcting of past wrongs.¹⁷ From this it is reasonable to infer that the compensation, whatever method is chosen, should be made by the aggressors or perpetrators, as it is due to their actions that the victims had experienced suppression in the first place. In the South African example that would be the government – or “the state”.¹⁸ The majority of the victims, of course, were the black community – and most other communities of colour.¹⁹

¹³ C Albertyn “Substantive Equality and Transformation in South Africa” (2007) Vol 23 *SAJHR* 253 253.

¹⁴ 1999 (1) SA 6 (CC).

¹⁵ 1999 (1) SA 6 (CC) par (60).

¹⁶ 2004 (12) BCLR 1125 (CC).

¹⁷ For a brief outline of the rationale and theory behind compensatory justice, see C Mbazira “‘Appropriate, Just And Equitable Relief’ In Socio-Economic Rights Litigation: The Tension Between Corrective And Distributive Forms Of Justice” (2008) *SALJ* Vol 125 Is 1 71 72-75.

¹⁸ The terms ‘government’ and ‘state’ are used interchangeably in this context. As the government is the most prominent representative of the state, its actions are equated to those of the state. See HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 83 93, for reasons why the state should be held accountable for the actions (and non-actions) of governments.

¹⁹ It should be noted, however, that although the State as an agent of society was the primary perpetrator in advancing discriminatory principles and norms, other relevant agents should also be considered, such as individual perpetrators and the beneficiaries of apartheid legislation. The neglect of such groups to not actively oppose apartheid also enabled the regime to persist.

Compensatory justice entails bringing the victim to the condition he would have been in had the damage never occurred; however, accurate estimations of these positions are undoubtedly near impossible to make. The compromise: placing victims in the positions in life that they would have been in, but for the major injustice that occurred, would have to suggest transferring them to a state of equal moral worth in relation to the rest of the members of society. The aggressors are to make a commitment to restore and correct their injuries, and in terms of society as a whole, aggressors bear the responsibility to “equalize the relationship between victim and perpetrator.”²⁰

Today, South Africa is predominantly governed by black people. Is it still reasonable to expect the government to compensate victims today when it is run by the precise group being compensated? Furthermore, can it be fair to compensate victims today, when many of those who have truly suffered have already died? Questions such as these will be addressed in detail in this section.

Distributive justice is not so much a singular theory of justice as it is a collective noun for various theories concerned with how material and non-material goods should be distributed in society. As it is virtually impossible to incorporate all the divergent theories into a single approach, I will, instead, examine the primary theorist of distributive justice, John Rawls, and his *difference principle* as a theory of distributive justice. The difference principle is concerned with how public social institutions that determine the “basic structure” of society should distribute social goods amongst different members of society and is therefore regarded as a forward-looking theory. Primary goods issued to each individual should at least enable him or her to be an active and constructive member of society.²¹ Not only are social goods to be seen as public commodities or a “collective asset”, but individual talents are to be regarded in the same manner.²² Individual talents are used to the benefit of all.

The difference principle dictates that society can only be just when a particular distributive model places the worst off members of society in the best possible

²⁰ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 95.

²¹ See J Rawls *Theory of Justice* (1971) 19.

²² J Rawls *Theory of Justice* (1971) 179. Talents are viewed as accidents of nature and therefore “the contingencies of social circumstance must be nullified.” DL Phillips “The equality debate: what does justice require?” (1977) *Theory and society* Vol 4 247 253. Allowing all members to share in one another’s good fortune creates a situation where it is not necessary to “‘even out’ endowments in order to remedy the arbitrariness of social and natural contingencies.” M Sandel *Liberalism and the limits of justice* (1998) 70.

position.²³ Therefore, certain economic inequalities are allowed, and may even be necessary, if that means that it would be to the benefit of the least advantaged member of society, but society is expected to strive for equality as far as possible *unless* inequality makes it more prosperous.

Such a distributive model would allow the least advantaged individuals to have higher expectations of achieving their life goals and economic independency. It would encourage redistributive taxations already present in South African economic policies. So, too, would the priority of improving the education system be an important distributive principle.

What the difference principle would take issue with is the *definition* of the least advantaged group. It would argue that it is essentially unjust to limit this group only to black people, as there are many other categories of people that are similarly poverty-stricken. Furthermore, the affirmative action policy in South Africa would also be considered unjust because of the minimising of the expectation of white individuals to pursue certain career opportunities.

Chapter four's purpose is to examine the intersection between various theories from different disciplines, in order to determine whether (a) the notion of substantive equality or remedial and restitutionary equality and (b) the difference principle or compensatory justice best makes sense of the constitutional equality provision, in general, and section 9(2), in particular. The eventual goal of the study is to examine existing affirmative action policies to determine whether they comply with the standards of the identified theory (or theories) of equality and justice.

Although the norms of compensatory justice and remedial and restitutionary equality derive from different disciplines, overlapping frequently occurs. If we assess affirmative action in terms of compensatory justice, it would be appropriate to do so with the end goal of attaining remedial and restitutionary equality.

Similarly, another way to serve the endeavour towards an equal society is to apply the difference principle as a measure of justice in order to support substantive equality. The value of affirmative action is centred in the positive outcomes that can

²³ What Rawls probably implies by this is that though we cannot in any way have absolute certainty about the consequences of certain distributions, we are still expected, however, to be reasonable when determining and planning the distributions that are to apply.

be expected such as greater representivity and a more equal society where all are able to attain full self-realisation. Justice, in this case, would entail the distribution of “benefits in society that would have accrued to racial [groups] in the absence of racism.”²⁴ But racism alone did not create the unequal society we currently have and the inequalities faced today stem from a multifarious range of sources although, it may be argued, racism may be the chief cause. Similarly, upliftment of victims of apartheid alone will not serve the ends of justice.

The difference principle may be used as a redistributive tool to determine who is eligible to receive certain goods – and it will enhance the future career and life expectations of those who are least advantaged in society.²⁵ Those who experienced racial discrimination in the past are clearly not capable of reaching their full potential and are by default entitled to social resources that would enable them to compete on fair terms with other members of society. The social institutions that currently determine the probable outcome of one’s life need to be re-aligned. As Van Wyk states: “the fact that a person is born into a poor rural black family is simply a fact; however, the fact that legal institutions attach the consequences of inferior education to the circumstances of his or her birth is unjust.”²⁶

This chapter will also employ the theoretical tools outlined in previous chapters to analyse how affirmative action can be better conceived in relation to disadvantage based on gender and disability. Largely informed by Fraser’s reflections on the relationship between redistribution and recognition, on the one hand, and her distinction between transformative and affirmative strategies on the other, it is asked which understanding of equality and which theory of justice best enable a transformative approach capable of responding to the specific harms associated with patterns of discrimination against women and the disabled, respectively.

Research has shown that affirmative action has the unfortunate consequence of serving an elite class,²⁷ which is continually growing stronger and more powerful, while the lower classes continue to suffer. The average lower class citizen is

²⁴ J Rabe *Equality, Affirmative action, and justice* (2001) 96.

²⁵ S Stroud “The aim of affirmative action” (1999) *Social Theory and Practice* Vol 25 No 3 385 386; WE Schaller “Rawls, the difference principle, and economic inequality” (1998) *Pacific Philosophical Quarterly* Vol 79 368 382.

²⁶ MW Van Wyk “Towards a Rawlsian justification for affirmative action” (2000) *South African Journal of Labour Relations* 58 70.

²⁷ See for example D Herman *The Naked Emperor* (2007) 36-42.

experiencing poor public service and is not receiving an adequate education which would effectively prepare him/her for a successful occupation. In the past few years, academic and non-academic authors have questioned the definition of the group of people who are to benefit from affirmative action policies. It is argued that the focus should shift from race to the individual's socio-economic position in society.²⁸ This approach could remedy the problems of under-inclusiveness and over-inclusiveness referred to above. Rather than simply equating race with socio-economic class, it would focus on the actual material deprivation and real-life contexts of individuals. In this respect, it resonates closely with the idea of substantive equality.²⁹

In chapter five, I will examine the potential of a class-based approach to address the current problems of race-based affirmative action such as the entrenchment of racial categories and the fortification of a black elite. I will also inquire into the limits of class-based affirmative action. My inquiry will be framed, in part, by Nancy Fraser's analysis of the relationship between class and status harms, or between maldistribution and misrecognition.³⁰ I will also draw upon a second distinction introduced by Fraser, namely the distinction between affirmative and transformative strategies. While affirmative strategies aim to redress disadvantage without addressing its root causes, transformative strategies seek to transform the "underlying generative framework" which caused the inequalities in the first place. It could possibly be argued that class-based affirmative action would be more deeply transformative, as it is directly concerned with material deprivation and could have the effect of transforming, rather than affirming, reified racial identities.³¹

²⁸ See for example D Herman *The Naked Emperor: Why Affirmative Action Failed* (2007) 82-87; R Kahlenberg "Class-Based Affirmative Action" (1996) 84 *California Law Review* 1037-1099; D Malamud "Class-based Affirmative Action: Lessons and Caveats" (1996) Vol 74 *Texas Law Review* 1847-1900; JW Young and PM Johnson "The impact of an SES-based model on a college's undergraduate admissions outcomes" (2004) Vol 45 *Research in Higher Education* 777-797; CD Cunningham and NR Madhava Menon "Race, class, caste...? Rethinking Affirmative Action" (1999) Vol 97 *Michigan Law Review* 1296-1310; C Cimino "Class-based Preferences in Affirmative Action Programs After *Miller v Johnson*: A Race-Neutral Option, or Subterfuge?" (1997) *The University of Chicago Law Review* Vol 64 1289-1310.

²⁹ R Roach "Class-Based Affirmative Action" (2003) *Black Issues in Higher Education* 22-26.

³⁰ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 7.

³¹ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 75. The value of transformative strategies, as opposed to affirmative strategies, is that they are able to "redress status subordination by deconstructing the symbolic opposition that underlie currently institutionalized patterns of cultural value." On the advantages and shortcomings of transformative strategies, see 77-78. See also, on the link between equality and "transformative constitutionalism", C

Chapter six will explore the affirmative action policies of Malaysia, India and Brazil respectively. Specific attention will be paid to the legal and historical justifications for this policy, with particular reference to the beneficiaries. Malaysia was chosen as a significant case study because, just as in South Africa, the defined group of beneficiaries comprises the majority of the citizens.³² As in the case of South Africa, Malaysian affirmative action is aimed at “returning people who had been excluded from the political dispensation to their legitimate position.”³³ India, on the other hand, was chosen as a unique example of a class- or caste-based system.³⁴ A thorough study of its policy could bear valuable fruit (in terms of lessons and warnings) if South Africa should ever decide to introduce similar methods of addressing inequality.³⁵ Lastly, this chapter will explore the Brazilian application of affirmative action due to its race-based approach.³⁶ In doing so, it should become apparent whether the problems faced in South Africa are unique to South Africa, or rather a general symptom of a race-based policy.

Albertyn “Substantive equality and transformation in South Africa” (2007) Vol 23 *SAJHR* 257; C Albertyn and B Goldblatt “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) *SAJHR* Vol 14 248; E Van Huyssteen “The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism” (2000) *African Studies* Vol 59:2 245-257.

³² FH Abdullah “Affirmative action policy in Malaysia: To restructure society, to eradicate poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 189-221; I Emsley *The Malaysian experience of affirmative action* (1996); E Phillips “Positive discrimination in Malaysia: A cautionary tale for the United Kingdom” in B Hepple and EM Szyszczak *Discrimination: the limits of law* (1992); J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 6-34; LH Guan “Affirmative action in Malaysia” (2005) *Southeast Asian Affairs* 211-228; T Sowell *Affirmative action around the world* (2004) 55-77.

³³ D Herman *The Naked Emperor* (2007) 25.

³⁴ D Kumar “The affirmative action debate in India” (1992) *Asian Survey* Vol 32 290-302; T Sowell *Affirmative action around the world* (2004) 23-54; T Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004); T Deane “A commentary on the positive discrimination policy in India” (2009) Vol 1 *PER* 28-52; F De Zwart “The logic of affirmative action: caste, class and quotas in India” (2000) Vol 43 *Acta Sociologica* 235-249.

³⁵ Affirmative action in India is “aimed at addressing the hierarchical differences in the caste system.” D Herman *The Naked Emperor* (2007) 55.

³⁶ M Lloyd “In Brazil, a new debate over color” (2004) Vol 50 *Chronical of Higher Education* 38-40; M Lloyd “In Brazil, a different approach to affirmative action” (2004) Vol 51 *Chronical of Higher Education* 49-52; C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 203-216; T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 3-14; LGM Tavoraro “Affirmative action in contemporary Brazil: two institutional discourses on race” (2008) Vol 19 *Int J Polit Cult Soc* 145-160; RHL Pedrosa, JNW Dachs, RP Maia and CY Andrade “Academic performance, student’s background and affirmative action at a Brazilian university” (2007) Vol 19 *Higher Education Management and Policy* 67-86; LC De Sousa and P Nascimento “Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity” (2008) Vol 19 *Int J Polit Cult Soc* 129-143; M Htun “From ‘racial democracy’ to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 *Latin American Research Review* 60-89; SR Bailey “Group dominance and the muth of racial democracy: antiracism attitudes in Brazil” (2004) Vol 69 *American Sociological Review* 728-747.

Finally, chapter seven will attempt to pull together the different strands comprising this thesis, and draw conclusions relating to backward-looking and forward-looking justifications for affirmative action; substantive equality and remedial and restitutionary equality; recognition and redistributive considerations; compensatory justice and the *difference principle*; class-based affirmative action; and comparative affirmative action policies. I am interested, in the first place, in the light these concepts and theories can shed on the constitutional equality provision in general, and section 9(2) in particular. Secondly, I will use these theoretical perspectives to appraise the broad legislative and policy framework for affirmative action in South Africa, and to comment critically on current practices. Specific conclusions about the definition of the class of beneficiaries will be drawn. Conclusions will also be drawn on the question whether a deferential or interventionist judicial stance is appropriate in cases involving affirmative action.

1.3 Research questions and research methodology

A range of research questions relating to the Constitutional Court's equality jurisprudence, notions of justice, forms of affirmative action, and comparative law are posed in this thesis. Two notions of equality are analysed, which have both contributed to the Constitutional Court's equality jurisprudence. These are: substantive equality, and remedial or restitutionary equality. Substantive equality recognises the differences in order to advance the goal of *creating* an equal society. Remedial and restitutionary equality, on the other hand, recognises harms done in the past in order to *make up for* past injustices, and thus to ensure a more equal society. The possibilities and limits of a strategy based on substantive equality and of a strategy seeking to advance remedial and restitutionary equality will be juxtaposed within the specific context of affirmative action.

Theories of justice are also regularly invoked as tools of interpretation and justification of affirmative action policy and legislation. It is asked whether an affirmative action policy which aims to restore compensatory justice is better equipped to foster transformation than distributive justice. Rawls's *difference principle* is selected as a theory of distributive justice and the purpose is to see

whether it is capable of restructuring the social and economic order in society, and specifically in South Africa, so as to create a more egalitarian society.

Various forms of affirmative action based on the selected beneficiaries can be defined. In this thesis, South Africa's race-based affirmative action scheme will be analysed according to its strengths and weaknesses. It is questioned whether other forms of affirmative action, such as a class-based affirmative action policy or one based on Sen's *capability approach*, might perhaps be more capable of reaching the goals more effectively. Throughout the project, Fraser's theories of redistribution and recognition are employed as yardsticks to gage the possible outcomes of different conceptions of equality and different theories of justice.

Finally, it is questioned whether foreign affirmative action policies, such as those in Malaysia, Brazil and India, can serve as meaningful examples in the South African context. These societies differ markedly from South Africa in terms of historical background; ethnic composition; wealth and social (dis)order. Nevertheless, it is still useful to ask how South Africa can benefit from their experiences.

The research methodologies employed in this thesis thus include: an analysis and critique of the South African affirmative action policy and judicial pronouncements on the beneficiaries and limits of affirmative action; a study and evaluation of different constitutional understandings of equality and different theories of justice; a contextual analysis of different constructions of disadvantage and how they impact on the identification of the class of affirmative action beneficiaries; and a comparative study of different approaches to affirmative action.

1.4 Parameters of research

Affirmative action debates often focus on the sphere of labour law. Other areas which are affected by affirmative action policies include preferential procurement of government tenders; education, especially higher education; and social welfare spending. Although I will inevitably refer to these contexts, particularly the employment context, I will not attempt to provide a detailed and exhaustive analysis of the legislation in question or of its interpretation by the courts. The focus falls,

rather, on the normative justifications for the existence of an affirmative action policy. Various justifications have been advanced for the current policy, which essentially entail that compensation should be made for past injustices and that redistributive strategies should be employed to create an egalitarian society.

The philosophical theories chosen which are aimed at the achievement of justice in this case are, firstly, that of compensatory justice and, secondly, Rawls's *difference principle* as a theory of distributive justice. Various other philosophical approaches could have been chosen, such as utilitarianism, strict egalitarianism, restorative (or corrective) justice or libertarian theories. However, the two selected theories tie in closely with the South African goals for affirmative action mentioned above as the idea of compensatory justice relates closely to mending the scars of past injustices, whereas Rawls's *difference principle* can be utilised as a mechanism for the achievement of an egalitarian society through its prescribed distributive principles.

Once the appropriate justifications for affirmative action have been discussed, I will focus more closely on the operationalisation of a preferred policy of affirmative action. Currently, race is central to the affirmative action policy practised in South Africa. It will be discussed whether this model is capable of achieving the forms of justice and equality that the Constitutional Court ascribes to. The current race-based approach will be juxtaposed to the alternative of a class-based approach. The focus in this regard will be restricted to the capability of such a policy to reach as many disadvantaged individuals as possible. Another theory that will also be explored is Sen's *capability approach*. Various other bases for affirmative action are employed in foreign law but will not be discussed. These include gender-based affirmative action (as in the case of Germany and the People's Republic of China); neighbourhood-based affirmative action (as in the case of France); ethnic-based affirmative action (as in the case of Slovakia and Malaysia); and even linguistic-based quotas (as in the case of Finland).

The evaluation of various foreign affirmative action policies is deemed useful for the reason that South Africa could adapt its policy to avoid their failures or even emulate their successes. The three key comparators, as mentioned above, are those of Malaysia, Brazil and India. The justifications for this selection will be presented in the appropriate chapter. At this point, suffice it to say that two of the three policies were

selected for the features that they have in common with South Africa, i.e. having a racial majority that are beneficiaries of affirmative action (Malaysia) or having a race-based affirmative action policy (Brazil). India will serve as an example of an affirmative action policy in which social class plays an important role. Other nations that also employ affirmative action policies include Japan, the USA and, closer to home, Namibia.

1.5 Definition of affirmative action

The official use of the term “affirmative action” has its origin in the United States. A troublesome racial history “rooted in plantation slavery and the historical persistence of race inequality, coupled with the demands and struggles of the civil rights movement” have to a large extent led to the development and entrenchment of affirmative action policies in the United States.³⁷ During the 1960s, black leaders in the USA were at the forefront of urging the government to recognise that merely eliminating racial barriers will not amount to sufficient measures to compensate for the preceding racial segregation. Ultimately, the objective of the struggle was to ensure that minority groups were adequately represented in areas of employment, education and public programs.³⁸

President John F. Kennedy’s 1961 Executive Order 10925 represented the first official use of the term *affirmative action*.^{39,40} It explicitly required that affirmative action measures be taken “to ensure that applicants are treated equally without

³⁷ R Dhami, J Squires and T Modood “Developing positive action policies: Learning from the experiences of Europe and North America” (2006) *Department for Work and Pensions: Research Report* No. 406
<http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep406.pdf> (accessed 15 September 2007) 53.

³⁸ I Krstić “Affirmative Action in the United States and the European Union: Comparison and Analysis” (2003) *Law and Politics* 6 825-843.

³⁹R Dhami, J Squires and T Modood “Developing positive action policies: Learning from the experiences of Europe and North America” (2006) *Department for Work and Pensions: Research Report* No. 406
<http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep406.pdf> (accessed 15 September 2007) 53; I Krstić “Affirmative Action in the United States and the European Union: Comparison and Analysis” 2003 *Law and Politics* 827.

⁴⁰ Although other sources argue that the first time the term was used was in the US National Labor Relations Act of 1935, or as it is more popularly known, The Wagner Act.

regard to race, colour, religion, sex or national origin".⁴¹ In South Africa, however, under-represented and grieved members of society were to wait nearly three decades for the dream of possible relief to become a reality.⁴² It should be taken into account, though, that affirmative action policies in these two sovereign states differ greatly in respects of targeted beneficiaries and the adequate measures to be taken, amongst others. The main and most obvious reason for this is that the previously disadvantaged group in the United States only consists of a minority of members of society, whereas in the case of South Africa, those who are unequal due to past injustices, or the previously disadvantaged, comprise a substantial majority of members of society.

When considering contentious issues such as the nature, consequences and justifications of affirmative action, it is preferable to commence with a suitable definition of the topic under discussion. The reason is that affirmative action policies have been given several labels in the past, such as "positive discrimination", "reverse discrimination", and "preferential treatment", each having its own positive and negative connotations.

Given that affirmative action programmes can be categorised within different contexts, it is essential for current purposes to construct an adequate working definition of the term in question. The *Bill of Rights Handbook* merely states that "[a]ffirmative action means preferential treatment for disadvantaged groups of people...The grounds of preference are usually race or gender".⁴³ This definition merely identifies *some* of the grounds for 'preferential treatment' but fails to provide justifications for such advancement.⁴⁴ Perhaps the most appropriate way to define affirmative action would be by paying close attention to the aims of affirmative action.

⁴¹ R Dhami, J Squires and T Modood "Developing positive action policies: Learning from the experiences of Europe and North America" (2006) *Department for Work and Pensions: Research Report* No. 406 <http://webarchive.nationalarchives.gov.uk/+/http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep406.pdf> (accessed 15 September 2007) 53.

⁴² The Employment Equity Act was only introduced in 1998. Since then, other affirmative action legislative measures have frequently appeared.

⁴³ I Currie and J De Waal *The New Constitutional and Administrative Law* (2005) 264. In *Equality, Affirmative Action and Justice* (2001), J Rabe attributes a similar definition to affirmative action.

⁴⁴ Note that in its more comprehensive discussion of affirmative action, this text does mention South Africa's discriminatory past and current inequalities in light of the evils that equality legislation is aimed at eradicating.

One of the most prominent vehicles for affirmative action in South Africa is the Employment Equity Act (EEA), which contains detailed affirmative action provisions in Chapter III.⁴⁵ According to the Explanatory Memorandum to the Employment Equity Bill, the aim of the EEA is “the elimination of unfair discrimination in employment, to redress the imbalances of the past and to create equality in employment by means of affirmative action”.⁴⁶ The Act itself defines affirmative action policies or measures as “measures designed to ensure that *suitably qualified* people from *designated groups* have *equal employment opportunities* and are *equitably represented* in all occupational categories and levels in the workforce of a *designated employer*.”⁴⁷ From a purely ‘labour law’ perspective, this definition is sufficient, for within each term lies a wide spectrum of qualifications.⁴⁸ For the purposes of the current study, a wider definition is required as theories of moral philosophy and political theory are not as context specific. A clinical, purely labour law orientated definition of affirmative action would reduce the scope of the measure or policy and, in turn, the study itself. Affirmative action measures should instead be viewed as restitutionary and compensatory instruments, primarily based on historical injustices, designed to facilitate the conception of a free and equal society by means of establishing institutional and policy-based measures. Therefore, for the purposes of this discussion, the following working definition of affirmative action will be adopted: An affirmative action programme is a programme designed to give preferential treatment to certain groups in order to redress the imbalances of the past, to facilitate the elimination of unfair discrimination and to create equal opportunities, with the eventual goal of creating a more equal society.

1.6 Legislation

The main agent for achieving equality is undeniably the South African Constitution.⁴⁹ Section 9 of the South African Constitution contains what is referred to as the

⁴⁵ Employment Equity Act 55 of 1998.

⁴⁶ J Rabe *Equality, Affirmative Action, and Justice* (2001) 368; Explanatory Memorandum to the Employment Equity Bill (1998) 19 ILJ 1345, 1346.

⁴⁷ Section 15 EEA of 1998.

⁴⁸ Such as *suitably qualified* people referring to a person’s ability to do a job based on the qualifications set out in Sec 20(3)(a)-(d) EEA of 1998, or *designated groups* pertaining to black people, women and people with disabilities as set out in Sec 1 EEA of 1998.

⁴⁹ Constitution of the Republic of South Africa 1996.

“equality provision”. Section 9(1) states that everyone is equal before the law and that everyone has the right to equal protection and benefit of the law.⁵⁰ An entity would not be in violation of section 9(1) if he/she/it differentiated between certain cultures or groups when it served as a vehicle for change, provided that there was a “rational relationship between the differentiation made and the legitimate governmental purpose which is provided to validate it”.⁵¹ Without any rational connection, the measures in question will necessarily be invalid.

The Constitution emphasises the importance of equality by encompassing principles of both formal and substantive equality.⁵² Formal equality requires that “the law must treat individuals in like circumstances alike.”⁵³ In essence, the application of formal equality is neutral, whereas substantive equality “requires that the actual social and economic circumstances of groups and individuals must be examined to determine whether any action violates the principle of equality”.⁵⁴ Substantive equality, as it features in section 9(2), permits that legislative and other similar measures may be taken in order to redress the inequitable social standing of those who were disadvantaged by unfair discrimination. Affirmative action provisions are an embodiment of these measures authorised by Section 9.

Section 9(3) and 9(4) of the Constitution only prohibit *unfair* discrimination, which indirectly serves as a ground of justification for claims that affirmative action practices are discriminatory. Therefore, “remedial measures which favour certain groups are not automatically in violation of the provision”.⁵⁵ One of the most important cases in South Africa regarding equality is that of *Harksen v Lane*.⁵⁶ In this case, the Court gave a detailed process by which to determine whether section 9 was violated.⁵⁷ To summarise, after it was established whether section 9(1) was violated as stated above, one needs to look at whether a particular state or individual conduct amounted to unfair discrimination. This is done by firstly establishing whether the

⁵⁰ Section 9(1) Constitution of the Republic of South Africa 1996.

⁵¹ J Rabe *Equality, Affirmative Action, and Justice* (2001) 297-298.

⁵² *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999 (1) SA 6 (CC); AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke and EML Strydom *Essential Labour Law* (2005) 215; I Currie and J De Waal *The Bill of Rights Handbook* (2005) 232-234.

⁵³ I Currie and J De Waal *The Bill of Rights Handbook* (2005) 232.

⁵⁴ J Rabe *Equality, Affirmative Action, and Justice* (2001) 291.

⁵⁵ J Rabe *Equality, Affirmative Action, and Justice* (2001) 294.

⁵⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

⁵⁷ 1998 (1) SA 300 (CC) par 54. See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC).

differentiation between categories of people amounted to *discrimination*, and then secondly, whether such discrimination amounts to *unfair discrimination*. Unfair discrimination will only be allowed if such discrimination is held to be justifiable under the limitations clause in section 36.

For the purpose of this discussion, it is not necessary to go into further detail regarding equality at this stage. Issues concerning equality, more specifically substantive, remedial and restitutionary equality, will be discussed at length under the Constitutional Court's equality jurisprudence.

Several pieces of labour law legislation have been implemented, as authorised by section 9(2) of the Constitution, in order to give effect to the Constitutional equality provision.⁵⁸ These include, amongst others, the Preferential Procurement Policy Framework Act 5 of 2000 and the Higher Education Act 101 of 1997. The most prominent sets of affirmative action legislation are the Labour Relations Act⁵⁹ (LRA) and the Employment Equity Act⁶⁰ (EEA). The LRA contains specific provisions rendering a dismissal automatically unfair when the dismissal is based on one of the listed grounds.⁶¹ When accused of dismissing an employee on discriminatory grounds, an employer can turn to Section 187(2) as a defence. This section holds that dismissals shall be considered fair "if the reason for dismissal is based on an inherent requirement of the particular job" or if the dismissal is based on the employee's age when the employee had "reached the normal or agreed retirement age for persons employed in that capacity".⁶² Schedule 2 of the EEA repealed Schedule 7 item 2(1)(a) of the LRA and subsequently the EEA now regulates unfair discrimination against applicants for employment and employees.⁶³

The affirmative action provisions of Chapter III of the EEA, as well as the aim as set out in the Explanatory Memorandum of the Employment Equity Bill, have been referred to in the above section. Section 2 of the EEA dictates the purpose of the Act and reads as follows:

⁵⁸ Sec 9(2) states: "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."

⁵⁹ Labour Relations Act 66 of 1995.

⁶⁰ Employment Equity Act 55 of 1998.

⁶¹ Grounds for automatically unfair dismissals are listed in Section 187(1) LRA.

⁶² Sec 187(2) Labour Relations Act.

⁶³ Sec 6(1) Employment Equity Act lists the grounds upon which employers may not discriminate.

“The purpose of this Act is to achieve equity in the workplace by

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to *redress* the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”⁶⁴

Similarly, section 13 places an obligation on designated employers to undertake affirmative measures as set out in section 15. Section 15(1) of the Employment Equity Act describes these affirmative action measures as “measures designed to ensure that *suitably qualified people* from *designated groups* have equal employment opportunities and are *equitably represented* in all occupational categories and levels in the workforce of a *designated employer*”.⁶⁵ This provision contains many key words, which are all defined in the EEA itself. “Equitable representation,” however, is not.⁶⁶ Section 42 of the Act creates the impression that equitable representation “is determined by a consideration of the demographic profile of the national and regional economically active population, the pool of suitably qualified people in the designated groups from which the employer may reasonably be expected to promote or appoint employees, and also the economic and financial factors relevant to the sector in which the employer operates”.⁶⁷ According to the EEA, a designated employer must prepare an employment equity plan upon conducting the required consultation with the representative trade union or nominated employees;⁶⁸ do an analysis by identifying barriers adversely affecting employees or members from designated groups;⁶⁹ prepare and implement an employment equity plan;⁷⁰ submit reports to the Department of Labour;⁷¹ and report income differentials of employees to the

⁶⁴ Sec 2 of the Employment Equity Act.

⁶⁵ Own emphasis added. This includes preferential appointment and preferential promotion. It should be noted however that sec 15(4) explicitly states that designated employers are not required to establish absolute barriers regarding employment or advancement of people who are not from designated groups.

⁶⁶ Sec 1 defines ‘designated groups’ and Sec 20 defines a ‘suitably qualified person’.

⁶⁷ AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke and EML Strydom *Essential Labour Law* (2005) 216; Sec 42 EEA of 1998.

⁶⁸ Sec 16 Employment Equity Act.

⁶⁹ Sec 19 Employment Equity Act. Such an analysis must also contain a profile of the employer’s workforce.

⁷⁰ Sec 20 Employment Equity Act.

⁷¹ Sec 21 Employment Equity Act.

Employment Conditions Commission.⁷² These actions as a whole are known as the Employment Equity Plan which Basson *et al* describe as the “centerpiece in the procedure for implementing affirmative action in the workplace.”⁷³

1.7 Forward-looking and backward-looking approaches

The main justifications for affirmative action originate from two key considerations: the need to redress past disadvantage and past imbalances, and the vision of an egalitarian society. This is confirmed by the Constitutional Court’s interpretation of Section 9(2) of the Constitution.⁷⁴ McHarg and Nicolson suggest that the way in which affirmative action is conceptualised, depends on which justificatory strategy is chosen. This, in turn, will determine (or even bypass) the possible negative consequences of the particular affirmative action policy.⁷⁵ For these reasons they posit that there are essentially three justificatory routes available for affirmative action, namely: *reverse discrimination* and compensatory justice; *non-discrimination* and distributive justice; and *preferential treatment* and social utility, each described in brief along with the concomitant problems associated with it.⁷⁶ The authors further distinguish between strong and weak affirmative action policies. Strong or ‘hard’ affirmative action policies generally refer to affirmative action measures conceptualised as ‘positive discrimination’, ‘reverse discrimination’ or ‘preferential treatment’. Weak or ‘soft’ forms of affirmative action are generally labelled ‘positive action’.⁷⁷

The first justificatory theory, compensatory justice, which is based on the elected definition of affirmative action as *reverse discrimination*, holds that those who have suffered in the past should be compensated by those who have caused their

⁷² Sec 27 Employment Equity Act.

⁷³ AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke and EML Strydom *Essential Labour Law* (2005) 220.

⁷⁴ *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC).

⁷⁵ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 9.

⁷⁶ At a later stage in this inquiry, it will be interesting to note how these three topics can be aligned by what Dupper refers to as forward-looking and backward-looking justifications of affirmative action.

⁷⁷ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 2; O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 89 93-94; Dupper “Affirmative Action in South Africa: (M)Any Lessons for Europe?” (2006) *VRÚ* 138 151-153.

suffering.⁷⁸ Both compensatory and distributive justice will be discussed at length later on. At this stage it is merely essential to note that these two theories are extensive and controversial, and therefore not without limitation. Concerning the problems associated with compensatory justice, McHarg and Nicolson state that the form and duration of compensatory measures are uncertain.⁷⁹ Of stronger importance and gravity is the argument surrounding the ‘innocent victims’ and ‘undeserving beneficiaries’. Simply put, “those who are required to ‘pay’, for instance, by losing out in the allocation of positions or contracts, are generally not responsible for the past discrimination, whereas the beneficiaries may themselves have escaped significant discrimination.”⁸⁰ Yet, easily overlooked, are the “faceless victims of past discrimination” and current, as well as future, victims of an unequal society.⁸¹ The third and final problem mentioned in connection with compensatory justice relates to the emotional consequences of affirmative action strategies, in that those who do not benefit from such policies experience “righteous anger” instead of “moral guilt” for past wrongs.⁸²

Justifications relating to distributive justice can be applied to affirmative action policies conceptualised as non-discriminatory. This method of justification portrays equality as substantive equality and affirms a notion of *equality of opportunity* rather than *equality of treatment*.⁸³ For these reasons, affirmative actions should be interpreted as “natural extension[s] of current anti-discrimination law”.⁸⁴ Effective as this justification might seem, the authors argue that it has several drawbacks, relating mainly to the pull between formal and substantive equality. These include practical issues; confusion between differential and preferential treatment; group-based

⁷⁸ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 9.

⁷⁹ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 10.

⁸⁰ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 10.

⁸¹ A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 10 – 11.

⁸² A McHarg and D Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 11.

⁸³ *Equality of treatment* being reminiscent of formal equality.

⁸⁴ A McHarg and Nicolson “Justifying Affirmative Action: Perception and Reality” (2006) *Journal of Law and Society* 12.

policies giving rise to 'genuine grievances'; and more general problems surrounding proportionality.⁸⁵

In the last instance, social utility justifications should be applied to affirmative action based on preferential treatment. This utilitarian view accepts as a given that preferential treatment occurs. However, such preferential treatment is justified as forming part of an "overarching social or organizational goal" which takes into account social inclusion and "the need to defuse social tension."⁸⁶ The benefits of such an approach are, firstly, that it avoids the usual negative associations that follow anti-discriminatory practices because this justification deals with "disadvantage and exclusion" and therefore it effectively caters for the actual victims of past injustices.⁸⁷ Secondly, this approach avoids the opprobrious consequences of affirmative action specifically in relation to the victims themselves. Victims are no longer stigmatized as being needy but are considered valuable members of society who are also capable of making contributions. However, this approach also has certain shortcomings. In the first instance, the approach has a tendency to devalue state neutrality. Criticism includes the fact that preferential treatment programs have a strong paternalistic nature.⁸⁸ Furthermore, without any reference to remedial equality, it is very difficult to persuade all members of society to agree to and appreciate a particular social goal. It is important for all members to value such goals because only then will they agree that the heavy costs involved are justified. Essentially, the aim is to combat prejudice and anti-discrimination policies should be centered on this goal.

It should be noted, however, that one should be cautious when committing to certain fixed conceptualisations. Theories of compensatory justice and distributive justice are far more complex and should not necessarily be as firmly constrained or tied to the abovementioned conceptions of affirmative action. Conversely, considerable value can be gained from forward-looking and backward-looking justifications of affirmative action. The reason for this is because, as will be established at a later

⁸⁵ A McHarg and Nicolson "Justifying Affirmative Action: Perception and Reality" (2006) *Journal of Law and Society* 13-14.

⁸⁶ A McHarg and Nicolson "Justifying Affirmative Action: Perception and Reality" (2006) *Journal of Law and Society* 15 -16.

⁸⁷ A McHarg and Nicolson "Justifying Affirmative Action: Perception and Reality" (2006) *Journal of Law and Society* 15.

⁸⁸ McHarg and Nicolson offers an acceptable rebuttal of this statement, arguing that by not taking active steps to redistribute social goods, the state would create the impression that it approves of and supports current inequalities.

stage of this inquiry, theories of compensatory and distributive justice are congruent with backward-looking and forward-looking justifications of affirmative action respectively. The theory of compensatory justice embodies the need to redress past disadvantage by focusing on the damage suffered by the victim,⁸⁹ whereas distributive justice is primarily concerned with the allocation of scarce economic goods in society with the main objective being to create an (equal) egalitarian society.

The injunction to redress the legacy of past injustices and unfair discrimination resonates with the emphasis in section 9(2) that the right to equality includes *full and equal enjoyment of all rights and freedoms*. With this, the Constitution implies that the aim of affirmative action can (amongst others) be viewed as remedial or compensatory in nature.⁹⁰ This backward-looking justification, alluded to above, rests on the premise that it is only through positive measures that deep structural inequalities resulting from past discrimination can be adequately addressed. It also holds that, but for the historical events that took place, we as a society have incurred certain duties towards those who have been harmed.⁹¹ These duties are not only determined on a utilitarian basis, in other words, reparations are not owed because of the *good* that it would do society, but because of their underlying *moral force*.⁹² We have to *tip the moral scales* in order to position them as they would have been had it not been for past injustices.⁹³ In addition to the duties owed to contemporary blacks, the backward-looking argument also states that it is the present day whites who should make such amends. Hill illustrates this by means of the “inherited stolen bicycle analogy”, stating that it is wrong for a person who has inherited a stolen item to keep it, even though he or she had not participated in stealing the bicycle in the first place. Hill states the following with regards to current reparations:

“...[P]resent-day whites owe reparations to contemporary blacks, not because they are themselves guilty of causing the disadvantages of blacks, but because they are in possession of advantages that fell to them as a result of the gross

⁸⁹ JW Chapman *Compensatory Justice: Nomos XXXIII* (1991) 101.

⁹⁰ Also see J Rabe *Equality, Affirmative Action, and Justice* (2001) 339.

⁹¹ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 179.

⁹² TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 179. The *duties* referred to above include that of “fidelity, justice, gratitude, and reparation.”

⁹³ J Kekes “The Injustice of Affirmative Action Involving Preferential Treatment” in S Cahn (ed) *The Affirmative Action Debate* (1995) 197.

injustices of their ancestors. Special advantages continue to fall even to innocent whites because of the ongoing prejudice of their white neighbors.”⁹⁴

Proponents of backward-looking arguments contend that such an approach confers real value on the interests of, and disadvantages facing blacks. Possible future benefits are therefore not as important as the current interests involved. A major focal point is therefore that all individuals, black and white, are not treated as mere instruments who are all enlisted to serve as a means to an end, namely to serve as pawns in the creation of a more equal society. Each is awarded his or her own set of rights, and individual (personal) interests are deemed to be highly valuable.

Conversely, this justification also has some drawbacks. Thomas E Hill believes that we should focus on the message of the social theory that is being analysed. The *message* that the backward-looking justification for affirmative action seeks to convey is that reparations should be *paid back in kind*.⁹⁵ Rightfully noted is that the “kind” of discrepancies involved in the present matter not only involve the actual loss of jobs, property and education, but more importantly it includes the emotional disadvantages suffered by the victims. The denial of rights of the black population is certainly a core issue that needs to be rectified, but what we have to bear in mind and should not deny is that “prejudicial attitudes damaged self-esteem, undermined motivations, limited realistic options, and made even ‘officially open’ opportunities seem undesirable.”⁹⁶ How then should reparations take place or be measured? What is obvious though is that reparations should take place. It is the extent of which where the uncertainty lies. Forward-looking justifications place less emphasis on past occurrences and (if anything) view them as mere indicators of which changes are more likely to bring about certain consequences.⁹⁷

The forward-looking approach essentially focuses on *present* day dilemmas facing South Africa. The list includes problems such as poverty, homelessness, inadequate

⁹⁴ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 180. The “innocent victim” issue will be discussed in more detail at a later stage when dealing with the problems of affirmative action.

⁹⁵ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 181.

⁹⁶ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 181.

⁹⁷ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 177.

healthcare and unemployment.⁹⁸ This view generally demands that a stronger form of distributive justice be adhered to in order to correct current inequalities or societal handicaps that are a direct result of past practices and policies.

Regarding the forward-looking rationale, Dupper suggests that such a notion would encompass two elements. Firstly, this view holds that affirmative action should serve as a tool to change the current *attitudes* towards members of disadvantaged groups in order to overcome societal prejudices. Individuals in society often formulate their opinions of other groups based on what they have (only) seen these groups do in the past, and therefore they find it difficult to conceive that black people, amongst others, may be able to operate on a higher and more professional level in the labour market than before. This *attitude-changing argument* therefore concerns the transformation of societal opinions of disadvantaged groups by allowing members of those groups to hold professional positions which require more skill and a higher level of proficiency.⁹⁹ Dupper also adds that this argument would not only benefit the members receiving preferential treatment, but the whole group itself would benefit and acquire a higher standing.¹⁰⁰

The second leg of the forward-looking approach is the *integrative argument*.¹⁰¹ This view links up with the above mentioned *attitude-changing approach* in that affirmative action serves as a method to integrate members of disadvantaged groups into the democratic society, specifically by allowing them to perform tasks which require higher levels of ability. The integration of all members of society is crucial as the segregation of groups has a “causal impact on two core ideals, namely equality of opportunity and democracy.”¹⁰²

⁹⁸ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 97.

⁹⁹ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 114-115.

¹⁰⁰ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 115.

¹⁰¹ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 115-120.

¹⁰² O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 116. On the subject of equality of opportunity, individuals of disadvantaged groups experience less favourable circumstances in securing employment or a financial and socially

As with backward-looking justifications for affirmative action, the forward-looking approach is not without critique. Thomas Sowell points out that a free market would have the same (or even more efficient) results as affirmative action policies, and by implication it would not bear the burden of negative stigmas often associated with affirmative action.¹⁰³ As it was explained above, Hill also criticises this approach with regards to the supposed *message* that it sends to the beneficiaries specifically, which is the following:

“Never mind how you have been treated. Forget about the fact that your race or sex has in the past been actively excluded and discouraged, and that you yourself may have had handicaps due to prejudice. Our sole concern is to bring about certain good results in the future, and giving you a break happens to be a useful means for doing this. Don’t think this is recognition of your rights as an individual or your disadvantages as a member of a group. Nor does it mean that we have confidence in your abilities. We would do the same for those who are privileged and academically inferior if it would have the same socially beneficial results.”¹⁰⁴

Justifying affirmative action in terms of a single approach allows for readily available criticisms. Therefore, when attempting to justify affirmative action, one should bear in mind visions of the past, in order to adequately grasp the gravity of the harms done, whilst simultaneously envisioning the ultimate goal one seeks to achieve. Beneficiaries (or victims) have not forgotten the hardships with which they have had to contend, and the battles they have had to fight, in order to get where they are today. The path to transformation cannot exclude reparations or necessary apologies.

advantageous standing due to their membership of the above mentioned group than those who were not disadvantaged by the previous regime. The impact on democratic values can be just as devastating when segregation occurs in the residential, educational and occupational sphere. Opportunities for cross-racial interaction and public cooperation are therefore reduced, along with the sharing of public goods. Furthermore, it also creates the possibility that the police would automatically consider a person of a different race as suspicious when found in a predominantly ‘white’ area. Anderson states that it is therefore imperative that a level of integration takes place which would encompass a “means of effective participation and interaction on terms of equality by members of different races in shared spaces of civil society.” E Anderson “Integration, Affirmative Action, and Strict Scrutiny” (2002) Vol. 77 *N.Y.U.L Rev.* 1195-1207. The forward-looking rationale has its own complications regarding certain aspects that Dupper mentions such as ‘threshold’, ‘cost’ and ‘time’, which will not be discussed in this thesis. See O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 120.

¹⁰³ See TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 178; D Herman *The Naked Emperor* 65-66.

¹⁰⁴ TE Hill “The Message of Affirmative Action” in S Cahn (ed) *The Affirmative Action Debate* (1995) 178-179.

1.8 General problems related to affirmative action

It has been accepted, and is indeed indicated throughout this thesis, that a definite necessity for affirmative action exists, yet its general application is not uncontested. Affirmative action, as it functions in South Africa, is not a policy void of complications or issues. It is important to take note of such problems in order to identify whether the issues exist on a policy level, or on a deeper societal level. Furthermore, identifying the problems could also indicate whether, and to what extent, outlined goals have been reached and what steps are necessary to complete the process. The problems created by affirmative action as implemented in South Africa range from the entrenchment of racial divisions in society, to the innocent victim issue and a reduction in general efficiency.

Johan Rabe lists a number of disadvantages of affirmative action within the South African context. Firstly, Rabe notes that persons advantaged by affirmative action are *stigmatised by preferential treatment*.¹⁰⁵ There is often such a degree of contempt and hype surrounding preferential appointments, that the beneficiaries are bound to face a twofold battle. The first is that they themselves are likely to feel inferior towards co-workers for not having to compete on an equal footing for the post. They may also feel that they have not truly *earned* the position that they were awarded. This, in turn, will lead to a lowering of self-esteem, and once more a reduction in productivity.¹⁰⁶ It has been suggested that in cases such as these, management should take responsibility and ensure that there are no misunderstandings or misconceptions about a particular employee's ability to do the job.¹⁰⁷ This brings us to the second difficulty that employees face in the labour market, which is that their co-workers too feel that they (the recipients of the preferential appointment) are unable to perform at the required level because they are merely affirmative action appointments. Resentment grows as those candidates

¹⁰⁵ J Rabe *Equality, Affirmative Action, and Justice* (2001) 352.

¹⁰⁶ This is especially prevalent in cases of tokenism.

¹⁰⁷ K Adam "Affirmative Action and Popular Perceptions: The Case of South Africa" (2000) *Society* 48 53.

who are not members of the “suitably qualified” group lose out, even when they were in fact not the best candidates for the job.¹⁰⁸

The second problem that affirmative action has created is that instead of facilitating the harmonious integration of racial and cultural groups, affirmative action has in fact even further diversified society and caused the *perpetuation of racial division*.¹⁰⁹ The use of race as a method to differentiate between people, causes society to be even more sensitive to the racial and cultural differences between them. This is rather ironic, when one considers the fact that the Constitution expressly states that it aims at creating a society based on ‘non-racialism’.¹¹⁰ Rabe states that even though racial divisions and antagonism between cultures are inevitable in the short term, affirmative action policies are still very valuable in the long run because they promote integration by ensuring the socio-economic success of black people.¹¹¹

In the third instance, there are those who fear that preferential treatment will lead to *reduced efficiency*. A major issue that the South African courts have had to deal with in recent years, was the tug of war between the constitutional ideals of representivity and efficiency.¹¹² These issues become magnified when dealing with the public sector. The result of paying too much attention to representivity and too little to efficiency should be obvious: “the bigger the discrepancy in the qualifications of those appointed and the other applicants are, the bigger the drop in productivity will be.”¹¹³ Employers should give adequate consideration to representivity as well as efficiency, but representivity, or rather, equality, should as a Constitutional imperative take preference in certain circumstances.

¹⁰⁸ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 127.

¹⁰⁹ J Rabe *Equality, Affirmative Action, and Justice* (2001) 353.

¹¹⁰ Sec 1(b) Constitution of the Republic of South Africa; O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 128.

¹¹¹ J Rabe *Equality, Affirmative Action, and Justice* (2001) 353. It is interesting to note that there are different kinds of race consciousness, namely essentialist race consciousness and contingent race consciousness. For further reading see O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 129.

¹¹² These issues become magnified when dealing with the public sector. This was the case in both *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) and *Coetzer and Others v Minister of Safety and Security* 2003 (3) SA 368 (LC) 2003 SA and will be dealt with in more detail in chapter two.

¹¹³ J Rabe *Equality, Affirmative Action, and Justice* (2001) 356. Rabe also adds that the reduced efficiency can be offset against the gain of a larger pool of talent.

The fourth disadvantage that affirmative action policies have brought about is that they have *benefited and harmed the wrong people*.¹¹⁴ The previous apartheid regime did not benefit *all* white South Africans and in the same manner it also did not disadvantage *all* 'Black' South Africans.¹¹⁵ It would therefore not serve the purpose of equality in creating a policy that would benefit those Black South Africans that do not need it and,¹¹⁶ in turn, further disadvantage White South Africans who are already experiencing hardship and poor socio-economic conditions. This illustrates the issue of affirmative action being *over-inclusive* but at the same time *under-inclusive*, which is a crucial reason on its own to justify altering the system. Affirmative action is said to be over-inclusive, as confirmed by case law, because it is a system based on group rights and not on individual need.¹¹⁷ This means that certain groups who are not necessarily 'previously disadvantaged' enjoy the protection and advantages of affirmative action programs (therefore, over-inclusive), but this comes directly at the expense of others who are indeed in need of redress (and as such, under-inclusive). Proponents of affirmative action and the group-based system argue that for practical reasons, no person has an individual right to affirmative action because measuring degrees of disadvantage is virtually impossible and highly impractical.¹¹⁸ Furthermore, it is very likely that the majority of the beneficiaries have been disadvantaged by discrimination in the past.¹¹⁹ It would obviously be unreasonable to propose a wholly individually based system, but perhaps other alternatives should be considered.

A far less convincing argument is that affirmative action *infringes upon the freedom of the individual*.¹²⁰ The argument goes that these policies force employers to make certain decisions that they would not have made, had they had a choice in the

¹¹⁴ J Rabe *Equality, Affirmative Action, and Justice* (2001) 356.

¹¹⁵ O Dupper "Affirmative action in South Africa: (M)Any lessons for Europe?" (2006) *Verfassung und Recht in Übersee* 138 161. This term includes all Black, Coloured and Indian South Africans.

¹¹⁶ Having been received education at expensive internationally renowned institutions abroad.

¹¹⁷ *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC). "It is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination in order to benefit from a provision enacted in terms of section 9(2)." (par 85).

¹¹⁸ O Dupper "Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States" (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 112.

¹¹⁹ O Dupper "Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States" (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 112.

¹²⁰ J Rabe *Equality, Affirmative Action, and Justice* (2001) 358.

matter. This is also often referred to as the “managerial prerogative”.¹²¹ The reason why this reasoning does not hold is the following: “In South Africa this state intervention is unfortunately essential as there may be no other way to achieve a more equitable distribution in a very unequal society.”¹²²

Lastly, Dupper warns that affirmative action could cause a problem of *entrenchment*.¹²³ No specific time limit has been set and the goals set out by the EEA are not so clear that affirmative action can be abolished as soon as they are met. Another vital fact is that the major supporters of affirmative action in South Africa are the beneficiaries who happen to be 88% of the population and whose political party has all the political power they need in order to keep affirmative action from disappearing.¹²⁴ It is therefore no wonder in the light of a nation dissatisfied with the slow pace of transformation, that the government would still endorse affirmative action as a “showpiece of success”.¹²⁵

A more trenchant issue that deserves mentioning is the close relationship between affirmative action in the employment sphere, on the one hand, and palpable skills shortages experienced, generally, on the other. The disparity between former model C schools and black schools is also worthy of our attention. Although affirmative action is particularly useful in ensuring increased representation of previously disadvantaged groups in the workforce, which includes the private and the public sphere, much of the successes have been rather underwhelming due to a lack of transformation in the educational sphere. This is, firstly, due to the severe disparities in quality of education obtained between former model C schools and black schools, with the latter predominantly falling short of the required standards. Former model C schools are only partly subsidised by the government and, therefore, also receive a large part of their contributions from school fees generally paid by parents. Black schools, on the other hand, receive practically all their contributions from the South

¹²¹ J Rabe *Equality, Affirmative Action, and Justice* (2001) 358.

¹²² J Rabe *Equality, Affirmative Action, and Justice* (2001) 358.

¹²³ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 129.

¹²⁴ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 129.

¹²⁵ O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 130.

African government, a subsidy which is not always sufficient in meeting all the demands. Ultimately, the quality of education attained suffers. Secondly, research has shown that there are an alarmingly high number of black learners who leave school at secondary level before completing their final matriculation exams.¹²⁶ These individuals are less likely to contribute to the skilled workforce in future than those who had completed their schooling. Research has also shown that there are disparities in the quality of education offered at tertiary level which also serves as an obstacle to transformation.¹²⁷ Dropout rates in certain tertiary educational programmes amongst black individuals are also relatively high in comparison to other races.¹²⁸ What needs to be understood is the supreme importance of a sound educational infrastructure and the role that it plays in furthering growth. In this regard Bloch states the following:

“Education contributes to the base of skills that enable the economy and society to function and grow; and allows the individual access to channels of advancement and hope. Further, it provides the citizenship and social orientations that ensure peace and stability, and shared perspectives for joint activity to enable society to progress for the benefit of all.”¹²⁹

What this points to, is that the educational system bears a considerably higher responsibility to ensure that learners are adequately prepared to enter the workforce when they are of age in order to contribute to the social structure. Various obstacles that would necessarily inhibit this include “[h]unger, malnutrition, HIV/AIDS, child abuse, criminal gangs, lack of books or people to assist at home and general ravages of poverty”.¹³⁰

Affirmative action is generally seen as a strategy that is intended to create more equal opportunities in the labour force. The factors listed above that prevent educational achievements indicate that if true transformation is to occur, affirmative

¹²⁶ P Moleke *Inequalities in higher education and the structure of the labour market* (2005) *Employment and Economic Policy Research Programme, Occasional Paper no. 13*

¹²⁷ M Breier “Introduction” in J Erasmus and M Breier (eds) *Skills shortages in South Africa: case studies of key professions* (2009) 9; S Godfrey “Law professionals” in J Erasmus and M Breier (eds) *Skills shortages in South Africa: case studies of key professions* (2009) 174.

¹²⁸ S Godfrey “Law professionals” in J Erasmus and M Breier (eds) *Skills shortages in South Africa: case studies of key professions* (2009) 172. For example, research has shown that the dropout rate for black students studying law was 17% higher than the average dropout rate.

¹²⁹ G Bloch “The complexity of systems change in education” in S Maile (ed) *Education and poverty reduction strategies: issues of policy coherence* (2008) 126.

¹³⁰ G Bloch “The complexity of systems change in education” in S Maile (ed) *Education and poverty reduction strategies: issues of policy coherence* (2008) 130.

action cannot be the sole means for doing so. Other policies and strategies need to be employed in unison with the affirmative action policy, such as skills development strategies. Economic growth will inevitably suffer if the necessary pool of skills runs dry, and without economic growth, transformation is delayed. Equal representation of all races within the workforce can hardly be achieved if there is an insufficient number of individuals who receive employment opportunities. Furthermore, skills developmental strategies suffer debilitating losses when senior employees, experts, and leaders within pertinent fields and companies, seek employment abroad as a result of affirmative action strategies as this phenomenon hampers “the ability of the workforce to absorb young entrants.”¹³¹

1.9 Limits?

There are various ways in which the affirmative action policy, or even the existence of it, can be seen to have limited potential. The first of these is the question whether an affirmative action strategy in itself is capable of transforming current day inequalities? This thesis will examine this statement in various ways. As the current model is based on a race-based strategy, it needs to be ascertained whether this will not merely result in pure surface reallocations which do not have the ability to penetrate the social structure and thereby truly transform society. As will be explained at a later stage, seemingly superficial reallocations might not necessarily be detrimental as Fraser indicates that such affirmative strategies might perhaps develop into transformative strategies in the long run if adequately paired with additional strategies (such as the enrichment of the educational structure or boosting skills developmental programmes).

The race-based model can be juxtaposed to a class-based affirmative action model which instead of basing preferential treatment upon race, instead assigns socio-economic standing as the key indicator for upliftment. As an alternative, this strategy may be better equipped to address the potential shortcomings of a race-based system, but might also be accompanied by a new set of disadvantages, including whether it too has transformative potential or not.

¹³¹ M Breier “Introduction” in J Erasmus and M Breier (eds) *Skills shortages in South Africa: case studies of key professions* (2009) 1.

A second limitation associated with affirmative action is the question: to what extent can affirmative action be seen as a redistributive strategy, and also, whether it should be expected to be one in the first place? The preambles of two key Acts, i.e. the Broad-Based Black Economic Empowerment Act and the Employment Equity Act could assist us in this regard.¹³² In the first instance the Broad-Based Black Economic Empowerment Act reminds us that the vast majority of South Africans are currently excluded from economic participation and therefore the distribution of income towards such persons are unequal in comparison to those who are economically active. The purpose of this Act is therefore to “increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and *more equitable income distribution...* so as to promote the economic unity of the nation, protect the common market, and *promote equal opportunity* and equal access to government services.”¹³³ Similarly, the Employment Equity Act observes the “disparities in employment, occupation and income within the national labour market” and seeks to address these issues through prescribed employment practices that are intended to facilitate equal representation in the workforce which would ultimately empower more people financially and socially.¹³⁴

The unavoidable conclusion from this is therefore that Parliament itself is of the view that, through more equitable income distributions, affirmative action can indeed serve as a redistributive policy of sorts. The question however remains whether it is currently a *just* redistributive policy? If this is not the case, adjustments need to be made.

¹³² Broad-Based Black Economic Empowerment Act 53 of 2003 and Employment Equity Act 55 of 1998.

¹³³ Preamble to Broad-Based Black Economic Empowerment Act 53 of 2003. (Own emphasis added).

¹³⁴ Preamble to Employment Equity Act 55 of 1998.

Chapter 2: Affirmative action and the Constitutional Court's equality jurisprudence

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The Constitutional Court has stated unequivocally that the Constitution attaches fundamental importance to the achievement of equality.¹³⁵ This, in part, is an acknowledgment not only that there have been substantial barriers to the realization of egalitarianism in the past, but also that such barriers still exist within the underlying structures of society. As a key role player in interpreting the principles and values enshrined in the Constitution, the Constitutional Court is tasked with promoting equality, whether substantive equality or remedial and restitutionary equality, depending on the situation.¹³⁶

This chapter will give an in depth outline of the Constitution's equality clause and will thereafter discuss the two forms of equality mentioned above, namely substantive equality and remedial and restitutionary equality. This chapter will also include a critical analysis of *Minister of Finance and Another v Van Heerden* and will conclude with a discussion of the dichotomy between efficiency and representation, with reference to the guidelines of affirmative action as set out in the relevant legislation.¹³⁷

¹³⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 74-76 where the Court states the following that the "achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'."

¹³⁶ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC); *Minister of Finance and another v Van Heerden* 2004 (12) BCLR 1125 (CC); *President of Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC); *Prinisloo v Van der Linde* 1997 (6) BCLR 759 (CC); *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC).

¹³⁷ 2004 (12) BCLR 1125 (CC).

2.1 Section 9 and the equality tests

According to *President of Republic of South Africa v Hugo*, “human dignity” lies at the heart of the Constitution’s equality guarantee.¹³⁸ This entails that each person within the jurisdiction of South Africa is afforded an equal sense of moral worth which the Constitution seeks to protect.¹³⁹ Section 9 is a clear reflection of South Africa’s egalitarian goal, which it aims to achieve in various ways depending on the context.¹⁴⁰ Various equality tests are applied by the Constitutional Court, to verify the validity of certain actions (public or private) or state policies.

Van Reenen suggests that the equality clause should be given a purposive interpretation, thereby giving full effect to the goal, history and language of the right to equality.¹⁴¹ In the light of the current South African reality this means that this constitutional provision should at all times follow a standard of substantive equality with due regard to the rights, interests, values and (impaired) human dignity of all parties involved. Equality stands as one of the most central values in any democratic dispensation and its importance is “conducive to an expansive, substantive understanding of the right” to equality.¹⁴²

¹³⁸ 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC). At par 41 Goldstone J states the following: “At the heart of the prohibition of unfair discrimination lies a 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.”

¹³⁹ P De Vos “Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court” (2000) *THRHR* 62 66.

¹⁴⁰ Section 9 of the Constitution of the Republic of South Africa states:

“(1) Everyone is equal before the law and has the right to 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 term of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one of more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

¹⁴¹ TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 151 164-165.

¹⁴² TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 165.

Section 9(1) protects everyone as being “equal before the law” and having “equal protection and benefit” of the law. Van Reenen questions whether these two phrases should be read in concert or separately.¹⁴³ It is suggested that a substantive interpretation of the right to equality should entail that the two concepts should be read in unison so as to give full effect to the values and principles of the Constitution.¹⁴⁴ By doing so, the Constitution is animated and given a reputation as a *living instrument* that develops and strengthens as societal values and norms adapt to new climates. “Equality before the law” concerns a measure of procedural justice whereas “equal protection and benefit of the law” confers on vulnerable groups and individuals within South Africa the necessary protection against ill-treatment and exploitation from controlling groups or even state action.¹⁴⁵ Albertyn and Kentridge suggest that this affirmation of the right to equality also “entails a commitment to redressing subordination and inequality, to making reparation and restitution.”¹⁴⁶

The Constitutional Court has interpreted section 9(1) to imply a “rationality” test. This means that it must be determined whether there is a rational relationship between the “differentiation in question and the governmental purpose which is proffered to validate it.”¹⁴⁷ Put differently, it should be determined whether there is a rational relationship between the differentiation between groups or categories of persons (the chosen means), on the one hand, and the governmental goal envisaged (the chosen purpose) on the other.¹⁴⁸ The Court has expressed its disinclination to endorsing a judicial activist role in terms of a section 9(1) analysis, particularly in cases concerned with redistributive programmes.¹⁴⁹ With regards to these redistributive programmes,

¹⁴³ TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 154.

¹⁴⁴ TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 154; C Albertyn and J Kentridge “Introducing the right to equality in the interim constitution” (1994) Vol 10 *SAJHR* 149 158.

¹⁴⁵ TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 155-156.

¹⁴⁶ C Albertyn and J Kentridge “Introducing the right to equality in the interim constitution” (1994) Vol 10 *SAJHR* 160.

¹⁴⁷ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) par 26.

¹⁴⁸ P De Vos “Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court” (2000) *THRHR* 70.

¹⁴⁹ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) par 20; *Harksen v Lane* 1997 (11) BCLR 1489 (CC) par 40.

the Court finds it necessary to abstain from deciding on issues that ordinarily fall within the scope of public policy.¹⁵⁰

The Constitution does not specifically prohibit all forms of differentiation.¹⁵¹ In the absence of such a rational connection, the differentiation is unconstitutional. If, however, the differentiation in question passes the rational connection test, it could still be held to constitute unfair discrimination.¹⁵²

Section 9(2) expressly authorises affirmative action. The internal section 9(2) test, as illustrated below in the discussion of remedial and restitutionary equality, was applied by the Constitutional Court in *Van Heerden*. Justice Mokgoro states the following: “The reason for the enactment of section 9(2) is to authorise restitutionary measures for the advancement of those previously disadvantaged by unfair discrimination.”¹⁵³ This section authorises lawful discrimination between groups and is not an exception to the right to equality, but is in fact an integral part of it. The examination of a measure ends as soon as it has been established that it complies with the internal requirements of section 9(2).¹⁵⁴

While section 9(2) is essentially goal orientated, section 9(3) is overwhelmingly group-orientated. The relationship between sections 9(2) and 9(3) has been explored by several authors.¹⁵⁵ Section 9(3) expressly prohibits direct or indirect *unfair* discrimination based on certain grounds.¹⁵⁶ The word “including” suggests that the grounds listed in section 9(3) are not a *numerus clausus*. The Court has recognised that discrimination on unlisted grounds may also be unfair if the ground is analogous to the listed grounds.¹⁵⁷ It is also possible for discrimination to involve

¹⁵⁰ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 48 and 104.

¹⁵¹ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

¹⁵² *Harksen v Lane* 1997 (11) BCLR 1489 (CC) paras 43-44.

¹⁵³ *Minister of Finance and another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 76.

¹⁵⁴ S Liebenberg and B Goldblatt “The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution” (2007) Vol 23 *SAJHR* 335 348.

¹⁵⁵ For further reading see S Fredman “Providing Equality: Substantive Equality and the Positive Duty to Provide” (2005) *SAJHR* 163 182-185; TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 151-165; J Rabe *Equality, Affirmative Action, and Justice* (2001) 359-366; *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC).

¹⁵⁶ For a distinction between direct and indirect discrimination see TP Van Reenen “Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa” (1997) *SAPL* 159; I Currie and J De Waal *The Bill of Rights Handbook* (2005) 260-263.

¹⁵⁷ I Currie and J De Waal *The Bill of Rights Handbook* (2005) 257; S Liebenberg and B Goldblatt “The interrelationship between equality and socio-economic rights under South Africa’s transformative

more than one of the listed grounds at a particular time, for example, discriminating against black women, thereby discriminating on grounds of race and gender simultaneously. The South African reality lends itself to situations such as these quite readily as intersectional disadvantage is a common occurrence amongst various groups.¹⁵⁸

The differentiation between groups on one of the listed grounds in section 9(3) will trigger a presumption of unfair discrimination unless the responding party can prove the contrary.¹⁵⁹ To determine whether a certain measure constitutes unfair discrimination, the Constitutional Court applied an extensive two-stage test in *Harksen v Lane NO*.¹⁶⁰ Firstly it has to be established whether the differentiation in question amounts to *discrimination*, and secondly whether such discrimination amounts to *unfair discrimination* (as the Constitution only prohibits unfair discrimination and not merely discrimination as such).¹⁶¹

To pass muster, measures need to meet the criteria of more stringent scrutiny (as compared to the section 9(1) analysis) under the “unfair discrimination” assessment. Restitutionary measures enacted in accordance with section 9(2), however, are not presumptively unfair.¹⁶² I will return to this point at a further stage within the ambit of the *Van Heerden* discussion.

constitution” (2007) Vol 23 *SAJHR* 347; P De Vos “Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court” (2000) *THRHR* 71. For example citizenship in the cases of *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC). In *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) the question was raised whether discrimination on grounds of HIV status amounted to “unfair discrimination”. In this case the Court found it unnecessary to determine whether HIV status constitutes an analogous ground of discrimination or whether it is synonymous with having a disability, which is a listed ground. The fact that the appellant’s dignity had been impaired by the employer’s conduct was sufficient to establish unfair discrimination (par 40).

¹⁵⁸ On the intersectional nature of disadvantage see *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 113; C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 248 253; J Conaghan “Intersectionality and UK equality initiatives” (2007) Vol 14 *SAJHR* 317-334; S Liebenberg and B Goldblatt “The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution” (2007) Vol 23 *SAJHR* 347; M Pieterse “Finding for the applicant? Individual equality plaintiffs and group-based disadvantage” (2008) Vol 24 *SAJHR* 397 406-407, 420-422; H Botha “Equality, plurality and structural power (2009) *SAJHR* 1 10.

¹⁵⁹ Section 9(5); I Currie and J De Waal *The Bill of Rights Handbook* (2005) 248.

¹⁶⁰ 1997 (11) BCLR 1489 (CC) par 45.

¹⁶¹ For further reading see P De Vos “Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court” (2000) *THRHR* 70-75; I Currie and J De Waal *The Bill of Rights Handbook* (2005) 235-236, 257-260.

¹⁶² S Fredman “Providing Equality: Substantive Equality and the Positive Duty to Provide” (2005) *SAJHR* 183-184.

From a philosophical perspective, the importance of ensuring that persons are not discriminated against on grounds of arbitrary characteristics is fairly obvious. The reason for this, which is analogous to the rationale behind John Rawls's *original position*,¹⁶³ is simply because individuals do not *choose* to be black, gay, female, a Tanzanian, in a wheelchair, 65 years old, or Swahili.¹⁶⁴ These are considered to be arbitrary characteristics very closely associated with an individual's identity, yet have no bearing on their intelligence or capabilities to contribute in a productive manner to society.¹⁶⁵ Similarly, other characteristics such as being pregnant, married, a transvestite, or choosing a different or new religion, do not impair one's ability to become a successful accountant, teacher or business consultant. What all these traits have in common, is the fact that they are closely bound up with one's sense of human dignity. In short, they define *who we are*. In *Hugo* the Constitutional Court offered a two-fold rationale for the purpose of the prohibition of unfair discrimination. Firstly, the provision seeks to avoid discrimination against individuals from disadvantaged groups, and secondly and more importantly, to establish a society in which "all human beings will be accorded equal dignity and respect regardless of their membership of [a] particular" group.¹⁶⁶

Section 9(4) allows for the horizontal application of the equality clause, whereas section 9(3) binds the state. Accordingly, private individuals also have the constitutional responsibility to promote equal treatment of all members of society and to prevent discrimination. This is particularly, but not exclusively, applicable within the employment sphere. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 regulates the occurrence of unfair discrimination on a

¹⁶³ The idea of the "original position" entails the hypothetical notion that citizens are placed under a "veil of ignorance" with regards to their own characteristics such as race, gender, religion, talents, etc and from this position they choose how social goods should be distributed. By not knowing who or what they are, individuals are more likely to choose a more just composition of society for fear of the possibility that they might end up at the bottom of the hierarchy. Chapter three will contain more elaborate discussions on this issue.

¹⁶⁴ Many authors have disputed the existence of the "gay gene" and the tests conducted in search of it. One of the most well-known articles in support of the difference between heterosexual and homosexual genes was published in 1993 in the *Science* magazine entitled 'A linkage between DNA markers on the X chromosome and male sexual orientation' by DH Hamer, S Hu, VL Magnuson, N Hu and AM Pattatucci; also supported in JE Nel *Joe Orton: A Psychoanalytical Reading of His Published Plays* Ph.D thesis University of Potchefstroom for CHE (1993).

¹⁶⁵ Also referred to as "mute" characteristics, i.e. those characteristics which are "intimately part of the human personality and are generally subject to stereotyping and prejudice." CRM Dlamini "Equality or Justice? Section 9 of the Constitution revisited – Part II" (2002) *Journal for Juridical Science* 15 17.

¹⁶⁶ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) paras 22-23.

horizontal and vertical scale insofar as matters do not apply to the employment arena in which case the Employment Equity Act 55 of 1998 will apply.

2.2 A Substantive Concept of Equality

“The purposive, contextual approach reveals that within the constitutional vision of democracy lies an expansive and substantive conception of equality which encompasses the need to remedy inequality as well as to remove discrimination, to give in the present that which was unjustly withheld in the past, and to restore in the present what was wrongly taken in the past.”¹⁶⁷

It is generally accepted, also by the Constitutional Court, that section 9 seeks to ensure substantive, as opposed to merely formal, equality. Equal treatment in South Africa in terms of formal equality will not serve the ends of justice. The underlying economic and social structure of apartheid has, in many respects, survived the transition to democracy. The *superficial* equal treatment of individuals today merely entrenches an already unbalanced structure. The courts and policy-makers have come to realise that and have geared themselves (and their policies) towards achieving a more egalitarian society. This section will outline the differences between formal and substantive equality. It will also aim at identifying the role of substantive equality within the legal realm as well as substantiating why states should promote such a notion of equality. Finally it will also outline the key characteristics, objectives and aims of substantive equality.

Substantive equality is best described by distinguishing it from formal equality. Formal equality entails that all individuals, irrespective of origin or identity, be treated equally. For example, X – who is a black woman from a socio-economically deprived rural settlement is equally eligible to apply for the same position as Y – a white middle-class man living in an affluent urban area. When applying this form of equality, one sees that it does nothing to advance individuals who come from disadvantaged backgrounds. It is very likely that the quality of education that X received did not adequately prepare her to compete on an equal footing with individuals such as Y. The main problem with formal equality is that it “presupposes

¹⁶⁷ C Albertyn and J Kentridge “Introducing the right to equality in the interim Constitution” (1994) Vol 10 *SAJHR* 152.

that all persons are equal bearers of rights within a just social order.”¹⁶⁸ To do so is highly idealistic, for there is no proof that South Africa has come even remotely close to establishing a *just social order*. Furthermore, this approach presupposes that by merely eradicating discriminatory policies, and by keeping all laws and practices neutral and colour-blind and enforcing them as such, the necessary level of equality will follow. Furthermore, Sandra Fredman similarly states that “formal equality holds out as universal and neutral the characteristics of the dominant group, expecting conformity to the norm as the price for equal treatment.”¹⁶⁹ Therefore, formal equality negates difference because it assumes that the status quo is a neutral baseline and ultimately “demands conformity as a price for equal treatment”.¹⁷⁰

The value of substantive equality is centred in its capacity to transform the unequal *structure* of society. Formal equality is per definition incapable of doing so. Formal equality pays no attention to characteristics such as gender, race, religion, or socio-economic status. By ignoring the deep-rooted disparities created by past practices, the courts merely perpetuate the current inequalities that individuals experience.

The main difference between formal and substantive equality is that the former entails a measure of *rule equality* whereas the latter is concerned with *result equality*.¹⁷¹ Unlike formal equality, substantive equality values and focuses on the differences between individuals, such as race, gender and socio-economic status, as these characteristics affect a person’s ability to compete on an equal footing with others who have had the necessary advantages and opportunities in life.¹⁷² Albertyn and Goldblatt posit that substantive equality entails “examining the context of an alleged rights violation and its relationship to systemic forms of domination within society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development.”¹⁷³ What this means is that substantive equality acknowledges the fact that society is based on an unequal system, it

¹⁶⁸ C Albertyn and J Kentridge “Introducing the right to equality in the interim Constitution” (1994) Vol 10 *SAJHR* 152.

¹⁶⁹ S Fredman “Providing Equality: Substantive Equality and the Positive Duty to Provide” (2005) *SAJHR* 165-166.

¹⁷⁰ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) Vol 23 *SAJHR* 214 216.

¹⁷¹ J Heaton “Striving for substantive gender equality in family law: Selected issues” (2005) *SAJHR* 547 549. Or otherwise generally referred to as “equality of result”.

¹⁷² C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 251.

¹⁷³ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 250.

recognises the structure for what it is and aims to identify the vulnerable groups. These groups are in turn dealt with in a different manner according to their disadvantage to ensure that they also have the opportunity to reach their fullest potential or, otherwise put, to ensure *meaningful participation in society*.¹⁷⁴

The core strength of substantive equality is its strong transformative potential.¹⁷⁵ It has been recognised in case law and academic literature, that the South African constitution was created as a mechanism to bring about transformation in South Africa.¹⁷⁶ This transformation entails a shift away from previous oppressive apartheid practices to policies aimed at creating an egalitarian society. Substantive equality, then, is the framework in which this change occurs. Albertyn lists four characteristics of substantive equality that contribute to its transformative capabilities. These are the following:

- An emphasis on understanding inequality within its social and historic context;
- A primary concern with the impact of the alleged inequality on the complainant;
- A recognition of difference as a positive feature of society; and
- Attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination or disadvantage.¹⁷⁷

¹⁷⁴ C Albertyn and B Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) Vol 14 *SAJHR* 254.

¹⁷⁵ C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 253.

¹⁷⁶ See Sec 9 of the Constitution of the Republic of South Africa; C Albertyn and B Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) Vol 14 *SAJHR* 248; C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 253.

¹⁷⁷ C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 258. It should be noted however, that the nature of disadvantage itself, is not as clear-cut or simple as it may seem on the surface. The role that *disadvantage* plays differs in various contexts. An often used example is that of the black woman. She does not only experience disadvantage because she is a black, or because she is a woman. The nature of the disadvantage that she experiences is complex because of the overlapping between two characteristics that are grounds for unfair discrimination. This situation is complicated even more once socio-economic status is added to the mix. For further reading see C Albertyn and B Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) Vol 14 *SAJHR* 248; S Liebenberg and B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) Vol 23 *SAJHR* 335.

Each of the characteristics listed above is fairly complex and, for the purposes of the current discussion, it is unnecessary to go into further detail at this stage. It should be noted, however, that substantive equality does not advocate the abstract, intangible enquiries found in formal notions of equality. Substantive equality holds that a contextual analysis should be applied when faced with considering alleged discriminatory practices.¹⁷⁸ In the light of transformative *equality jurisprudence*, this would entail “locating the impugned act within real life conditions and understanding how these reinforce both disadvantage and harm.”¹⁷⁹ For example, denying permanent residents of the Republic of South Africa access to social grants, would amount to infringement of their right to social security, as well as the constitutional right to equality.¹⁸⁰ In a previous decision, the Constitutional Court found that within this specific context, the decision by the state to differentiate between permanent residents and citizens amounted to unfair discrimination and hence words were read into the legislation to include permanent residents within the category of those entitled to social security benefits. The reason for this is because the socio-economic rights conferred in the Constitution by sections 26 and 27 apply to ‘everyone’ and therefore different sections of the state should not award socio-economic rights selectively. Mokgoro J held the following:

“There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.”¹⁸¹

Substantive equality imposes a duty upon the state to supply the infrastructure for enforcement of remedial measures that are necessary to establish the required

¹⁷⁸ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 260.

¹⁷⁹ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 261. This inquiry alluded to above involves a complex four phase process in practice (261).

¹⁸⁰ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); S Fredman “Redistribution and Recognition: Reconciling Inequalities” (2007) *SAJHR* 230-231.

¹⁸¹ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [74].

version of justice based on the Constitutional Court's jurisprudence. The reason why this duty rests on the state is because of the "group-nature" of inequality. Sandra Fredman agrees that "societal discrimination extends well beyond individual acts of prejudice."¹⁸² Those groups who have been oppressed based on arbitrary external characteristics,¹⁸³ have suffered due to a system geared at marginalising them for the sake of the norm. It is, therefore, not impossible to conceive that, to alleviate their suffering, the system itself should change. This change can only be brought about by state actors for two reasons. Firstly, because they have, in part, played a role in sustaining the oppressive regime in the past and, secondly, because they are in the "best position to bring about [the necessary] change."¹⁸⁴ In the light of the *positive duty to provide*, Fredman identifies four key substantive aims:

- Substantive equality should aim to *break the cycle* of disadvantage associated with out-groups;
- It should *promote* respect for the equal dignity and worth of all, thereby *redressing* stigma, stereotyping, humiliation and violence because of membership of an out-group;
- It should entail *positive affirmation and celebration* of identity within community; and
- It should *facilitate* full participation in society.¹⁸⁵

Although substantive equality embodies characteristics similar to those of compensatory justice,¹⁸⁶ it is more accurately defined in terms of distributive justice. Substantive equality places the obligation upon the state to distribute and redistribute social benefits and scarce resources in a just and "equal" manner.¹⁸⁷

Recently, an important relationship has emerged between substantive equality and transformative constitutionalism. In *Minister of Finance v Van Heerden*, Sachs J

¹⁸² S Fredman "Providing equality: Substantive Equality and the Positive Duty to Provide" (2005) *SAJHR* 166.

¹⁸³ Such as race, gender and socio-economic status.

¹⁸⁴ S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) *SAJHR* 168.

¹⁸⁵ S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) *SAJHR* 167. Own emphasis.

¹⁸⁶ Past harms have to be clearly identified and measured to an extent.

¹⁸⁷ See S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) *SAJHR* 168.

states that substantive equality is rooted in a transformative constitutional philosophy.¹⁸⁸ The legacy of apartheid, along with its underlying socially corrupt structure, will remain unless a major transformation takes place in accordance with the Constitution. Klare defines *transformative constitutionalism* as:

“[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”¹⁸⁹

In order to realise its full ‘transformative’ potential, substantive equality should be “conceptually consistent.”¹⁹⁰ This entails that substantive equality should be firmly located within the social context of systemic inequalities – which in essence is what an adequate reading of substantive equality entails.¹⁹¹ How then should the courts go about locating the impugned acts within real life circumstances? Albertyn and Goldblatt have suggested a four-part contextual analysis of such an inquiry.¹⁹² To begin with, the court should examine the socio-economic conditions of the individuals in question. Secondly, the court must identify the “impact of the impugned provision on social patterns and systemic forms of disadvantage.”¹⁹³ Once this is done, the court should then understand the multifaceted nature of group disadvantage by examining “grounds of discrimination in an intersectional manner.”¹⁹⁴ Lastly, and as the above definition of *transformative constitutionalism* suggests, the court must explore the historical context of the case.¹⁹⁵ This contextual application will not always be a straightforward feat; in fact, it can prove to be highly complex and intricate.¹⁹⁶ The court has to interpret each case

¹⁸⁸ *Minister of Finance and another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 142.

¹⁸⁹ K Klare “Legal Culture and Transformative Constitutionalism” (1998) *SAJHR* 146 150.

¹⁹⁰ C Albertyn “Substantive Equality and Transformation in South Africa” (2007) Vol 23 *SAJHR* 254.

¹⁹¹ C Albertyn “Substantive Equality and Transformation in South Africa” (2007) Vol 23 *SAJHR* 254. See C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 250.

¹⁹² C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 261.

¹⁹³ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 261.

¹⁹⁴ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 261.

¹⁹⁵ C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 261.

¹⁹⁶ See C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 262.

within the *language* of the Constitution in order to ensure the transformative outcome.

As in the case of South Africa, this approach is applicable to any society that seeks, and is committed to, 'large-scale, egalitarian social transformation.'¹⁹⁷ I will undertake a more in depth discussion of *transformative constitutionalism* in my contextual analysis of affirmative action and the theories of justice.¹⁹⁸

2.3 Remedial and Restitutionary Equality

"Like justice, equality delayed is equality denied."¹⁹⁹

The phrase *remedial and restitutionary equality*, though seemingly self-explanatory, has been used by the Court particularly in the context of affirmative action. However, the Court has to date failed to give adequate content to this expression. It is, therefore, unclear what the precise limits of affirmative action in terms of remedial and restitutionary equality should be. The purpose of this study, consequently, includes giving content to remedial and restitutionary equality. One of the first decisions in which the Constitutional Court referred to these two terms was in the judgment of *National Coalition for Gay and Lesbian Equality v Minister of Justice*.²⁰⁰ This section will analyse the operation of the terms in the context of this case, as well as the adequacy of their use in this particular regard. In the subsequent chapter, remedial and restitutionary equality, as well as substantive equality, will be situated from the vantage point of compensatory and distributive justice respectively. The aim of this approach is to give narrower definitional content to these principles of equality by exploring the substance and limits of theories of justice to which they could be related.

Earlier in the discussion it was argued that significant regard should be given to the justifications that accompany various versions of affirmative action.²⁰¹ In terms of

¹⁹⁷ K Klare "Legal Culture and Transformative Constitutionalism" (1998) *SAJHR* 151.

¹⁹⁸ Chapter 4.

¹⁹⁹ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC).

²⁰⁰ 1999 (1) SA 6 (CC).

²⁰¹ It is also worth inquiring as to why it is that the courts have to date not yet done the above mentioned (or of similar calibre) analysis. Possible explanations for this have been put forward and in

equality, we are required to take one step backwards. The question in this regard is how certain forms of equality justify and mandate affirmative action. Thus, what are the inferences to be drawn from remedial and restitutionary equality regarding affirmative action, and how do they limit affirmative action? Two significant cases in this regard are those of *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*²⁰² and *Minister of Finance and Another v Van Heerden*.²⁰³

In *National Coalition for Gay and Lesbian Equality*, an application was brought requesting that the criminalisation of gay sodomy be declared unconstitutional. The Constitutional Court based its decision on various principles of equality and found that the provisions indeed amounted to an infringement of Constitutional rights, including the right to privacy²⁰⁴ and the right to human dignity.²⁰⁵ More importantly, the provisions unfairly discriminated against a vulnerable minority group based on grounds listed in section 9 of the Constitution, namely sex and sexual orientation. Consequently, it was found that the discriminatory provisions were to be declared unconstitutional. The Court recognised that this needed to be done in the light of substantive, and remedial and restitutionary equality, respectively. The Constitutional Court found it necessary to introduce the concepts of remedial and restitutionary equality because it was argued that the Court's equality jurisprudence was incapable of addressing material inequality and it responded by insisting that its vision of equality, as informed by section 9, is both substantive and remedial.²⁰⁶

this regard I am grateful for Professor Botha's input. It may be that the courts perceive these notions to be self-explanatory. Should this be the case, it is uncertain why they feel it necessary to give content to *other* terms such as substantive equality or affirmative action. Secondly, have the courts merely decided to delay doing so and instead decided to develop an adequate understanding of remedial and restitutionary equality in the light of each particular case? This is similar to the Court's interpretation of the equality jurisprudence which was suggested to develop on a case-by-case basis in *S v Ntuli* 1996 (1) BCLR 141 (CC) par 19. Or, could it be that this is a classic example of judicial deference, where the judiciary have actively decided to uphold the policy decisions made by the other branches of the state? In the South African context, it is likely that the answer lies between the spheres of the last two options given. Whichever possibility it may be, it remains to be answered what the terms 'remedial and restitutionary equality' truly mean.

²⁰² 1999 (1) SA 6 (CC).

²⁰³ 2004 (12) BCLR 1125 (CC).

²⁰⁴ Sec 14 Constitution of the Republic of South Africa, 1996.

²⁰⁵ Sec 10 Constitution of the Republic of South Africa, 1996.

²⁰⁶ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 62. The term 'remedial and restitutionary equality' was introduced in response to submissions made to the Court by the Centre for Applied Legal Studies. What is somewhat surprising in this regard was the fact that one would expect remedial and restitutionary equality to be more fitted to affirmative action issues where past discrimination is evident. For it to make its first appearance in a sexual

The Constitutional Court commenced with its discussion of remedial and restitutionary equality by asserting that if not expressly remedied, past injustices and unfair discrimination will continue to exist.²⁰⁷ This is followed by a logical leap in paragraph 61 where Justice Ackermann unequivocally states that section 9(3) of the Constitution recognises the need for remedial and restitutionary measures.²⁰⁸

How should section 9(3) then be interpreted? When can it be said that a provision encapsulates the essence of remedial and restitutionary equality? The terms themselves suggest some sort of corrective procedure that needs to take place. Sachs J suggests that we should look towards the history of discrimination in order to understand its suppressive and stereotypical effects in the present.²⁰⁹ This would indicate from where the *scarring* originates. In the case of the gay and lesbian community, it has been their *invisibility* that has caused the most harm to this vulnerable minority group.²¹⁰ Because this aspect has been identified, it is possible to contemplate some sort of remedial strategy by, for example, declaring discriminatory provisions unconstitutional.²¹¹ What is somewhat surprising about this line of reasoning is the fact that the Court was not asked to consider section 9(2), nor was the case concerned with material inequality.

In *Van Heerden*,²¹² Moseneke J associates restitutionary measures with the policy of affirmative action. Accordingly, sections 9(1) and 9(2) of the Constitution should be read in concert to fully embrace the value of substantive equality which Moseneke J states is “inclusive of measures to redress existing inequality” i.e. remedial and

discrimination case does seem somewhat amiss. It is also worth noting that in this specific matter the issues were also more centered around misrecognition, rather than maldistribution, as the violation pertaining to homosexuals traditionally does not involve a lack of appropriation of economic resources, but instead a denial of deserved status.

²⁰⁷ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 60.

²⁰⁸ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 61; Section 9(3) of the Constitution of the Republic of South Africa states: “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.”

²⁰⁹ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 127.

²¹⁰ *National Coalition for Gay and Lesbian Equality and others v Minister of Justice* 1999 (1) SA 6 (CC) par 127.

²¹¹ The discrimination in question was more related to the issue of moral societal exclusion and the recognition of the particular group’s human dignity and moral worth.

²¹² *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC).

restitutionary equality.²¹³ One could infer that this entails that substantive equality, on the one hand, and remedial and restitutionary equality on the other, are in fact not two different versions of equality. The latter, it seems, is merely an essential component of the former.²¹⁴ The decision of Mokgoro J, too, states that substantive equality entails that there should be some form of compensation for past injustices which cannot be remedied by simply abolishing discriminatory or harmful practices.²¹⁵ The Court states that taking remedial measures in the form of “differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination”, is justified on condition that it meets the internal requirements of sec 9(2).²¹⁶ This test entails the following:²¹⁷

- Does the measure *target* persons or categories of persons who have been disadvantaged by unfair discrimination?
- Is the measure designed to *protect or advance* such persons or categories of persons?
- Does the measure *promote* the achievement of equality?

The two decisions above both consider remedial and restitutionary equality as a worthy ideal but lack consensus with regards to the core foundation of this version of equality. The first case, *National Coalition for Gay and Lesbian Equality*, affirmed that remedial and restitutionary measures are strongly centred in sec 9(3) of the Constitution, whereas *Van Heerden* states that sec 9(2) supports substantive equality which in turn contains elements of remedial and restitutionary equality as well. Mokgoro J suggests, though not explicitly, that section 9(2) and 9(3) both have elements of remedial and restitutionary equality. It is said, we recall, that section 9(2) is goal-orientated, while section 9(3) is group-orientated.²¹⁸ In the light of remedial and restitutionary equality, when a policy, decision or piece of legislation falls within the ambit of section 9(2), and its goal is to advance those previously disadvantaged or to make up for previous harms, then it would be considered justified. Remedial or

²¹³ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 31. A more in-depth discussion of Sec 9 of the Constitution will follow at a later stage.

²¹⁴ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 32.

²¹⁵ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 75.

²¹⁶ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 32.

²¹⁷ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 37.

²¹⁸ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 78-79.

restitutionary measures which do not comply with the requirements of section 9(2), may nevertheless pass constitutional muster if it is found that, in view of their purpose and impact, they do not constitute unfair discrimination.²¹⁹

In its aim to compensate for past injustices, remedial and restitutionary measures are essentially backward-looking. This corresponds with the values of compensatory justice which is also an overwhelmingly backward-looking theory of justice. Conversely, substantive equality should, therefore, be forward-looking. It acknowledges that all individuals are not yet equal, and accordingly redistributive measures are formulated to ensure not an *equal* distribution of social resources, but a *just* distribution. This corresponds with the theory of distributive justice. A 'transformative equality jurisprudence' will entail that the application of substantive equality should be informed by a thorough understanding of systemic inequalities.²²⁰ This 'change' that a substantive version envisages, presupposes "remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework" and therein lies the marriage between substantive equality and remedial and restitutionary equality.²²¹

To summarise, substantive equality recognises the difference between individuals because it will advance the goal of *creating* an equal society. In contrast, remedial and restitutionary equality recognises harms done in the past, in order to *make up for* past injustices, and in so doing ensure a more equal society.

2.4 A critical analysis of *Van Heerden*

Thus far mention has been made of different orientations of equality as well as of various sub-sections of the equality clause. The section that follows will illustrate the application of different versions of equality, i.e. substantive equality and remedial and

²¹⁹ Conversely to this idea of analysing the harmful 'impact' on vulnerable groups in order to situate it within the sphere of remedial and restitutionary equality, Albertyn suggests that the "emphasis on context and impact enables a transformatory approach" which in turn serves substantive equality ideals. C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 273.

²²⁰ C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 254. Nancy Fraser distinguishes between an inclusive approach to equality and a transformative approach which "aims to address...inequalities, and thus to shift the power relations that maintain the status quo." C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 256.

²²¹ C Albertyn "Substantive Equality and Transformation in South Africa" (2007) Vol 23 *SAJHR* 256.

restitutionary equality, as well as give a thorough outline of the equality provision of the Constitution of the Republic of South Africa.

In 1994 a publicly funded Closed Pension Fund (CPF) was created for all the members of parliament and political office-bearers who held office before 1994.²²² This CPF had certain terms and conditions which amounted to the exclusion of new members of parliament. After 1994, the advent of a new democratic era, a new pension fund had to be created, as instructed by the Constitution, for members of parliament who joined after 1994. For various reasons this Fund only came into being in 1998 and provided for different categories of members that differentiated between those who were and those who were not members of the CPF. Each member was obliged to contribute a monthly rate of one-twelfth of 7.5% of his/her annual pensionable income to the Fund. However, the contributions made by the employers were not on the same uniform scale as the contributions by the members. Higher contributions were made to the retirement benefits of Category A and B members than to those of Category C members, who were the previous CPF members. This was to operate retrospectively from April 1994 to May 1999 and thereafter a uniform rate was applicable to all. The respondents argued that this scheme unfairly discriminated against CPF members.²²³

The High Court decision preceding the Constitutional judgment relied mainly on a formal notion of equality and found in favour of the respondent, concluding that the “impugned” measures were “haphazard, random and overhasty” as well as “arbitrary” and therefore amounted to unfair discrimination. Consequently, the Minister of Finance and the Pension Fund were granted leave to appeal to the Constitutional Court. Moseneke J delivered the main judgment, while Mokgoro J, Ngcobo J and Sachs J all wrote separate judgments.

Moseneke J

Moseneke J states that the respondent’s argument had three components. Firstly, that restorative measures undertaken in terms of section 9(2) that were based on the

²²² *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 5-6.

²²³ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 2. The respondent’s second argument alleged that the Fund was not validly established in terms of section 190A of the Interim Constitution. For current purposes this argument will not be considered.

section 9(3) listed grounds are presumptively unfair.²²⁴ Therefore any affirmative action or remedial policy that discriminated against individuals on grounds of race for example, had to discharge the onus of proving that the measure was not unfairly discriminatory. Secondly, they claimed that the State should at least have alleged that it was necessary to disfavour Category C members in order to benefit Category A and B members.²²⁵ The third argument was that there were several “jammergevalle” that were CPF members without generous pensions and the “adverse impact of the scheme on...[these members] is sufficient to render the...[Fund] as a whole unfairly discriminatory.”²²⁶

The majority judgment reminds us that the constitutionally inspired achievement of equality is an important foundational value and the standard to which all policies should be held.²²⁷ To that end, it should inform our goal of creating a “non-racial and non-sexist” egalitarian society, as well as pioneer the “process of reparation for past exclusion.”²²⁸ A substantive notion of equality will assist in realising this ideal by serving a dual purpose, namely by dismantling current forms of social differentiation and secondly by preventing the creation of new patterns of disadvantage.²²⁹

The notion of *equality* includes also standards of *remedial and restitutionary equality*.²³⁰ In particular, as stated above, substantive equality includes “measures to redress existing inequality.”²³¹ For that reason the Court rejects the first argument made by the respondents, namely that there is a presumption of unfairness concerning Section 9(2) measures. Policies aimed at redressing inequality can not be seen as an exception to the value of equality enshrined in Section 9, but are an integral part of it. The only obstacle to be considered is whether the measures conform to the internal test set by section 9(2) (as set out above).²³²

The Court clarified each of the elements of the test. The first step of the inquiry involves whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination. It was argued that the measures in

²²⁴ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 19.

²²⁵ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 20.

²²⁶ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 21.

²²⁷ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 22.

²²⁸ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 25-26.

²²⁹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 27.

²³⁰ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 30.

²³¹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 31.

²³² *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 32.

question failed this test, as it also benefited individuals who had not experienced past disadvantage. However, the Court stated that the question is whether the “overwhelming majority of [the] members of the favoured class are persons designated as disadvantaged by unfair exclusion.”²³³ Secondly, was the measure designed to protect or advance such persons? Here measures should only be “reasonably capable of attaining the desired outcome.”²³⁴ Lastly, does the measure promote the achievement of equality? The Court should answer this question with due regard to the broader society as well as the overarching goal of creating an egalitarian society.²³⁵ Moseneke J was satisfied that the scheme set out by the Fund conformed to all three requirements.

Mokgoro J and Ngcobo J

Though on the whole satisfied with the conclusions made by Moseneke J, Mokgoro J disagreed with the means by which it was reached. Instead of dealing with the issue in question in terms of section 9(2), she states that this measure falls firmly within the ambit of section 9(3). However, there remains agreement that the achievement of equality “requires a democratic structure and measures that foster substantive equality that “consciously and systematically obliterate[s]” current inequalities, and that it is incorrect to view section 9(2) measures as presumptively unfair.”²³⁶

Mokgoro J’s distinction between section 9(2) and section 9(3) has been briefly mentioned above. It was stated that section 9(2) is essentially goal-orientated and therefore forward-looking, while section 9(3) focuses on the complainant, the impact of the measure on him or her, and whether he or she has been a victim of past discrimination, rendering the provision backward-looking. She states that it is important to make the distinction between these two provisions; specifically, it seems, when to consider the complainant in a particular case. The impact that remedial measures have on complainants should not be given too much consideration within a section 9(2) inquiry. It is inevitable that there might be some collateral damage in the

²³³ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 40.

²³⁴ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 41.

²³⁵ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 44-45.

²³⁶ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 73 and 76-77.

pursuit of an equal society, which is essentially the main aim of the measure.²³⁷ Therefore she states that the *Harksen v Lane* test for unfair discrimination is not suited for section 9(2) because it will “focus unduly on the position of the complainant...”²³⁸ Mokgoro J also warns that section 9(2) should only be used in the specific circumstances for which it was intended in order to prevent measures passing as legitimate where they are actually unfairly discriminatory.²³⁹

Mokgoro J was satisfied that the scheme was permissible, not in terms of the section 9(2) analysis as applied by Moseneke J, but in terms of the section 9(3) test. According to her, the scheme did not pass the first step of the internal section 9(2) test because of how the group was defined: it included members who were not disadvantaged by unfair discrimination and should, therefore, be tested against section 9(3) instead. She considered the various factors applied in *Harksen v Lane* to determine whether the discrimination in question was in fact unfair.²⁴⁰ These factors include whether the measure serves an important societal goal, the position of the complainants in society, and the impact on their sense of dignity.²⁴¹

The discrimination in question is on an unlisted ground, namely membership of parliament, but it is possible to argue that it is also based on the listed grounds of race and political affiliation.²⁴² The respondents “remain a privileged class of public pension beneficiaries notwithstanding the challenged remedial measures” and, therefore, there can be no valid argument that there was an adverse impact on their fundamental dignity. The same cannot be said for their pockets, however!

²³⁷ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) paras 79-80.

²³⁸ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 80; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

²³⁹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 87.

²⁴⁰ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) par 51 as quoted in *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 99: '(a) (T)he 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 is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question...; (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 complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.'

²⁴¹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 99.

²⁴² *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 100.

Ngcobo J confirmed the importance, and the protection, of human dignity when considering the equality guarantee.²⁴³ Unequal treatment in itself will not amount to unfair discrimination (and in turn an impairment of human dignity). In fact, equal treatment at all times will, is the subtle warning that Ngcobo J gives against the possible dangers of formal equality. To reiterate: “This is a recognition of the fact that treating unequals as if they are equals may produce inequality.”²⁴⁴ Having regard to the impact of the discrimination on the respondent, Ngcobo J also came to the conclusion that the scheme was not in contravention of section 9(3).²⁴⁵

Sachs J

The above discussion illustrates how complex the issues can be that arise from the equality guarantee. To find concurrence between only four judges proves highly difficult, not to mention a society as a whole. Sachs J argues in favour of a consolidated reading of the equality guarantee. Sections 9(2) and 9(3) are not to operate separately, as the above decisions suggest, but in conjunction with one another. In this view, rigid categorical reasoning may, perhaps, not suit the envisaged equal outcome. What is needed instead is “context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.”²⁴⁶ The overarching goal of section 9(2) is to take apart the historically prejudicial infrastructure that the current society was founded on, and to protect individuals from experiencing discrimination based on “mute” characteristics.²⁴⁷

Sachs J makes three important points relating to substantive equality, human dignity and the relationship between sections 9(2) and 9(3), respectively. Firstly, he states that a substantive reading of equality is firmly entrenched within a transformative constitutional dogma that actively seeks the eradication of the above-mentioned discriminatory infrastructure in order to create much needed equality. This approach

²⁴³ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 116.

²⁴⁴ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 119.

²⁴⁵ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 121.

²⁴⁶ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 140.

²⁴⁷ As noted above, mute characteristics those characteristics which are “intimately part of the human personality and are generally subject to stereotyping and prejudice.” CRM Dlamini “Equality or Justice? Section 9 of the Constitution revisited – Part II” (2002) *Journal for Juridical Science* 17.

to equality corresponds with Fraser's *transformative strategies* and will be addressed at a later stage.

Secondly, he makes an important reference to human dignity. Not only does he refer to personal human dignity, but interestingly also to that of the country as a whole. Human dignity in this regard is particularly significant because remedial action authorised by the Constitution takes certain characteristics into account that are intrinsically connected to a person.²⁴⁸ These characteristics will in turn determine whether a person qualifies for remedial programmes or not. However, there are individuals in society located within a comfortable hub created by, or at least endorsed by, the previous oppressive regime. Sachs J foresees that these individuals will more likely be taxed (in the broader sense of the word) more heavily than others because of this. Having been part of that regime has contributed to the decline of the country's reputation, and more importantly, the "dignity [of] our country as a whole."²⁴⁹ Repairing the infringed dignity of previous sufferers will do much to repair the tainted dignity of the Republic of South Africa. This will not only benefit those who were *previously disadvantaged* (in the short as well as the long term), but also those who *will* experience disadvantage now, though this time justifiably.

In the third instance Sachs J suggests that the Courts should locate the equality analysis within the bounds of an "egalitarian continuum".²⁵⁰ This should be done instead of narrowly following the tests and boundaries set between sections 9(2) and 9(3). This implies that it makes no difference whether the Court opts for a section 9(2) or section 9(3) analysis, for the outcome will most likely be the same in any event. If truth be told, the reading of section 9 would still have been the same, even if section 9(2) had not existed.²⁵¹ What section 9(2) does, however, is give "properly devised affirmative action programmes a clear constitutional nod."²⁵²

The overlap between sections 9(2) and 9(3) lies essentially within the third leg of the internal section 9(2) analysis, i.e. whether the measure was designed to promote

²⁴⁸ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 144.

²⁴⁹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 145.

²⁵⁰ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 138.

²⁵¹ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 147.

²⁵² *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 140.

equality.²⁵³ This will in turn indicate whether it can be considered unfair under section 9(3).²⁵⁴ Justice Sachs states the following:

“Serious measures taken to destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain, clearly promote equality (section 9(2)), and are not unfair (section 9(3)).”²⁵⁵

Sachs J’s judgment can be summed up as follows: To apply the test for unfair discrimination in cases where remedial measures were enacted to advance persons who have previously experienced disadvantage, will impede the ends of justice. Both tests, namely the factors identified by the Constitutional Court in establishing unfair discrimination under section 9(3) and the section 9(2) test aimed at promoting equality; focus on the position of the persons involved. Therefore, section 9(3) focuses on the complainants in unfair discrimination matters, whereas section 9(2) focuses on the beneficiaries of affirmative action and the affirmative action strategy that was applied.²⁵⁶ The last leg of the section 9(2) analysis entails the inquiry into whether a measure promotes the achievement of equality. To determine whether an impugned provision impairs a person’s dignity, it has to be established whether the provision serves an important societal goal. The achievement of equality is just such a vital societal goal.

Academically speaking, Sachs J’s judgment serves as an important reminder that the Courts should not cling too rigidly to categorical modes of reasoning. They should bear in mind the true nature of the issues at hand and the impact on the individuals involved in the dispute. Practically speaking, as enlightened as we may be, it is still not clear how the Courts should go about determining equality issues. To merely suggest that the more nestled a particular policy is within section 9(2), the more likely it would pass muster under its analysis, is insufficient. Yet in terms of embarking on

²⁵³ With regards to the specific role envisaged by section 9(2), Judge Sachs is of the opinion that the Courts will certainly be in error to presume that state actions that promote the achievement of equality under the guise of affirmative action measures, are presumptively unfair, which was the case in *Van Heerden v The Speaker of Parliament and Others* Case No 7067/01, 12 June 2003, unreported (par 137).

²⁵⁴ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 149; A further important consideration to be taken into account is the *proportionality* of the impact of the measures on all the individuals involved and the purpose the measure envisages, within the ambit of each particular case (par 152).

²⁵⁵ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 152.

²⁵⁶ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 136.

a similar analysis as the one in question in future, with such various considerations to be made, Sachs J feels that it is “prudent to avoid categorical and definitional reasoning and [Courts should] instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.”²⁵⁷ What precisely these *context-based proportional interrelationships* entail, however, is unclear. The true uncertainty in his judgment lies within the balance that Courts are expected to strike between the above mentioned *context-based* analysis on the one hand – and the due restraint expected of them on the other. If the Courts are instructed to be “reluctant to interfere with [affirmative action] measures” and should only interfere when a “measure at issue is manifestly overbalanced”, how are they expected to function effectively? Sachs J’s judgment, therefore, provides very little guidance to the legislature, the executive and future courts as to the constitutional limits of affirmative action measures, apart from cautioning judges to show restraint.

What this case clearly illustrates is that South Africa’s equality jurisprudence is far from being fully developed. This is why I believe it necessary to turn to other disciplines such as political philosophy, to enhance not only much needed certainty on how to deal with such issues, but also the potential of reaching valuable societal goals.

2.5 Other relevant cases

The Constitutional Court is not the only organ that has been given the duty of interpreting section 9 and other equality and affirmative action provisions. For further interpretations of equality, it is necessary to turn to other equality-based decisions. Two noteworthy cases in this regard are *Stoman v Minister of Safety and Security* and *Gordon v Department of Health*.²⁵⁸ In *Stoman*, a white policeman applied to be

²⁵⁷ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 140.

²⁵⁸ *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T); *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008). This is by no means an exhaustive list of the relevant cases pertaining to matters of efficiency and representivity. For instance, a recent matter in the Labour Court also reflected similar concerns relating to the balance between efficiency and representivity. See *Solidariteit obo RM Barnard v South African Police Service* (Case No JS455/07) where a crucial vacant position was left unfilled due to the State’s inability to fill it with a member from a “designated group”.

promoted to the position of superintendent. Shortly thereafter he was informed that he made the “short list” of candidates that were being considered for the post. He managed to achieve the highest percentage mark of all the candidates. The fourth respondent, a black man, achieved the highest mark of all the black individuals who took part. Upon consideration it was decided that the black man should receive the promotion. In court the applicant argued that there had been a breach of section 9(3) of the Constitution and that the respondents had discriminated unfairly against him on grounds of race. As stated above, whenever a section 9(3) inquiry is launched, any discrimination on one of the listed grounds is presumed to be unfair and the burden of proof shifts to the respondents to show that the said discrimination was in fact fair. To do so, the respondents maintained that the appointment of the black candidate (who scored less than the white candidate) was made due to their Constitutional obligation in terms of section 9(2) and the Employment Equity Act pertaining to affirmative action measures.

Van der Westhuizen J once again confirmed that the principles in the Constitution are based on substantive equality. This notion of equality entails that distinguishing between persons who come from previously discriminatory backgrounds and those who do not does not amount to unfair discrimination.²⁵⁹ The court, in its determination of unfairness, turned to section 9(2) and its underlying structure. In particular the court elaborated on the meaning of the phrase: “measures designed to protect and advance persons”.²⁶⁰ Actions or decisions taken by employers in particular will not comply with the requirement of section 9(2) if they are “haphazard, random and overhasty.”²⁶¹ The tug of war in this instance originated from the required rational connection between the measures taken and the aims they are designed to achieve.²⁶²

Specific consideration should be given to this, especially in the case of the public service that is required by law to be *broadly representative* and also *efficient*. In a previous case it was stated that “a broadly representative public administration can...not be promoted at the expense of an efficient administration.”²⁶³ The *Stoman*

²⁵⁹ *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) p 477.

²⁶⁰ Section 9(2) Constitution of the Republic of South Africa.

²⁶¹ *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) p 480.

²⁶² *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) p 480.

²⁶³ *Public Servants Association of South Africa and Others v Minister of Justice* 1997 (3) SA 925 (T) [990A].

case is a suitable example of the tension that exists between representivity on the one hand and efficiency on the other, when trying to achieve the societal goal of equality. It also illustrates that those pivotal inquiries as the one in question, can only be approached in a case-by-case manner. *In casu*, the police service came under consideration. Judge Van der Westhuizen stated that the representivity of the police service was integrally connected to the efficiency thereof because it “could hardly be efficient [in the long run] if its composition is not at all representative of the population or community it is supposed to serve.”²⁶⁴ The careful consideration given to the vital role that representivity plays in support of efficiency-arguments, shows that these two ideals are not to be held as separate and competing principles, but interdependent, especially in the light of South Africa’s history of unfair discrimination.²⁶⁵

It is particularly interesting and striking that the courts have to date only dealt with or applied the *Van Heerden* decision in a very limited fashion. This may be ascribed to the fact that the three readings of Moseneke J, Mokgoro J and Sachs J, as set out above, are so diverse, that the courts have decided to deal with equality as they see fit instead. One of the decisions in which *Van Heerden* did surface, was that of *Gordon v Department of Health*.²⁶⁶ The facts of the case are as follows: Mr Gordon applied for the post of Deputy Director of Administration as advertised by the Department of Health. When the matter occurred in 1996, Mr Gordon had been working for the respondent since 1967. Working his way up in the ranks, he finally filled the position of Assistant Director in 1992. Mr Gordon was not successful in his application for the aforementioned post as the respondent hired a black individual - who had only been in the post of Administration Officer at the time - instead, despite the fact that the selection panel had recommended Mr Gordon. This was done, allegedly, to abide by the “constitutional imperative to promote representivity in the public service.”²⁶⁷ Mr Gordon consequently approached the CCMA and the Labour Court for adequate relief. After being unsuccessful in the Labour Appeal Court, the matter was referred to the Supreme Court of Appeal.

In casu, the Court discussed the matter of joinder of the black individual to the case in detail. This is not relevant for the purposes of the current discussion. What is of

²⁶⁴ *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) p 482.

²⁶⁵ *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) p 482.

²⁶⁶ (337/2007) [2008] ZASCA 99 (17 September 2008).

²⁶⁷ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 3.

importance here was the claim made by the appellant. It was his contention that the respondent had committed an unfair labour practice as envisaged by item 2(1)(a) of Schedule 7 of the Labour Relations Act (LRA) by unfairly discriminating against him on grounds of race.²⁶⁸ He also stated that the respondent could not justify this action by relying on any “rational policy, plan or programme” because there was none to speak of.²⁶⁹ The Department of Health responded by stating that the black individual was “obviously disadvantaged by past unfair discrimination” and therefore his appointment promotes the achievement of equality as envisaged by the Constitution.²⁷⁰ Had this been the case, a matter of judicial deference would kick in. Consequently, the Court had to determine whether the actions taken in this particular matter were “employment policies and practices” in terms of Item 2(2)(b) of the LRA or whether they were “measures designed to achieve equality” in terms of Section 8 of the Interim Constitution.²⁷¹

Mlambo J, with reference to *Van Heerden*, stated that substantive equality broadly involves the justified unequal treatment of individuals.²⁷² The Court needed to establish whether there had been a rational connection between the actions taken (the appointment of the black individual) and the objective sought (achieving equality). With reference to *Van Heerden*, the Court once again consolidated the position that measures taken need merely be “reasonably capable of attaining the desired outcome.”²⁷³ In the present matter, “properly formulated programmes” are more likely to reach the outcomes sought than “ad hoc arrangement[s]”.²⁷⁴ The Court held that the respondents’ actions entailed the latter and did not form part of any affirmative action plan as the respondents had alleged.²⁷⁵ The only connection

²⁶⁸ Act 66 of 1995; *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) [12].

²⁶⁹ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 12.

²⁷⁰ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 13.

²⁷¹ The Constitution of the Republic of South Africa Act 200 of 1993.

²⁷² *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 16.

²⁷³ *Minister of Finance and Another v Van Heerden* 2004 (12) BCLR 1125 (CC) par 41 as quoted in *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 18. The courts are not required to scrutinize the “ends” sought in a case such as this, as this is a matter left to the legislatures and policy-makers. The “means” chosen to achieve this end, however, do not evade the same judicial immunity.

²⁷⁴ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 22. The Court also briefly mentions the necessity of representivity within the public service in paragraph 23 but fails to establish its importance within the realm of efficiency. This in itself entails a great deal to consider. For a more in-depth discussion of the role of representivity *versus* efficiency in the public service, see *Coetzer v Minister of Safety and Security* 2003 (3) SA 368 (LC).

²⁷⁵ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 24.

between the decision to appoint the black individual instead of Mr Gordon and the Constitutional imperative of equality was on the ground of race.²⁷⁶ No evidence of the likelihood of this doing anything to ensure representivity within the different levels of the Department of Health was brought before the Court.²⁷⁷ The equality clause entails that measures taken in terms of section 9(2) of the Constitution (or 8(3) of the Interim Constitution), should be properly considered. *In casu* they were found to be inherently arbitrary and, therefore, unfair as contemplated by Item 2(1)(a) LRA.²⁷⁸ In short, the appointment made was neither a “measure” in terms of Section 8 of the Interim Constitution nor a “practice” in terms of Item 2(2)(b) LRA.²⁷⁹

From the discussions above, it is apparent that there is no fixed interpretation of equality or affirmative action as of yet. The scope of affirmative action seems to develop with each new case that presents itself. These notions are very much alive and constantly evolving within the multicultural South African society. Judicial decision-making is often informed not only by the political and social context, but also by a variety of ideologies. Conflicting views exist on the nature, justifications and limits of affirmative action. These views draw upon different visions of equality and justice. The imprecise use of key terms further adds to the confusion. Against this background, I will turn to consider theories of compensatory and distributive justice in the next chapter. It is hoped that an analysis of these two broad justifications of affirmative action will contribute to greater conceptual clarity, and help to make sense of the elusive meaning of section 9(2).

²⁷⁶ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 24.

²⁷⁷ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 24.

²⁷⁸ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 25.

²⁷⁹ *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) par 26.

Chapter 3: Theories of Justice

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Justice and equality as overarching ideals cannot function separately. An egalitarian society is more likely to be a just society than a state characterised by gross inequality. Similarly, there is no justice in a state where discriminatory policies predefine social groups. Therefore, the apartheid regime was by implication a system run on flawed principles of justice. Justice entails that fairness take precedence. Given the current unbalanced state of affairs in South Africa, what would fairness entail? Deep rooted rifts, not only between groups but also emotional fractures, have torn the fabric of society. The term *justice*, as it is used in this discussion, is to be understood as an order of fairness in a *democratic* society. It implies a sought after state of affairs in which past (and current) inequalities are fully eliminated and rectified to such a degree that all members of society can truly be said to be equal in the egalitarian sense of the word. It also means that the policies on which laws and practices are based, are completely fair and void of any malpractice. In this regard, justice, to Paul, means upholding the inherent human rights afforded to all human beings, including the right to life, liberty, property and human dignity.²⁸⁰ In my opinion, this will not only entail that all institutionalised operations be fair and equal, but it is vital that private relations between members of society, too, are not tainted by prejudice and abhorrence.

Compensatory justice and redistributive goals are frequently used as justifications for affirmative action. The aim of this chapter is to outline the differences between compensatory and distributive justice, or more specifically, John Rawls's *difference principle*. As a theory of justice, compensatory justice acknowledges the injustices committed in the past, and aims to restore justice. Conversely, the *difference*

²⁸⁰ EF Paul "Set-asides, reparations, and compensatory justice" in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 102.

principle focuses on the current unequal distribution of social goods and endorses a more just allocation of resources. In philosophical terms, justice is considered to be a fundamental component of society that has been lost due to various reasons. In the South African example, the subversion of justice was due to oppressive apartheid policies imposed in the past and this aberration needs to be corrected. How one should go about doing so depends on which theory of justice one applies. This chapter will examine these two theories of justice, in the context of the South African affirmative action debate.

3.1 Compensatory Justice

“Institutionalised injustice demands institutionalised compensation”²⁸¹

The overarching rationale behind compensatory justice is that justice is restored by the correcting of past wrongs.²⁸² The purpose of this section is to analyse what this entails. The following issues will support this query: What is compensatory justice? Is it forward looking or backward looking? Who should be compensated and who is responsible for doing so?

Compensatory justice, or the mode of restoring justice so to speak, differs markedly from distributive justice, though the redistribution of social goods is inevitable in both cases. Aristotle, too, distinguished between compensatory and distributive justice.²⁸³ The difference between the two will be illustrated at length in this chapter.

Compensatory justice, with its focus on repairing and “making up for...” is an ideal vehicle for restoring justice once it is lost or required. According to Taylor, compensatory justice functions under the following conditions:

²⁸¹ PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 177-182.

²⁸² For a brief outline of the rationale and theory behind compensatory justice, see C Mbazira “Appropriate, Just And Equitable Relief’ In Socio-Economic Rights Litigation: The Tension Between Corrective And Distributive Forms Of Justice” (2008) *SALJ* Vol 125 Is 1 71-72-75.

²⁸³ In *Nicomachean Ethics*, Aristotle refers to compensatory justice as rectificatory justice. Authors have since criticised Aristotle’s conception of compensatory (rectificatory) justice of being incomplete. See, for example, H Khatchadourian “Compensation and reparation as forms of compensatory justice” (2006) *Metaphilosophy* 429-448; EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 97-139. What is remarkable about the theory of compensatory justice is that it was conceptualised long before modern civilisation. The *Nicomachean Ethics* was first published in 350 BC, and yet, more than 2 millennia later, mankind still hasn’t diverged from discriminatory treatment of its fellow man.

“[I]f there has been an established social practice (as distinct from an individual’s action) of treating any member of a certain class of persons in a certain way on the ground that they have characteristic C and if this practice has involved the doing of an injustice to C-persons, then the principle of compensatory justice requires that C-persons as such be compensated in some way.”²⁸⁴

All that needs to be added to this definition is a classification of the group or entity that is to be responsible for making the said compensation. For instance, should the state be held accountable, or should the burden of reparations fall on the specific group of perpetrators accused of harming the victims? Depending on the harm in question, this exercise can be a considerable thorny issue. I will elaborate on this point in further detail below.

Compensatory justice can be divided into four main principles:

- 1: Compensatory justice is essentially backward looking;
- 2: Compensatory justice considers the injury in question i.e. as experienced by the victims and as inflicted by the perpetrator;
- 3: Compensatory justice treats all parties as equals and, therefore, all rights must be respected; and,
- 4: Compensation entails bringing the victim to the condition he would have been in had the damage never occurred.²⁸⁵

Several authors have confirmed that compensatory justice is a *backward-looking* theory.²⁸⁶ Paul states that this criterion consists of a three-part analysis. The first part is referred to as the “act(s) requirement”; secondly, there is the matter of identifying the victim and the perpetrator; and, in the third instance, the act should

²⁸⁴ PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 180.

²⁸⁵ EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 103

²⁸⁶ EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 103, 111; Lötter “Compensation for impoverishing injustices of the distant past” (2005) *Politicon* 83-102; H Khatchadourian “Compensation and reparation as forms of compensatory justice” (2006) *Metaphilosophy* 429-448; PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 177-182; C Mbazira ““Appropriate, Just And Equitable Relief In Socio-Economic Rights Litigation: The Tension Between Corrective And Distributive Forms of Justice” (2008) Vol 125 Is *SALJ* 1 74.

have amounted to a violation of a fundamental human right.²⁸⁷ The acts in question refer to governmental acts for the purposes of the current discussion, and not individual acts.²⁸⁸ An obvious example of such a governmental action is the implementation of legislation that is discriminatory in terms of race or culture, i.e. legislation that differentiates between different groups, causing some to feel inferior to others. The first and third legs of this inquiry are fairly uncomplicated. Resolving the issue of victim and perpetrator, however, is not.

Compensatory justice aims at returning victims to, or placing them in, a position where all are equal before the law. This should occur at the hands of the aggressors or perpetrators, as it is due to their actions that the victims had experienced suppression in the first place. In a typical example, such as the apartheid era, the victims were, for the most part, the black community of South Africa, and the perpetrator was the government (and therefore the state) who acted as an extension of the will of the white group.²⁸⁹ Today, South Africa is predominantly governed by black people.²⁹⁰ Is it still reasonable to expect the government to compensate victims when the government is run by the group being compensated?²⁹¹ Or should it be absolved of any responsibilities as a result and should the white group be held solely responsible for the injustices of the past? Furthermore, can it be fair to compensate victims today, when many of those who have truly suffered have already died? To answer this last question, Lötter convincingly argues that because of the group, and perpetual nature of the injustices committed, *current* members of a previously victimised group also deserve compensation – if it is established that

²⁸⁷ EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 112.

²⁸⁸ It is necessary to clarify at this stage that the current discussion is mainly concerned with compensatory justice on a societal scale. In terms of compensatory justice on a smaller level, state delict, contract and property laws are capable of dealing with matters between individuals. See C Mbazira “‘Appropriate, Just And Equitable Relief’ In Socio-Economic Rights Litigation: The Tension Between Corrective And Distributive Forms of Justice” (2008) Vol 125 Is 1 *SALJ* 73; TE Hill “Compensatory Justice: Over Time and Between Groups” (2002) Vol 10 No 4 *The Journal of Political Philosophy* 392 394-396.

²⁸⁹ The terms ‘government’ and ‘state’ are used interchangeably in this context. As the government is the most prominent representative of the state, its actions are equated to those of the state. See HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 83 93, for reasons why the state should be held accountable for the actions (and non-actions) of governments.

²⁹⁰ Since the election of a democratic government in 1994.

²⁹¹ Taylor argues that it is, in fact, society as a whole that is responsible towards those who were discriminated against – a view confirmed by Lötter, who states that compensating victims of the past should be viewed in the same light as any publicly funded good or service. PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 178; HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 93. These issues will be addressed during a discussion of compensatory justice in relation to affirmative action.

compensation is to be made.²⁹² As will be explained below, the injustices that set compensatory justice into motion, so to speak, are usually of such a magnitude that they affect generation upon generation.

That being said, let's return to the issue of compensatory justice's backward-looking nature. Taylor illustrates the essence of a backward-looking theory in concise terms.²⁹³ To summarise: those responsible for making reparations at t_2 (the present state) should look to t_1 (a point in time in the past) to determine the necessary compensation.²⁹⁴ It is, therefore, logical to infer that compensatory justice is not in essence a theory directed at a specific outcome, though coincidentally a more even distribution of resources could occur, but a theory largely aimed at repairing the injustices of the (often distant) past.

The second criterion for compensatory justice, as outlined by Paul, is that it concentrates on the *injuries* suffered by the victims and inflicted by the perpetrators. The injustices committed by perpetrators should at least meet certain criteria. Lötter explains that the *effects* that major injustices have on groups should serve as an indicator of whether those acts can be deemed to be compensable or not.²⁹⁵ Quite often, groups are subjected to a multitude of traumatic experiences as a consequence of large-scale rights violations. These include the following:

“[L]oss of life, serious bodily injuries, deep emotional scars, damage to property or loss thereof, destruction of interpersonal or communal relationships, and loss of opportunities for personal and communal development and growth.”²⁹⁶

²⁹² HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 92.

²⁹³ It is apposite to note that this is not the conclusion to which he was alluding. Taylor argues that a certain characteristic may not be “morally relevant” at a particular point in time but later, at another point in time, it may become relevant, and to abide by the principle of compensatory justice, and for justice to be served, reparations must be made. In other words, where a particular characteristic may have attracted certain social practices that were unjust, despite that particular characteristic not having any morally relevant weight at that precise moment, that characteristic may be imbued with moral relevance at a later point in time and to such a degree that the historical injustice brought about by the social practices meted out must be rectified by means of “compensation or reparation” and, as he puts it, to argue otherwise “would be to ignore the fact that there had been a social practice in which unjust actions” occurred in the first place. Taylor “Reverse discrimination and compensatory justice” (1973) 179.

²⁹⁴ PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 177-179.

²⁹⁵ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 86. Note that these major injustices are not only limited to singular large-scale events, but can also consist of several smaller events.

²⁹⁶ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 89. For examples of major injustices see HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 89-91.

The relevance of these “traumatic experiences” in these cases is that the debilitating effects do not end when the injurious act ceases.²⁹⁷ This could certainly be the case in socio-economic terms, meaning that large groups still live in “traps of poverty” and without the capacity to improve their day-to-day lives without assistance.²⁹⁸ On the other hand, the argument for compensatory justice is also strengthened when group remembrance still bears passionate feelings of rage and resentment.²⁹⁹ The stronger the current effects due to past injuries, the stronger the case will be for compensatory justice.³⁰⁰

The third criterion for compensatory justice, i.e. that all parties should be treated as equals, simply implies that the rights of all the parties involved should be respected.³⁰¹ Lastly, the fourth criterion explains the position to which victims are to be restored. According to Paul, this is the position which victims would have been in “had the injurious event never occurred.”³⁰² This she acknowledges to be somewhat complicated, and arguably even pointless. The example used in her discussion is that of the corrective justice needed after the American slave trade era. Restoring such individuals to the positions they would have occupied had it not been for the injustices committed against them, would entail placing them in circumstances much worse than the reality they currently occupy.³⁰³ Furthermore, accurate estimations of these positions are undoubtedly near impossible to make.³⁰⁴ I find it difficult to conceive that the requirements of compensatory justice could be as callous and consequently untenable.

²⁹⁷ Apartheid ripples are still evident even today, 16 years after becoming a democratic state in 1994. See HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 86.

²⁹⁸ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 89.

²⁹⁹ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 86.

³⁰⁰ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 86-87. Lötter foresees the possibility that one can argue that there are cases where a more resilient group might have fought harder to overcome the legacy of past injustices, and succeeded, and this will, in turn, determine whether full or merely partial compensation is owed.

³⁰¹ EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 118. This is similar to “equality before the law” as stated in Section 9(1) of the Constitution of the Republic of South Africa 1996.

³⁰² EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 119.

³⁰³ EF Paul “Set-asides, reparations, and compensatory justice” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 119. She uses the examples of “[s]tarvation, war, tribal depredations, infant mortality, [and] disease” as the current conditions in many of the African states from where the slaves had originated, which would have been the fate of the descendants of slaves.

³⁰⁴ Also see C Mbazira “‘Appropriate, just and equitable relief’ in socio-economic rights litigation: The tension between corrective and distributive forms of justice” *SALJ* (2008) 79.

Though the ultimate goal of compensatory justice is to restore equality, it (perhaps even more importantly) also includes restoring *moral equality* between the different parties involved.³⁰⁵ The restoration of feelings of dignity and equal worth cannot be likened to the settling of monetary debts.³⁰⁶ Gaus states that “no mere redistribution of resources, no matter how generous, can restore moral equality between victim and aggressor.”³⁰⁷ Something much deeper and more meaningful is required.

To make the last criterion appear as at least vaguely realistic, a more compassionate compromise is needed. Placing victims in the positions *in life* that they would have been in, but for the major injustice that occurred, would have to suggest transferring them to a state of equal moral worth in relation to the rest of the members of society. Once this is done, “they are to be treated like everyone else.”³⁰⁸ When it is established that the aggressors are to be held accountable, reparations should be made in the following way: in terms of the victims themselves, the aggressors are expected to make a commitment to restore and correct their injuries, and in terms of society as a whole, aggressors bear the responsibility to “equalize the relationship between victim and perpetrator.”³⁰⁹ A vital component of the latter of the two obligations, is that the *repayment* in question should also include some form of admission of the role they played in the misfortune and suffering of the victims as an act of contrition, a form of apology if you will.

The theory of compensatory justice can be criticised for its limited capacity in truly restoring equality on a practical level. Matters of levelling the moral equality between members of society are far easier debated in theory than deciphered in practice. Furthermore, determining which injustices deserve compensation, and which don't, is a convoluted issue. Lötter states that when determining which injustices are to be corrected, one should look to those cases that still have persisting effects in the present and whose victims are “clearly defined and describable.”³¹⁰ Therefore, those living in poverty as a result of the apartheid regime, the major injustice in this case,

³⁰⁵ G Gaus “Does compensation restore equality?” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 73.

³⁰⁶ G Gaus “Does compensation restore equality?” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 72.

³⁰⁷ G Gaus “Does compensation restore equality?” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 73.

³⁰⁸ PW Taylor “Reverse discrimination and compensatory justice” (1973) *Analysis* 180.

³⁰⁹ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 95.

³¹⁰ HPP Lötter “Compensating for impoverishing injustices of the distant past” (2005) *Politikon* 88.

deserve compensation, and conversely, those who would have been living in poverty in any event, don't.

When does the responsibility of others to restore an individual's social stance end, and the individual's own responsibility to become an "agent of [his] own healing and recovery" begin?³¹¹ To determine this, Lötter states that one should "take into account [amongst other things] the scope and consequences of the trauma caused by the injustice, the physical, mental, and social recourses available to the victims before the event, and the extent of the damage to these resources."³¹² Also important is the view taken of the causes of inequality. What some would ascribe to the neutral workings of the market or to individual merit and choice, others would see as directly linked to systemic disadvantage and lasting structural inequality that were either caused by the discriminatory practices of the past or were exacerbated by it. These factors weigh heavily on considerations of whether reparations are due or not. In the South African context, it seems particularly important to stress the structural nature of disadvantage – or else a too thin conception of compensatory justice may result.

3.2 Compensatory Justice and Affirmative Action

The era of apartheid had effectively compelled South Africa to create sustainable industries at a time when sanctions prevented standard trade agreements with other self-sufficient nations. Primary industries such as the mining industry, mineral exploration and agriculture flourished due to South Africa's inability to trade and import products that it needed. This, in turn, created job opportunities that had not previously existed, specifically for non-professional black individuals. What this points to is that apartheid did not only leave a legacy of suffering and suppression in its wake, although the poverty created by apartheid in particularly rural areas cannot be overstated. Had this been the case, the argument for compensatory justice would not have been as complicated (though complicated nonetheless).

³¹¹ HPP Lötter "Compensating for impoverishing injustices of the distant past" (2005) *Politikon* 88.

³¹² HPP Lötter "Compensating for impoverishing injustices of the distant past" (2005) *Politikon* 88. Other relevant factors have also been mentioned that should be taken into consideration.

The biggest setback to the application of compensatory justice to the present affirmative action scheme, is establishing a causal connection - first between the true perpetrators and victims of apartheid, and secondly between the past victims of apartheid and present beneficiaries of affirmative action.³¹³ Very often, the person harmed most by apartheid benefits the least from affirmative action and vice versa.³¹⁴

Some commentators are of the view that compensation should not occur in general, but compensation should be made by the *aggressor*, though this point of view is not shared by all.³¹⁵ More compatible with the South African affirmative action policy, is the view that compensatory “burdens” should be shared by society as a whole.³¹⁶ This will not only act as a more feasible solution, but it would also eliminate the stigma surrounding white citizens as *the evil perpetrators of apartheid*.³¹⁷ South Africa has already made a positive step towards reconciling victims and perpetrators by establishing the Truth and Reconciliation Commission (TRC). In terms of compensatory justice, the TRC serves a two-fold purpose: it is the ideal platform for (true) scar-baring victims of racial discrimination to voice their grievances against the actual individuals and institutions responsible for the injustices committed against them. Secondly, it compels apartheid decision-makers to take ownership of the decisions they had made in the past and to face the consequences.³¹⁸ The apartheid

³¹³ J Rabe *Equality, Affirmative Action, and Justice* (2001) 91-92.

³¹⁴ J Rabe *Equality, Affirmative Action, and Justice* (2001) 92. This occurs for various reasons. These individuals might possibly be too old to enter the careers they would have hoped to pursue but were not allowed to, or might not have the financial means today to acquire the property they were prevented from buying. Another more troublesome reason for this is that the benefits of affirmative action are currently only being made available to the black upper-middle class which is a very select group of individuals. Whilst the system of apartheid contributed to a very large black underprivileged class, it also generated a small urban black-middle class who are now predominantly the beneficiaries of affirmative action. Influx control legislation ensured that the majority of the black population did not have access to the urban areas, but furthermore granted a small portion of the black population to enter and occupy these areas as a means to generate black support for the apartheid regime. H Botha “Equality, plurality and structural power” (2009) Vol 25 Is 1 *SAJHR* 1 22; J Seekings and N Nattrass *Class, Race and Inequality in South Africa* (2006) 92-111. This situation is comparable to Dupper’s arguments on affirmative action being too over- and under-inclusive. See Chapter 1.

³¹⁵ G Gaus “Does compensation restore equality?” in JW Chapman (ed) *Compensatory Justice: Nomos XXXIII* (1991) 45 72-73; see note 291.

³¹⁶ Compensation in this sense not only refers to making amends for specific acts but also for discrimination in general.

³¹⁷ The matter of apartheid entrenching racial divisions has been discussed at length by various authors and its use for the purposes of the current discussion is considered redundant. See for example J Rabe *Equality, Affirmative Action, and Justice* (2001) 353; D Hermann *The Naked Emperor: Why affirmative action failed* (2007) 29-58.

³¹⁸ For an in-depth account of the role of the TRC and how South Africa’s divided past and the testimonies of victims of apartheid could shape our future, see D Thelen “How the Truth and Reconciliation Commission Challenges the Ways We Use History” (2002) *South African Historical Journal* 162-190.

regime did not only cause economic damage, but more importantly, it produced profound emotional damage and marred the fundamental right to dignity owed to all human beings. A backward-looking theory of justice is well-suited to address the present day grief that victimised groups still continue to experience.

Also, the plurality of past wrongs created an array of current day disadvantages. Not only did it cultivate racial discrimination, but it also caused other forms of disadvantage, based on gender, class and other attributes. Disadvantages in South Africa today are intertwined within the realms of immutable characteristics and therefore entail complex measures to separate and address each issue. At times, it may not even be possible to do so individually.

Another theory of justice that aims at establishing a more just order is distributive justice, or more specifically, John Rawls's *Difference Principle*.

3.3 Distributive Justice

“Justice is the first virtue of social institutions, as truth is of systems of thought”³¹⁹

The ethos of distributive justice is not so much a singular theory of justice as it is a collective noun for various theories concerned with how material and non-material goods should be distributed in society. The primary philosopher in this field has been John Rawls. While many other theorists have since written on the subject - some in agreement and others holding opposite viewpoints - most use his theory of justice as starting-point. These philosophers include Ferdinand Hayek, Michael Walzer, Robert Nozick, Martha Nussbaum, Brian Barry, and Nancy Fraser. As it is nigh impossible incorporating all these divergent theories at this point in time and adequately discussing each, it is my aim, instead, to examine the primary theorist of distributive justice, John Rawls, and his *difference principle*. This section will commence with an introduction of Rawls's theory of justice and an outline of his two principles of democratic equality. The first principle is the *equal liberty principle*, and the second consists of the *fair equality of opportunity and difference principle*. After examining

³¹⁹ J Rawls *A theory of justice* (1971).

the *difference principle* in more detail, a discussion will follow on how it applies to affirmative action.

In terms of Rawls's theory of justice, society consists of a "fair system of cooperation between free and equal persons."³²⁰ The basic equality afforded to each individual, is what Rawls strives to realise. This idea is embedded in the notion that when excluding all arbitrary characteristics, such as race, gender, and culture, all people are considered to be (equal) moral individuals, which is why Rawls places emphasis on the basic aspects of being human. The theory entails that there is a long line of contingencies that were unforeseen - amongst others, family life and gender, which are social and genetic factors and should therefore play no role in a person's future role in society - that brought each person to where he or she is today. Given this reality, Rawls, ever the contractarian, expects members of society to enter into an agreement by agreeing on certain "fair terms of social cooperation".³²¹ The contracting parties are expected to be rational individuals acting in their self-interest who have more or less the same needs and interests. The conditions under which the social contract is agreed upon should also be void of "threats of force and coercion, deception and fraud", and no parties should be in possession of any "unfair bargaining advantages".³²²

The position from which parties enter into this agreement is referred to as the *veil of ignorance*.³²³ In order to have a viable social contract that benefits all the parties involved, i.e. society, parties should be "removed from and not distorted by the particular features and circumstances of the existing basic structure", and therefore parties should not know the social positions they are to receive, or any of their personal characteristics, once exiting the contract.³²⁴ When acting under the *veil of ignorance* parties tend to exclude irrelevant considerations from the equation because they are unforeseen and not in their control. The reason for this is because

³²⁰ J Rawls *Justice as Fairness: A Restatement* (2001) 14.

³²¹ J Rawls *Justice as Fairness: A Restatement* (2001) 15.

³²² J Rawls *Justice as Fairness: A Restatement* (2001) 15.

³²³ Rawls acknowledges that the original position, from which the parties enter into the social contract under the *veil of ignorance*, is an abstract notion. The reason for this is because it is both hypothetical and nonhistorical. Rawls explains: "(i) It is hypothetical, since we ask what the parties...could, or would, agree to, not what they have agreed to. (ii) It is nonhistorical, since we do not suppose the agreement has ever or indeed ever could actually be entered into. And even if it could, that would make no difference." Rawls *Justice as Fairness: A Restatement* (2001) 16-17.

³²⁴ J Rawls *Justice as Fairness: A Restatement* (2001) 15. The characteristics that individuals are oblivious to when debating the terms of the contract also include personal traits such as natural talents, intelligence and physical strength.

each person's conception of *the good* is tied to his position, and one can only have a proper conception of the good when not knowing one's position in society. Rawls explains that "[c]ontingent historical advantages and accidental influences from the past should not affect an agreement on principles that are to regulate the basic structure from the present to the future."³²⁵

Rawls believes that his two principles of justice can be regarded as a starting point for the debates that are to follow when the best possible societal dispensation is decided. These principles of justice determine the just terms of cooperation between rational, free and equal citizens who act in self-interest and operate according to a lexical priority. As stated above, the first principle of justice is the *equal liberty* principle which entails that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."³²⁶ This principle has to be satisfied before moving on to the second principle. Rawls's second principle of justice is subdivided into two sections, i.e. the *fair equality of opportunity* and *difference principle*. This principle holds that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."³²⁷ Fair equality of opportunity (as opposed to formal equality of opportunity) entails that those individuals with "the same native talent and the same ambition have the same chances for competitive success."³²⁸ The principle of fair equality of opportunity has

³²⁵ J Rawls *Justice as Fairness: A Restatement* (2001) 16. He also notes that whatever principles these parties agree upon, the principle of utility won't be included, for it holds that it is fair for some to be worst off so that society as a whole may be happier and better off. According to Rawls, it is not rational to include such a condition into the contract as each contracting party is aware of the possibility that he or she might in fact be the unfortunate scapegoat.

³²⁶ DL Phillips "The equality debate: what does justice require?" (1977) Vol 4 *Theory and Society* 247-251. For further discussions on this topic see, for example, J Rawls *A theory of justice* (1999); C Farrelly *Contemporary political theory: A reader* (2004); DL Phillips "The equality debate: what does justice require?" (1977) Vol 4 *Theory and Society* 247-272.

³²⁷ J Rawls "On justice as fairness" in M Clayton and A Williams (eds) *Social Justice* (2004) 59. In Rawls's theory of justice, the first principle of justice and the principle of *fair equality of opportunity* each have priority over the *difference principle* respectively. In a sense, assuring that positions be open to all, requires not only that they be available in the first place, but also that all people in society "have a fair chance to attain them." J Rawls "On justice as fairness" in M Clayton and A Williams (eds) *Social Justice* (2004) 66). Individuals who were born with similar abilities along with the motivational drive to make use of them, should be allowed to strive for the same life goals as others – "regardless of their initial place in the social system." J Rawls "On justice as fairness" in M Clayton and A Williams (eds) *Social Justice* (2004) 66.

³²⁸ R Arneson "Justice after Rawls" in JS Dryzek, B Honig and A Phillips *The Oxford Handbook of Political Theory* (2008) 47-48.

strict lexical priority over the difference principle, as does the first principle of justice over the second.³²⁹

The difference principle is concerned with how (public) social institutions that determine the “basic structure” of society should distribute social goods amongst different members of society. This applies to the “design of organizations that make use of differences in authority and responsibility.”³³⁰ It also entails the “division of advantages from social cooperation.”³³¹ Rawls uses an index of primary goods to quantify the various levels of inequality, social and economic, present in a particular distributive system.³³² This index comprises the following headings: basic rights and liberties; freedom of movement and free choice of occupation; income and wealth; and the social bases of self-respect.³³³ The primary goods issued to or afforded to each individual should at least enable him or her to be an active and constructive member of society.³³⁴ From this one can derive that individuals become eligible for acquiring social goods depending on their social position in society. Rawls distinguishes between more advantaged and the least advantaged individuals.³³⁵ Advantaged members are those who were born into a particular higher class than others or have been endowed with greater natural talents. Rawls states that although we do not necessarily *deserve* these standings (and talents), we still have a

³²⁹ R Arneson “Justice after Rawls” in JS Dryzek, B Honig and A Phillips *The Oxford Handbook of Political Theory* (2008) 46-47. In other words, basic liberties may not be sacrificed for the sake of other gains.

³³⁰ J Rawls “On justice as fairness” in M Clayton and A Williams (ed) *Social Justice* 2004 60.

³³¹ J Rawls *Theory of Justice* (1971) 7-8.

³³² N Daniels “Democratic equality: Rawls’s complex egalitarianism” in S Freeman (ed) *The Cambridge Companion to Rawls* (2003) 242.

³³³ N Daniels “Democratic equality: Rawls’s complex egalitarianism” in S Freeman (ed) *The Cambridge Companion to Rawls* (2003) 242; J Rawls *Political Liberalism* (2005) 181.

³³⁴ Rawls also requires that all individuals be rational and reasonable (J Rawls *Theory of Justice* (1971) 19). This is of particular importance under the *veil of ignorance*, for those that do not possess these qualities will not choose a system of distribution that can be considered to be just. Such individuals are more likely to take into consideration aspects that are morally irrelevant and inappropriate to the conception of a just society. See N Daniels “Democratic equality: Rawls’s complex egalitarianism” in S Freeman (ed) *The Cambridge Companion to Rawls* (2003) 243.

³³⁵ For a discussion on the classification and clarification of the “least advantaged representative person” in society, see WE Schaller “Rawls, the difference principle, and economic inequality” (1998) 79 *Pacific Philosophical Quarterly* 368-391. In this article Schaller accepts that Rawls’s difference principle is open to criticisms such as creating work disincentives by allowing individuals to enter the least advantaged class by their own doing, yet the difference principle lends itself to other applications so as to overcome such prospective problems (and criticisms). To similar criticisms Sandel adds that society does in fact provide incentives for the exercise of natural talents “rather than have them lie dormant.” M Sandel *Liberalism and the limits of justice* (1998) 71.

right to them.³³⁶ Just as social goods are to be seen as public commodities, or rather, a “collective asset”, individual talents should similarly be seen.³³⁷ As unappealing, and even repulsive, as this concept might appear, it allows members to use such talents – both for themselves and to the benefit of those who were not fortunate enough to be in the same position.³³⁸ Furthermore, once those who have been fortunate enough to possess greater positions or talents than the rest use these capacities to the benefit of society, they *are* considered to be entitled to and deserving of these advantages, thereby giving them a “claim to their better condition”.³³⁹ In this way, society rewards members who keep to the terms of the original agreement.

The difference principle dictates that a society can only be just when a particular distributive model places the worst off members of society in the best possible position.³⁴⁰ This does not necessarily hold that there should be an absolute equal distribution of assets. In fact, Rawls allows for, and even advocates, certain kinds of economic inequalities, such as the unequal distribution of wealth and income, when it is advantageous to all. What this translates to in terms of a particular distributive pattern is that it has to be considered reasonable when a representative individual “prefer[s] his prospects with the inequality to his prospects without it.”³⁴¹ Society is expected to strive for equality as far as possible, unless inequality places everybody in a better off position. The position of the least advantaged person will only improve

³³⁶ Therefore, along with many considerations accepted to be morally irrelevant, such as race, sex and sexuality, so too do natural talents fall under this exclusionary heading. For an expansion on this notion see M Sandel *Liberalism and the limits of justice* (1998) 72.

³³⁷ J Rawls *Theory of Justice* (1971) 179. Talents are viewed as accidents of nature and therefore “the contingencies of social circumstance must be nullified.” DL Phillips “The equality debate: what does justice require?” (1977) Vol 4 *Theory and society* 253.

³³⁸ Allowing all members to share in one another’s good fortune creates a situation where it is not necessary to “even out” endowments in order to remedy the arbitrariness of social and natural contingencies.” M Sandel *Liberalism and the limits of justice* (1998) 70.

³³⁹ M Sandel *Liberalism and the limits of justice* (1998) 71.

³⁴⁰ I think what Rawls implies with social and economic inequalities being reasonable and being expected to be to everyone’s advantage is that, though we cannot in any way have absolute certainty about the consequences of certain distributions, we are still expected, however, to be reasonable (and therefore as wise as possible) when determining and planning the distributions that are to apply.

³⁴¹ J Rawls “On justice as fairness” in M Clayton and A Williams (eds) *Social Justice* (2004) 62. To this Rawls also adds the following: “One is not allowed to justify differences in income or in positions of authority and responsibility on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another.” In Rawls’s theory of justice there is no room for the concept of “taking one for the team”. All distributions should only be in the interest of the greater good, but not at the cost of the expectations of any individuals, no matter how few.

when those with exceptional talents accept the “restrictions on the degree to which they can benefit from their natural endowments.”³⁴²

Similarly, the difference principle allows all members of society to “share in the benefits of the distribution of natural talents and abilities...in order to alleviate as far as possible the arbitrary handicaps resulting from our initial starting places in society.”³⁴³

In a society functioning on a set of rules determined by the difference principle, the Rawlsian version of equality is referred to as democratic equality. This determines that the representative position from which a society is judged to be just (or not), is that of the least advantaged position. Therefore, maximising the standing of the worst off person, or improving the expectations for, or aspirations to, social and economic primary goods of the least advantaged group as far as possible, creates a more just society.³⁴⁴

Though many have praised Rawls’s theories of justice, the past 30 years have also seen many challengers to the difference principle, including Robert Nozick, Ronald Dworkin and Amartya Sen, to name but a few.³⁴⁵ Yet many of these criticisms seem to stem from the particular notion of (distributive) justice which each critic endorses.³⁴⁶ For instance, those who support strict egalitarianism are opposed to any forms of inequality, whether to the benefit of the least advantaged or not.³⁴⁷ Strict egalitarians believe that material benefits should be distributed evenly in society. To have the difference principle guiding these distributions, resulting in economic inequalities on every level, would be contrary to the strict egalitarian vision.

³⁴² DL Phillips “The equality debate: What does justice require?” *Theory and Society* 1977 Vol 4 247-272 252.

³⁴³ J Rawls “Distributive Justice” in RM Stewart (ed) *Readings in Social and Political Philosophy* (1996) 225.

³⁴⁴ On further discussions of democratic equality, see Rawls “On justice as fairness” in Clayton and Williams (ed) *Social justice* 2004 67-75; Sandel *Liberalism and the limits of justice* 1998 68-77; and several discussions in Freeman (ed) *The Cambridge Companion to Rawls* 2003.

³⁴⁵ R Dworkin *Sovereign Virtue. The Theory and Practice of Equality* (2000); A Sen *Inequality re-examined* (1992); R Nozick *Anarchy, State, and Utopia* (1974).

³⁴⁶ On the difference principle in general, Daniels proposes that there are three main challenges facing this theory of distributive justice. To summarise: (1) The difference principle can at best only mitigate the effects of the social and economic inequalities it allows. Its aim is not to correct them. (2) Rawls is criticized for his method of measuring inequality. (3) Lastly, the scope of his principles is also considered inadequate. See N Daniels “Democratic Equality: Rawls’s Complex Egalitarianism” in S Freeman (ed) *The Cambridge Companion to Rawls* (2003) 241-276.

³⁴⁷ Stanford Encyclopedia of Philosophy “Distributive Justice” (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 3.

Utilitarian philosophers, on the other hand, simply profess that the difference principle does not maximise utility.³⁴⁸ Utilitarians are predominantly concerned with the well-being and happiness of mankind in general and would allow for certain inequalities as long as they serve the happiness of all. Rawls, on the other hand, specifically advocates that inequalities are only permissible insofar as they are to the benefit of all, especially the least advantaged members of society and that any other infringements will be unacceptable if they do not satisfy both the first and second principles of justice. Therefore, unlike utilitarian theories Rawls has strict qualifications for the subordination of individual rights.³⁴⁹

Libertarians, such as Robert Nozick, assert that the just acquisition of holdings entitles individuals to the rightful ownership of their material (and non-material) belongings – without there being any particular distributive pattern.³⁵⁰ Social goods and services are not to be redistributed to the least advantaged members of society, via affirmative action benefits, “redistributive taxation to the poor” or otherwise.³⁵¹ Such acts are considered *immoral*.³⁵² One of the largest discrepancies present in the debate between the difference principle and the libertarian theory of justice is the treatment of individuals. In the libertarian view, the difference principle allows people to be treated as a means to an end - the end being, in this case, to create a fair and just society.³⁵³ The libertarian version of justice, instead, treats individuals as ends in themselves.³⁵⁴ The best illustration for these statements is the case of talents. Nozick’s theory allows individuals full ownership of their talents and creations without having any responsibility towards society in support of those who are not as talented. As stated above, under the difference principle, once a person has discharged his duty towards society to *share his good fortune* with the least advantaged members of

³⁴⁸ Stanford Encyclopedia of Philosophy “Distributive Justice” (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 3.

³⁴⁹ For further discussions on this topic see S Scheffler “Rawls and Utilitarianism” in S Freeman (ed) *The Cambridge Companion to Rawls* (2003) 426-459.

³⁵⁰ See R Nozick *Anarchy, State and Utopia* (1974).

³⁵¹ Stanford Encyclopedia of Philosophy “Distributive Justice” (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 4.

³⁵² Stanford Encyclopedia of Philosophy “Distributive Justice” (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 4.

³⁵³ Simply speaking, this is the implication of the difference principle in practice; yet to this Rawls would disagree and would state that “principles of justice manifest in the basic structure of society men’s desire to treat one another not as means only but as ends in themselves.” J Rawls *Justice as Fairness* (1974) 179.

³⁵⁴ Stanford Encyclopedia of Philosophy “Distributive Justice” (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 11.

society, he can at most be considered to be entitled to his talents, but never the true owner. Libertarians can be criticised for their disregard of the vast inequality of resources. In supporting a *laissez faire* free market system, libertarians assume that once individuals are allowed to trade and operate freely, a fair distribution of resources would occur. Not only does this falsely presume that everyone has equal opportunities and equal access to resources, but it also presupposes that the market is neutral. Rawls's theory of justice, on the other hand, advocates the idea of a "well-ordered society" where the rules of engagement are based on mutually accepted principles of justice.³⁵⁵

Lastly, other theorists supporting desert-based principles and resource-based principles, for instance, all vow that their dogmas are superior to the difference principle. It is not necessary at this point to expand on all the possible theories of distributive justice and their individual criticisms of the difference principle respectively.³⁵⁶

3.4 The difference principle and affirmative action

The South African affirmative action policy lends itself to be suitably interpreted and justified in terms of the difference principle. Moreover, an *original position* assessment would invariably lead to the most advantageous distributive system to affirmative action targets and, therefore, the least advantaged South Africans. The reason is simply because this is such a large group that the likelihood of the person behind the *veil of ignorance* becoming one of these members is an inescapable possibility. The difference principle, correctly applied, would allow the least advantaged to have higher expectations of achieving their life goals and economic independence, as would the principle of fair equality of opportunity.³⁵⁷

As stated before, inequalities in economic and social positions are only justified under the difference principle when they serve the interests of everyone, especially

³⁵⁵ J Rawls *A theory of justice* (1971) 453-454.

³⁵⁶ For a comprehensive reading list on various theories of distributive justice, see Stanford Encyclopedia of Philosophy "Distributive Justice" (2007) <http://plato.stanford.edu/entries/justice-distributive> (accessed 13 January 2009) 13-15.

³⁵⁷ R Stacey "'We the people': the relationship between the South African Constitution and the ANC's transformation policies" (2003) Vol 30(2) *Politikon* 133 138.

the least advantaged. One may therefore argue that affirmative action does exactly this as the diversity it brings to all spheres of interaction, including education and employment, is a clear goal of affirmative action and contributes to a richer and more vibrant society. As a distributional regime, affirmative action is justified under the difference principle as it allows the more advantaged members of society to share the fruits of their talents, as referred to above, with those less fortunate in various ways, for example, taxation revenue can be used to fund skills development programmes and more subsidies and bursaries can be made available to fund tertiary education for those unable to afford it. However, the question is whether all of this goes too far when extra funding is required to make up for the potential loss of efficiency when preferential employment occurs?

The difference principle would encourage the redistributive taxations present in South African economic policies so that the revenue generated from the natural talents of fortunate individuals will be geared towards overall societal upliftment, especially of the least advantaged. So, too, would the priority of improving the education system, making it more accessible to all, be an important distributive principle. The difference principle ensures that the educational needs of all individuals are addressed. A *trickle down* effect would inevitably lead to a situation where a racially and culturally diverse group of individuals can compete equally for career opportunities. This stage would, unfortunately, not be reached as soon as many would hope, but the long term consequences of this endeavour is a just society with fewer economic inequalities. Ultimately, the “previously disadvantaged group will be able to take [its rightful] place as equal participants in all spheres of life.”³⁵⁸

What the difference principle would take issue with is the definition of the *least advantaged* group. It is an undisputed fact that the majority of black people make up the larger group of the least advantaged members of society. However, to limit the benefits of any distributive pattern to these members alone so as to exclude another group or other individuals similarly economically disadvantaged would not satisfy the equal liberty principle.³⁵⁹ This implies that the benefits of affirmative action should

³⁵⁸ P Andrews “Affirmative action in South Africa: Some theoretical and practical issues” in S Liebenberg *The constitution of South Africa from a gender perspective* (1995) paraphrased in R Stacey “‘We the people’: the relationship between the South African Constitution and the ANC’s transformation policies” (2003) Vol 30(2) *Politikon* 140.

³⁵⁹ R Stacey “‘We the people’: the relationship between the South African Constitution and the ANC’s transformation policies” (2003) Vol 30(2) *Politikon* 138-139.

not be withheld from other underprivileged groups, such as women or poor whites. The aim of the difference principle is essentially to improve the expectations of the least advantaged members of society, i.e. expectations to achieve their life goals and economic independence, for example. This group is socially diverse and includes white individuals, even though they are clearly in the minority.

Furthermore, not only does affirmative action as implemented in South Africa breach the equal liberty principle which is lexically prior to the second principle of justice, but it is also contrary to the equal opportunity principle because of the minimising of the expectations of white individuals to pursue certain career and educational opportunities, for example enrolment at medical universities.³⁶⁰ What is required is not a formal notion of equality of opportunity, but *fair* equality of opportunity. This principle is not satisfied under the current distributional regime as the socio-economically disadvantaged black people have no equal opportunities to adequate educational facilities and opportunities, as do many other members of society. This, Rawls would state, is unacceptable and unjust. However, it is also possible to argue that affirmative action in general, far from violating equality of opportunity, merely attempts to equalise everyone's life chances.

Under a just distributive model, groups that have been impaired due to past discrimination have a claim to certain distributive benefits – not based on the discrimination as such, but because of the social and economic benefits they would have had access to “under fair conditions”.³⁶¹ What distinguishes the difference principle from compensatory justice, is its forward-looking approach. Whereas compensatory justice would aim at redressing the hurtful occurrences of the past, the difference principle looks to the current or prevailing order as is and determines a just distributive model accordingly. This effectively eliminates the problem of accurately identifying and locating the *true* victims of discrimination.³⁶²

The object of this chapter was to discuss two selected theories of justice and to a limited extent how they are to be applied to South Africa. The following chapter will be a contextual analysis of the forward and backward-looking justifications of

³⁶⁰ See for example *Solidariteit obo RM Barnard v South African Police Service (Case No JS455/07)* where a white individual was refused an employment opportunity whilst no other individuals were otherwise employed in the vacant position which was consequently left unfilled.

³⁶¹ J Rabe *Equality, Affirmative Action, and Justice* (2001) 96.

³⁶² J Rabe *Equality, Affirmative Action, and Justice* (2001) 96.

affirmative action by evaluating the inter-connectivity between substantive equality and remedial and restitutionary equality on the one hand, and compensatory justice and the difference principle on the other.

Chapter 4: Contextual analysis

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4.1 General observations

A number of justifications for affirmative action have been advanced. These justifications can be classified along different axes. These include: whether they are forward-looking or backward-looking; whether they draw on compensatory or distributive theories of justice; and whether they fit best with substantive or remedial (also known as restitutionary) conceptions of equality. The above concepts have been introduced in the previous two chapters. In this chapter, I am interested in the intersections and overlaps between these different forms of justification. As will be argued below, compensatory theories of justice overlap significantly with backward-looking justifications of affirmative action and with remedial or restitutionary conceptions of equality. Conversely, the Rawlsian difference principle (as one of the most prominent theories of distributive justice) has an affinity with forward-looking justifications of affirmative action and with a substantive understanding of equality.

These justifications of affirmative action will be considered, while bearing in mind the different criticisms of current affirmative action policies. Affirmative action has been criticised *inter alia* for being elitist, promoting tokenism, creating feelings of inferiority among beneficiaries, entrenching race consciousness and giving rise to increased racial animosity. In view of these criticisms, it will be asked which of the justifications under consideration provides us with the best possible understanding of the possibilities and limits of affirmative action. Put differently, the focus will be on the theoretical tools that would best enable us to imagine the transformation of legal,

political and economic institutions in view of the Constitution's egalitarian commitments. Since these questions cannot simply be answered in the abstract, the possibility needs to be kept open that the question of which theory of equality and justice provides the best justification for affirmative action, is itself context-bound. For this reason, different forms of disadvantage (eg disadvantage based on race, gender and disability) will be considered.

4.2 Compensatory justice and remedial and restitutionary equality

If we should assess affirmative action in terms of compensatory justice, it would be appropriate to do so with the end goal of attaining remedial and restitutionary equality. The aim would be to remedy such disadvantage by placing victims of past discrimination in the position they would have been in had such discrimination not occurred. However, critical questions need to be raised about the correlation between the harm caused by discriminatory laws and policies and the beneficiaries of affirmative action measures. Does affirmative action truly benefit those disadvantaged by past discrimination, or do its benefits accrue only to a tiny – and possibly already privileged – subset of the previously disadvantaged?

Dupper postulates three refutable arguments in defence of the backward-looking approach.³⁶³ Firstly, “[e]very member of the deprived groups has in fact suffered from the effects of past discrimination and similarly every member of a non-deprived group has benefited (at least indirectly) from the effects of past discrimination.”³⁶⁴ This argument alludes to the involvement of the whole society in the effects of past discriminatory practices. All the members of victimised groups are taken to have been handicapped in some way due to the injustices endured by their predecessors, whether it be directly (for example, not being allowed to acquire property or compete for qualified positions) or indirectly (for example, suffering from a “lack of self-confidence or lack of self-respect”).³⁶⁵ Conversely, those who were not at the

³⁶³ O Dupper “In defence of affirmative action in South Africa” (2004) *SALJ* 187 197-205.

³⁶⁴ O Dupper “In defence of affirmative action in South Africa” (2004) *SALJ* 198.

³⁶⁵ O Dupper “In defence of affirmative action in South Africa” (2004) *SALJ* 198; J Jarvis Thompson “Preferential hiring” (1973) Vol 2 No 4 *Philosophy and Public Affairs* 364 381.

receiving end of mass oppressive policies did, and still do, benefit from them.³⁶⁶ Jarvis Thompson states that the jobs that white males claim they are entitled to, do not in fact belong to them in the first place, but to the community.³⁶⁷ Unfortunately, white males are those who will carry the highest burden of society's reparatory load unless it could be shown that there is another way in which reparations could be made with similar consequences.³⁶⁸ Dupper rebuts this reasoning by proposing a two-fold inquiry. In the first instance, he questions the appropriateness of taxing the identified group with "society's amends-making" duty and, secondly, in the light of the approbation of preferential treatment based on previous injustices, asks "why should not other victims of injustice also receive special treatment?"³⁶⁹

Preferential treatment *per se* is justified because black people in particular were denied "full membership in the community."³⁷⁰ The problem, however, is that there is a glaring discrepancy between the percentage of previously disadvantaged individuals and white males. According to Statistics South Africa, it was estimated in 2008 that black people (male and female) between the ages of 20 years and 55 years comprised 36,3% of the South African population.³⁷¹ The population of white males between the same ages is considerably less and only represents 2,2% of the population.³⁷² It is grossly unfair to expect such a meagre-sized group to single-handedly carry the colossal restitutionary load. Even if we denied all 1 092 900 white males between the above mentioned ages any jobs (and distributed them amongst black people), notwithstanding the possibility that this number may be considerably less because not all of them are currently employed, 16 578 000 black people's lives would remain unchanged.

The second question relating to the groups of victims and perpetrators, relates to the nature of the injustices that deserve compensation. This issue can only be

³⁶⁶ This argument is in response to the emotive outcries by those who believe that they should not be held accountable for past actions because they "played no part in causing the wrong". See O Dupper "In defence of affirmative action in South Africa" (2004) *SALJ* 198; J Jarvis Thompson "Preferential hiring" (1973) Vol 2 No 4 *Philosophy and Public Affairs* 380.

³⁶⁷ J Jarvis Thompson "Preferential hiring" (1973) Vol 2 No 4 *Philosophy and Public Affairs* 382.

³⁶⁸ J Jarvis Thompson "Preferential hiring" (1973) Vol 2 No 4 *Philosophy and Public Affairs* 383.

³⁶⁹ O Dupper "In defence of affirmative action in South Africa" (2004) *SALJ* 199-200.

³⁷⁰ J Jarvis Thompson "Preferential hiring" (1973) Vol 2 No 4 *Philosophy and Public Affairs* 383.

³⁷¹ STATSSA "Mid-year population estimates: 2008" Statistical release P0302 www.statssa.gov.za (accessed 24 April 2009)

³⁷² The differentials not included are the following: the Coloured; Asian and Indian population; White females; and White males younger than the age of 20 and older than 55 years of age. It should also be noted that the percentage of 2,2% white males does not include disabled white males or those otherwise incapable of working.

addressed by awarding reparations to groups by virtue of their status as *victims* of injustice and not because of their membership of a particular race or gender.³⁷³ Proponents of the classic notion of affirmative action would most likely not endorse this argument because it would expand the size of the group of victims and, therefore, include individuals who are not traditionally categorized as *previously disadvantaged* but who have nonetheless still experienced unjustified hardship in the past.

The second backward-looking argument Dupper addresses is that “[t]hose who are to be compensated are not individual victims at all but rather the groups to which they belong.”³⁷⁴ According to this notion, those who receive preferential appointments need not have been subjected to discriminatory practices, for when employed, they are representatives of their groups and not merely individuals. The *group-v-individual* aspect of compensation has received some recognition by the courts but, to my knowledge, one of the most convincing counter-arguments is highlighted by Dupper. He draws attention to the inconsistency between the compensation made to groups and the “distribution of that compensation to individual members.”³⁷⁵ If we should once again return to the above mentioned figures it is clear that the black individuals receiving the jobs of 2,2% of the population consisting of white males, will not in fact be those who are desperately in need of societal assistance, but most probably the black higher or middle-class who have already become self-realised and economically independent members of society.

Thirdly, Dupper questions the statement that “[o]nly those group members who have actually suffered from past discrimination should be given preference in terms of affirmative action.”³⁷⁶ This statement is directed at the over-inclusive consequences caused by the second backward-looking argument.³⁷⁷ Nevertheless, because of what Dupper calls “a very high correlation between being [black]...and being a victim” this claim is easily disputed.³⁷⁸

³⁷³ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 201.

³⁷⁴ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 201.

³⁷⁵ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 203.

³⁷⁶ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 204.

³⁷⁷ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 204. In fact, Dupper states that “those who have suffered most under discrimination are seldom those who benefit from these policies.”

³⁷⁸ O Dupper “In defence of affirmative action in South Africa” (2004) SALJ 205.

What we are left with is the following: there is a considerable correlation between being black and being a member of a group that deserves compensation based on previous discriminatory practices, but even if we deduce that this means that black people *per se* are entitled to reparatory measures, there is no guarantee that they will in fact receive what they are rightfully entitled to. As stated before, it is more likely that an educated black person, of whom there are admittedly still too few, will receive a bursary for tertiary education or a government tender than the black individual still confined to an existence of perpetual manual labour. If any justification for affirmative action is to be based on compensatory justice, it will be necessary to show that it is possible to overcome this problem.

Justifications for affirmative action, based on backward-looking compensatory arguments, also face the following obstacles: Firstly, if the goal is to unite a divided society, there is the possibility that the amplification of compensatory justice could result in the opposite. If a duty of reparations is forced on certain groups only for the reason that they are ordered to make amends, and not that it is in the greater interests of society and the future of society to do so, it is not inconceivable that such policies would encounter more hostility than support.³⁷⁹ Secondly, in a more practical sense, the reparations made in the form of preferential measures are limited.³⁸⁰ As also stated previously, one of the purposes of compensatory justice is to restore the victim of injustice to the position they would have been in had the injustice not occurred. In order to do this, the court needs to establish a causal connection between the wrong committed and the injury done to the victim.³⁸¹ The “restoration” of victims and the verification of a causal connection are both challenging elements of such an inquiry.³⁸² Thirdly, compensatory justice will only focus on the victims of apartheid and, again, this will not assist in achieving the objective of uniting

³⁷⁹ ML Duncan “The future of affirmative action: a jurisprudential/legal critique” (1982) 17 *Harv CRLL Rev* 503 539.

³⁸⁰ C Mbazira “Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 *SALJ* 71 75.

³⁸¹ As Mbazira notes, without any wrong there can be no claim. It forms the “subject of the claim” and is therefore an “essential element” thereof. C Mbazira “Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 *SALJ* 75.

³⁸² Massey views the justification of affirmative action based on reparations for past wrongs as a weak affirmative action argument, stating that “counter arguments are sufficiently compelling.” G Massey “Thinking about affirmative action” (2004) Vol 21 Nr 6 *Review of Policy Research* 783 787.

society.³⁸³ This relates to the fourth issue, which is that the difficulties that society faces today are founded on such a multitude of sources that relying solely on compensatory measures to mend the deep-rooted structural rifts is simplistic to say the least. Policies of redress based on compensatory justice and aimed at remedial and restitutionary equality are what Fraser refers to as *affirmative strategies*. This can be compared to a metaphorical band aid being plastered on the victims of injustice in order to “correct inequitable outcomes of social arrangements” without treating the cause of the infection or the reason for the misalignment of social structures.³⁸⁴ Practically speaking, this means that if race-based affirmative action is applied under the guise of compensatory justice by means of preferential appointments only, without addressing the root causes of inequality and deprivation such as an inadequate education or poor socio-economic resources, no real advancement will occur.

It could however be argued that backward-looking justifications of affirmative action that are based on compensatory justice capture something important about the ills of past discrimination, which would be lost if we were simply to focus on future distributions of social goods. That is that apartheid did not only rest on a skewed distribution of wealth and economic opportunities, but that it also denied the basic human dignity of members of disadvantaged groups. Or to use Nancy Fraser’s terminology, the ills of apartheid consisted as much in status as in class harms, or in misrecognition as in maldistribution. A backward-looking justification of racially based affirmative action that is grounded in compensatory justice could, arguably, play an important symbolic role by recognising the stigmatisation and prejudice caused to black people under colonialism and apartheid. Even if it is true that affirmative action benefits cannot reach those most disadvantaged under apartheid, they can nevertheless serve to redress the moral and psychological harm caused by the past treatment of black people as inferior and incapable of performing managerial roles.

³⁸³ See also C Mbazirza “Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 *SALJ* 75. These “victims” not only include black people, but also women and disabled people who can be shown to be victims of past discrimination.

³⁸⁴ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 74. See also 76-77 on the disadvantages of this approach.

Without wishing to deny the symbolic value of such forms of redress, it is nevertheless necessary to examine the downside of this argument more closely. In the absence of a more sustained attempt to transform the underlying structures of the economy, attempts to undo the moral and psychological harm caused by apartheid through affirmative action appointments may in fact have the opposite effect, by labelling the class of beneficiaries as incompetent, “deficient and insatiable”.³⁸⁵ Moreover, because they rest on an affirmative strategy, they may have the unintended effect of forcing individuals into a system of collective identities without any room to establish themselves as separate individuals, fearing that to do otherwise will be disloyal.

In short, affirmative action policies based on compensatory justice are unsuitable “to address all current legal problems.”³⁸⁶ This is not to say that compensatory justice and measures aimed at creating remedial and restitutionary equality are redundant. It is merely important to accept that the goals of affirmative action which are based on the elimination of discrimination, the redress of past wrongs and the creation of an egalitarian society, will not be reached when this course is pursued. These objectives require the necessary transformative strategies that are capable of addressing the current root causes of inequality and deprivation. The following section will address this matter in further detail.

4.3 The difference principle and substantive equality

One way to serve the endeavour towards an equal society is to apply the *difference principle* as a measure of justice in order to support substantive equality. The value of affirmative action policies lies within the purpose that they serve in society and the positive outcomes that can be expected from them, i.e. greater representivity in the workplace and a more equal society in which all members are able to attain full self-realisation. Justifying affirmative action in terms of this theory of justice means that

³⁸⁵ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 77.

³⁸⁶ C Mbazira “‘Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 SALJ 80.

now, more than ever, affirmative action policies should be acceptable in theory and in practice, based on a reasoned and reasonable conceptualisation of justice.³⁸⁷

Another advantage that the forward-looking perspective holds is that there is no longer the necessity to establish a causal connection between harms committed in the past and the inequality experienced today.³⁸⁸ Instead, this theory of distributive justice looks at present day inequalities and structures remedies accordingly, in order to create a more equal dispensation of social goods and resources.³⁸⁹

The *difference principle* may be used as a redistributive tool to determine who is eligible to receive certain goods. As was stated before, the *difference principle* enhances the future career and life expectations of those who are least advantaged in society.³⁹⁰ Under such terms, people who, as a result of past discrimination, are not capable of reaching their full potential, are entitled to social resources that would enable them to compete on fair terms with other members of society. Social institutions are currently arranged in such a way that one's position at birth is a strong indicator of the probable life expectations that one might have. In other words, a black woman born in a township will most likely receive poor education and a minimum wage for the rest of her life. Similarly, a white female born in a middle-class suburb will most likely attend educationally competent schools and is more likely to attain tertiary education than the black woman previously mentioned. This will enable her to hold a stronger position in society and afford her greater opportunity for participation in society. Rawlsian fairness dictates that social institutions should be aligned in such a way as to counteract the "natural lottery" so as to enable everyone to attain self-realisation. Van Wyk states that the "fact that a person is born into a poor rural black family is simply a fact; however, the fact that legal institutions attach the consequences of inferior education to the circumstances of his or her birth is unjust."³⁹¹

³⁸⁷ ML Duncan "The future of affirmative action: a jurisprudential/legal critique" (1982) Vol 17 *Harv CRLL Rev* 507.

³⁸⁸ J Rabe *Equality, Affirmative action, and justice* (2001) 96.

³⁸⁹ See G Sher "Reverse discrimination, the future, and the past" (1979) Vol 90 No 1 *Ethics* 81 83.

³⁹⁰ S Stroud "The aim of affirmative action" (1999) Vol 25 No 3 *Social Theory and Practice* 385 386; WE Schaller "Rawls, the difference principle, and economic inequality" (1998) Vol 79 *Pacific Philosophical Quarterly* 368 382.

³⁹¹ MW Van Wyk "Towards a Rawlsian justification for affirmative action" (2000) *South African Journal of Labour Relations* 58 70.

It is possible to argue that an indirect consequence of the current race-based affirmative action policy is the detriment caused to, amongst others, poor whites.³⁹² This includes making it harder for them to seek employment as well as to retain their employment. Conversely, since the abolition of discriminatory practices in 1994, the class of economically affluent black people has grown considerably. Broader societal interests come into play when redistributive policies are applied.³⁹³ The *difference principle* allows for redistribution on the basis that discriminatory practices in the past had caused groups to experience several stumbling blocks in life - but this redistribution may not be to the detriment of other members of society who also find themselves in the lowest socio-economic classes.³⁹⁴ Therefore, if affirmative action is sanctioned as a redistributive policy, resources may not be redistributed in such a way as to further disadvantage other groups not classified as “affirmative action beneficiaries” but who nonetheless are still economically worse off. As Schaller states: “[n]othing is gained by increasing the number of people who are unable to be self-supporting.”³⁹⁵ In fact, the strength of this forward-looking approach lies in the

³⁹² Poor black people also find it increasingly difficult to compete for that matter as inadequate educational facilities do not give them the necessary tools to compete with more those who are more affluent. There has been an increasing number of white South Africans who also find themselves amongst the poor. This fact even surprised soon-to-be President Jacob Zuma during his visit to a white informal settlement. News24 “Zuma surprised by white poverty” [18 April 2008] http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2308492,00.html (accessed 10 May 2009). In the same article, Herman explains that poverty amongst white people has grown by as much as 150% in recent years. This information is contrary to what is endorsed by the *difference principle*. Measures aimed at redistributing economic resources are not to be to the further disadvantage of those least advantaged in society – regardless of whether they have been part of a more affluent group in the past or whether they themselves are the group previously disadvantaged. Other developments have shown that state institutions (for example the Gauteng Department of Social Development) have even gone as far as to deny non-governmental organizations subsidies in future if they continue to aid non-designated groups. “White poverty in South Africa with the emphasis on the Tshwane Metropolitan area” Report compiled by *Solidarity Helping Hand* for Mr. Jacob Zuma, June 2008.

³⁹³ See Mbazirza “‘Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 *SALJ* 79.

³⁹⁴ A practical example of this theory can be found in the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). This case involved a group of individuals who sought relief in the form of emergency housing. The Constitutional Court found that although the state’s housing policy was constitutional, its inability to provide for those in desperate need was however unconstitutional. In a philosophical sense one would thus argue that this redistributive housing policy could not be considered just as it does not further, and in fact negates, the interests of the least advantaged members of society.

³⁹⁵ WE Schaller “Rawls, the difference principle, and economic inequality” (1998) Vol 79 *Pacific Philosophical Quarterly* 382.

“community-wide implications” that it holds.³⁹⁶ Poverty-stricken communities, regardless of race, should benefit.

Theories of distributive justice support a commitment to substantive equality because of the emphasis both place on structural change. The strength of substantive equality lies in its flexibility and multi-dimensional approach to issues of equality. Amongst its many different dimensions, substantive equality also has a redistributive dimension.³⁹⁷ It is not content simply to extend equal treatment to all, but seeks to redress material disadvantage and systemic inequality. From the perspective of a substantive understanding of equality, the aim of adopting measures so as to promote the achievement of equality indicates an acknowledgment that deep rooted inequalities still exist and that their eradication is an ongoing process. *Systemic inequalities*, in this case, can only be challenged once the “underlying social and economic conditions that create[d] and reinforce these inequalities” are fully understood.³⁹⁸ The aim is, of course, to change the social institutions that perpetuate unequal distributions “rather than expecting the individual to conform.”³⁹⁹ Here it is worth recalling, once again, Fraser’s distinction between transformative and affirmative strategies. Unlike affirmative strategies, which seek to make surface reallocations to redress the effects of existing inequalities, transformative strategies effectively address the “underlying generative framework” which caused the

³⁹⁶ See Mbazira “‘Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 SALJ 78.

³⁹⁷ 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) 18. Fredman reasons that substantive equality has four dimensions. Firstly it is an asymmetric principle. Secondly, it “promotes respect for the equal dignity and worth of all”; thirdly, “it does not exact conformity as a price of equality”; and in the fourth instance, substantive equality facilitates “full participation in society.” 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) 18. Several authors, Fredman and Fraser included, support a multi-dimensional approach to substantive equality, arguing that it is a comprehensive theory of equality consisting of issues of recognition; redistribution and participation. The exclusion of any one of these three aspects of equality will nullify attempts to adequately address societal disadvantage and inequalities. This makes sense because “most types of actual social injustice are a mixture of economic and cultural injustices.” I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) Vol 10(4) *Constellations* 538 538.

³⁹⁸ C Alibertyn “Equality” in H Cheadle, D Davis, and N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 1 6.

³⁹⁹ 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) 18.

inequalities in the first place.⁴⁰⁰ Substantive equality cannot be a viable ideal without any “transformatory change”.⁴⁰¹

It would be exceptionally naïve to believe that society can reach equilibrium in terms of an absolute equal distribution of resources; full participation by all citizens in civil society; or complete eradication of differences in status. But that is not what is argued for here. As a redistributive policy based on the difference principle, affirmative action is required not to exacerbate current day inequalities, and to regulate the just redistribution of societal resources to the benefit of the least advantaged members. In other words, equality and justice are often elusive ideals which cannot be accomplished overnight, but require ongoing transformation. This transformation, guided by the difference principle, therefore needs to be grounded in transformative policies, as opposed to affirmative policies that address the unfavourable symptoms of social arrangements without curing the diseased cesspool that is the underlying social structure.⁴⁰²

In the remainder of this section, I will consider whether and to what extent a substantive understanding of equality, married to the difference principle, can assist us in conceiving of such an ongoing transformation of social relations and distributive patterns. Referring to the notion of transformative constitutionalism, Justice Langa states the following:

“Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of

⁴⁰⁰ N Fraser and A Honneth *Recognition or Redistribution* (2003) 75. The value of this strategy, as opposed to affirmative strategies, is that it is able to “redress status subordination by deconstructing the symbolic opposition that underlies currently institutionalized patterns of cultural value.” On the advantages and shortcomings of transformative strategies, see 77-78.

⁴⁰¹ C Albertyn “Substantive equality and transformation in South Africa” (2007) Vol 23 *SAJHR* 253 257; C Albertyn and B Goldblatt “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) Vol 14 *SAJHR* 248 248. On this topic *Van Huyssteen* states the following: “[Transformative constitutionalism] emphasizes substantive equality in all spheres of life and each citizen’s meaningful participation in decision-making that affects her or his life, as the foundation for dignity and empowerment.” E Van Huyssteen “The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism” (2000) Vol 59:2 *African Studies* 245 257.

⁴⁰² N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 74. To be fair, Fraser reminds us that even affirmative strategies may have long-term transformative potential, despite its deficiencies, should it be coupled with other strategies which reinforce it and counter its negative effects. N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 78-80.

being are constantly explored and created, accepted and rejected and in which change is unpredictable but *the idea of change is constant*.⁴⁰³

It is possible for critics on the left to argue that the difference principle amounts to little more than a justification of the welfare state, in which superficial reallocations are made to the poor without truly transforming the underlying economic structures. However, it will be argued that the difference principle does, in fact, have the ability to do much more; i.e. have a more trenchant and lasting impact. Firstly, with the requirement that the products of natural talents be shared by all and therefore redistributed to those not fortunate enough to have received such talents initially, a general sense of community is fostered. This means that through redistributive taxation or career development and vocational training programmes, upper classes redistribute a portion of their “good fortune” to those in need and accept their responsibility to utilise its products in the interests of all.

Secondly, the redistribution of basic goods to those who all agree are most in need expands the class of self-sufficient citizens.⁴⁰⁴ Being self-sufficient in the sense of having all one's needs met, allows one to focus more intently on general needs and enhances *participatory parity* within society. Coined by Fraser, this term refers to the

⁴⁰³ P Langa “Transformative constitutionalism” (2006) Vol 3 *Stell LR* 351 354. Karl Klare has been criticised for confining transformative constitutionalism to the adjudicative sphere. Van Huyssteen and Justice Langa argue that we should apply transformative constitutionalism and seek it in the democratic institutions that the new constitutional dispensation is founded on. To limit transformative constitutionalism to judicial fora will be highly ineffective in solving the complex equality issues facing South Africa today. Very few potential claimants who are in need of constitutional remedies have actual physical and/or financial access to courts. Mbazira argues that in cases such as these, the relief granted should be extended to other groups in similar circumstances but who, through lack of the financial or other means, could not make use of their constitutional rights. Because of this and its forward-looking aim of dismantling underlying structures in order to rebuild a more just society, this notion of constitutionalism can be viewed as a principle of social justice, and in particular, distributive justice. Mbazira states that change should take place by transforming a “society based on socio-economic deprivation to one based on equal distribution of resources.” The creation of a more optimal dispensation grounded in egalitarian ideals is a vision supported by the Constitution’s Preamble: “We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.” C Mbazira “Appropriate, just and equitable relief’ in socio-economic rights litigation: the tension between corrective and distributive forms of justice” (2008) Vol 125 Is 1 *SALJ* 85, 91; P Langa “Transformative constitutionalism” (2006) *Stell LR* 358; E Van Huyssteen “The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism” (2000) Vol 59:2 *African Studies* 259.

⁴⁰⁴ The term “citizens” in this context does not refer to the distinction between citizens, permanent residents, aliens and refugees. In this case it refers to all entities who are considered to be part of society and who therefore share the responsibility to act in the interest of the general society.

alignment of social institutions so as to facilitate full peer-orientated interaction between all individuals regardless of race, class, gender, sexuality etc.⁴⁰⁵ As a redistributive mechanism, the general policy of affirmative action should, therefore, be geared towards the full emancipation of everyone, especially disadvantaged citizens. Participatory parity not only requires the (re)distributional regime to enable and support individual independence, but it also requires that “institutionalized patterns of cultural value express equal respect for all participants and ensure equal opportunity for achieving social esteem.”⁴⁰⁶ The latter condition aims to address the status order of society that is so easily tainted once a particular group become the target of serious prejudice or stigmatisation. This would then also prevent them from attaining full independence as well as the confidence to self-acknowledge their rightful place as equal participants in civil society. The dualist approach therefore reminds us that strategies that reform and compensate members of society for the natural uneven outcomes of the market should nevertheless address both aspects of redistribution and recognition. This means that the devaluation - even denigration - of specific groups or the devaluation of concomitant characteristics of specific groups is unjust. Any actions, social institutions, social norms or otherwise that “deny some people the status of full partners in interaction” must be eliminated or excised.⁴⁰⁷

The third potential societal change that the difference principle could enable is a direct consequence of the second. A stronger civil society is created by the emancipation of more individuals, which in turn strengthens civil institutions that can demand a more responsive government. Government structures can, then, no longer deny the necessary structural changes that improve society on all the vital levels.

The *difference principle* should be able to endorse affirmative action as a redistributive and remedial measure.⁴⁰⁸ The *difference principle* allows inequalities to exist in society if they are to the advantage of the least fortunate in society.

⁴⁰⁵ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 36-37.

⁴⁰⁶ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 36.

⁴⁰⁷ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 36.

⁴⁰⁸ The term “remedial” in this regard should not be confused with remedial and restitutionary equality. In this context it refers to the value embedded in restructuring society through social justice in such a way as to mend inequalities by providing hope for the future.

Otherwise put, affirmative action, seen as a policy aimed at creating an equal society, inevitably leads to temporary inequality by favouring certain groups. The inequality created should be to the advantage of the lower classes (whether previously disadvantaged or not) and should not be to the detriment of higher classes either, although the term “detriment” does not necessarily refer to economic disadvantages, as some allowances could be considered to be a fair price to pay to be a member of a peaceful egalitarian society.

4.4 Contextual analysis of theories of justice and equality: gender and disability

Due to shifting patterns of inequality and disadvantage, different considerations might apply in different contexts. Consequently, different conceptions of equality and theories of justice may be better attuned to some contexts than to others. So far, the basic distinctions between backward-looking and forward-looking justifications of affirmative action, compensatory and distributive theories of justice, substantive and remedial equality, recognition and redistribution and affirmative and transformative strategies have been dissected, juxtaposed and related to each other in an attempt to theorise the possibilities and limits of affirmative action. In this section I will reapply the above analysis in order to gain an extended perspective on matters pertaining to gender and disability discrimination, as well as the concomitant actions necessary to correct these harms for the purposes of bringing about transformation. Therefore, these two issues will be viewed in the light of forward-looking and backward-looking justifications for correcting of the harms; compensatory and distributive justice; and, whether the aim is to advance substantive or remedial and restitutionary equality. This analysis will be largely guided by Fraser’s differentiation between redistributive and recognition-based strategies.

Although various forms of discrimination are pooled together into section 9(3) of the Constitution, stating that “[t]he 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”, different grounds of

discrimination often involve different power dynamics and forms of disadvantage. In an article advocating a complex understanding of equality, Botha states that such an understanding recognizes “that different forms of discrimination may require different types of analysis.”⁴⁰⁹ For this reason, the bases for compensation are dissimilar and require that the harm faced by the victimized group be scrutinised in detail so as to afford the said group the full deliverance they deserve.

4.4.1 Gender

Gender inequality and gender discrimination differs from racial discrimination as group solidarity is less entrenched in the former case. This is not to say that there are not any cohesive civil society establishments which advocate the rights of women, for example, but it merely means that in comparison to black civil society movements, gender is less unifying.⁴¹⁰ This could possibly be ascribed to the fact that South Africa has had less of an arduous journey when it comes to gender discrimination than compared to the formally established racially discriminatory apartheid regime. Yet nevertheless gender discrimination, though not as overt as other forms of discrimination, still remains. It lurks in the sub-spheres and peripherals and on face value does not seem to threaten the current social order. Disguised as traditional social institutions, gender discrimination manifests itself through the inability of women to achieve full participatory parity due to the entrenched practices of the underlying generative structure. As Botha states, “gender inequality feeds on a rich diet of [cultural] misrecognition and maldistribution, of sexual prejudice and female poverty, of status- and class-based distinctions.”⁴¹¹

In the South African context there are several examples of social practices, economic structures and cultural traditions that have contributed to the material and cultural oppression of women. Historically women, and particularly black women, were

⁴⁰⁹ H Botha “Equality, Plurality and Structural Power” (2009) Vol 25 *SAJHR* 1 8.

⁴¹⁰ Civil society movements and organizations that advocate the rights of women in particular include the following non-exhausted list: ANC Women’s League; Catholic Women’s League; South African Qur’aan Union Women’s League; National council of Women of South Africa; Rural Women’s Movement; Women’s Institute for Leadership, Development and Democracy; National Council of African Women; Dames Aktueel; Women for Peace; The Women’s Lobby; and, Women’s National Coalition.

⁴¹¹ H Botha “Equality, Plurality and Structural Power” (2009) Vol 25 *SAJHR* 9.

denied certain political rights during the apartheid era.⁴¹² These rights included the right to vote and the right to land ownership.⁴¹³ As opposed to statutory law, customary law as implemented and enforced by traditional African cultures prescribed its own limitations to the ability of women to participate and express themselves economically and politically. For instance, under customary law any economic earnings, whether earned by the husband or the wife was legally the property of the husband and he alone “had [the] sole capacity to perform juridical acts in respect of this property.”⁴¹⁴ Also, customary law of succession dictated that women were not allowed to inherit from their deceased husbands and any remaining family property was to be bequeathed to the next male heir.

Upon the advent of the new democratic era, efforts in the form of equality legislation were made to change the lopsided relationship between men and women. However, the goals have not at all times been realised due to an array of factors which range from traditional leaders’ reluctance to accept and therefore disperse the implementation of *western* statutory law as it might undermine and diminish their authority within traditional communities.⁴¹⁵ A major impediment to the comprehensive implementation and enforcement of new statutory regulations that would provide economic and political protection to women, who were as a matter of course subjected to customary law, was the “inaccessibility of the new law”.⁴¹⁶ Not

⁴¹² During this period section 11(3)(b) of the Black Administration Act 38 of 1927 stated that “a Black woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.”

⁴¹³ See for example the Black Areas Land Regulations R188 of 1969 which only allowed land ownership to be vested in the male head of a family. A Claassens “Women, customary law and discrimination: the impact of the Communal Land Rights Act” in C Murray and M O’Sullivan (eds) *Advancing women’s rights: the first decade of democracy* (2005) 47.

⁴¹⁴ L Mbatha, N Moosa and E Bonthuys “Chapter 6 – culture and religion” in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 161. In fact, it is still common practice today for the male heads of the family to control family earnings, even when they do not contribute significantly. B Clark and B Goldblatt “Chapter 7 – gender and family law” in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 198-199.

⁴¹⁵ C Himonga “The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession” in C Murray and M O’Sullivan (eds) *Advancing women’s rights: the first decade of democracy* (2005) 98-101.

⁴¹⁶ C Himonga “The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession” in C Murray and M O’Sullivan (eds) *Advancing women’s rights: the first decade of democracy* (2005) 105.

only did it become costly to enforce their equal rights, but it became an arduous geographic feat to access these rights in the first place.⁴¹⁷

Other factors that perpetuate traditional and contemporary forms of disadvantage for women include domestic violence,⁴¹⁸ the effects of HIV/AIDS on women; unemployment and lower earning capacity; as well as the changes in family structures. This last factor relates to two forms of migration. Firstly, husbands leave their rural homes and families in search of urban employment and thereby leave their wives to care for the children. She often faces hardships due to her weaker economic position having to compete for “social and economic benefits” with an urban wife the husband has decided to acquire.⁴¹⁹ Secondly, female headed households, meaning households that do not have dominant husbands or male figures, whether because of divorce, death or otherwise, are often also disadvantaged by the migration of the mother in search of urban employment, leaving the grandparents to raise her children. These factors play an important part in the feminization of poverty.⁴²⁰

Given our history of patriarchy and sexism, a compensatory approach has some intuitive appeal. At the same time, however, many of the same problems identified above in relation to race also feature here. For example, there is the danger of affirming reified social understandings of gender differences. Moreover, those most in need are unlikely to benefit: unless attempts at compensation focus more on gender’s intersections with race, class, the rural/urban divide, disability, marital status etc, such measures are likely to benefit only those that are already privileged. In addition, since gender is so pervasive and gender discrimination is often subtle, it is very difficult to gauge in what position women would have been in the absence of

⁴¹⁷ C Himonga “The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession” in C Murray and M O’Sullivan (eds) *Advancing women’s rights: the first decade of democracy* (2005) 106.

⁴¹⁸ Violence is used as a means of control by men to perpetuate the subordination of “their females”. Concomitant disadvantages also include “employment and health costs” and “a significantly higher risk of HIV infection”. B Clark and B Goldblatt “Chapter 7 – gender and family law” in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 199-200; M O’Sullivan and C Murray “Brooms sweeping oceans? Women’s rights in South Africa’s first decade of democracy” in C Murray and M O’Sullivan (eds) *Advancing women’s rights: the first decade of democracy* (2005) 6. Violence against women, therefore, continues to suppress their autonomy and deny them equal opportunities and a voice in public affairs.

⁴¹⁹ B Clark and B Goldblatt “Chapter 7 – gender and family law” in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 197-198.

⁴²⁰ B Clark and B Goldblatt “Chapter 7 – gender and family law” in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 205.

gender discrimination. A substantive reading of equality is more capable of realising the full emancipation of women than would purely remedial and restitutionary equality. One could argue that substantive equality is less inclined to be overly victim-focused and strives toward an egalitarian outcome. However, current structural changes need to be addressed. A complex notion of equality voiced in the language of Fraser's two-dimensional approach would inform us that addressing gender inequality would require both redistributive and recognition-based initiatives.⁴²¹ Equality in this respect firstly requires addressing material disadvantage that manifests as a result of the societal distributional system and secondly requires that we should address the "failure to recognise the equal dignity and worth" of women in particular.⁴²²

In the first instance, redistributive issues which manifest as material disadvantage are created and exacerbated by inequalities in the labour force. A predominantly capitalist economic system tends to favour male-dominated structures.⁴²³ Gender divisions are also present within and between formal and informal labour sectors.⁴²⁴ This results in "gender-based exploitation, economic marginalization, and deprivation."⁴²⁵

Gender divisions, like racial divisions, create and sustain a class-like structure which helps perpetuate the marginalization and exploitation of the least advantaged. At the same time, recognition-based inequalities manifest in the arena of status and culture by endorsing androcentrism as the price for mutual acceptance.⁴²⁶ This means that "traits associated with masculinity" are favoured above qualities traditionally associated with the feminine.⁴²⁷

⁴²¹ Fraser states that gender, race and class are all examples of hybrid categories which are "rooted simultaneously in the economic structure and the status order of society." N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 19.

⁴²² H Botha "Equality, Plurality and Structural Power" (2009) Vol 25 *SAJHR* 16.

⁴²³ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 20.

⁴²⁴ This means that not only are there gender divisions between the two sectors, but within the formal sector there is a tendency toward male-domination.

⁴²⁵ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 20.

⁴²⁶ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 20.

⁴²⁷ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 20-21.

The duality of the issues of maldistribution and misrecognition created by inequalities, particularly racial and sexuality-based inequalities are generally addressed by following either affirmative or transformative strategies, as mentioned above. With regards to gender discrimination, it seems that affirmative strategies on their own would not suffice as superficial redistributions, for instance maternity leave benefits, would do little or nothing to subvert gender inequalities which are deeply entrenched in distributive patterns and cultural value systems. Instead, transformative strategies “aim to destabilize invidious status distinctions”.⁴²⁸ The only question that stands, however, is whether the theories of justice presented in the previous chapter have the ability to bring about this form of transformation.

I will argue that forward-looking approaches are better equipped to address gender inequalities. Reasons why backward-looking, and therefore compensatory arguments, would not suffice include the impracticality of identifying the specific past wrong or social practice that needs to be corrected. Unlike laws that expressly prohibit same-sex marriages, and therefore infringe upon one’s right to choose one’s sexuality and still enjoy the same liberties as heterosexual people, gender inequality is far more systemic in nature as its effects seeps through all aspects of social interaction. Although women have made major achievements in the political sphere (especially in South Africa – as will be illustrated below), social and economic benefits are still withheld to a certain extent. In the social context, preconceptions of the women’s role to bear and raise children are still very active within this society, which inhibits the conceptualisation and achievement of life aspirations. Similarly, these aspirations might include career advancements which would provide financial independence. Discrimination based on sexual orientation, on the other hand, is predominantly a matter to be rectified by strategies based on recognition. Systemically, homosexuals face fewer obstacles as “homosexuals are distributed

⁴²⁸ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 77. The reality, unfortunately, is that women today, or any disadvantaged collectivity for that matter, is far more likely to rely on their “depreciated identity” in order to gain short term relief, than demand that the existence of identity distinctions be eliminated. N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition: a Political-Philosophical Exchange* (2003) 77-78.

throughout the entire class structure of capitalist society, occupy no distinctive position in the division of labor, and do not constitute an exploited class.”⁴²⁹

Compensatory justice also requires that victims be brought to a position had the injury never occurred. Patriarchal norms are so deeply entrenched and historical traditions of male dominancy have become so generally accepted and typical that imagining a world where this had never occurred is virtually impossible. Therefore, instead of looking to specific past wrongs that had occurred to the general female populace, equality is more likely to be attained if the underlying structures that perpetuate and regenerate gender disadvantage are scrutinised and reformed. Focusing on individual victims and individual perpetrators also runs the risk of the reification of gender identities that once again become the systemic ulcers that breed gender inequalities.

Distributive justice, according to the difference principle, would entail that we reconsider and compare the life chances and opportunities accruing to women and men from childhood. This does not only include their education but also the way in which they are brought up and what they are taught in terms of peer interaction. The reason is that these crucial developmental stages ultimately determine our chances and interactions later in life. The difference principle states that basic societal goods are to be distributed in such a way that they are to the advantage of the least advantaged members of society, even if this means that certain inequalities occur. Thus, ensuring that members from both genders receive equal opportunities would be to the benefit of all. This participatory parity of both genders enriches society on various levels. For example, it is more probable that society would function on optimal levels if *more* members of society are constructively involved in civil society, the employment sphere, the political arena, sporting activities, cultural activities, and academia.

Rawls himself does not identify the least advantaged class in society according to gender, but limits this class to only encompass those with the least income and wealth. Nonetheless feminist accounts of distributive justice like that of Okin illustrate how the Rawlsian principles of justice can be applied in the quest for gender

⁴²⁹ N Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation” in G Peterson (ed) *The Tanner Lectures on Human Values XIX* (1998) 13.

equality.⁴³⁰ For example, basic goods that are to be available to the free and equal citizens within society include the “liberty of free choice of occupation”.⁴³¹ Okin states that within the current gender structured society both sexes are compromised in this regard as both face an uphill battle realising this liberty which leads to “asymmetric economic” dependency upon men, although men do receive some relief in the long run.⁴³² In our current discussion Rawls’s theory therefore dictates that the link between traditional gender roles and sex be broken. The full freedom to pursue one’s occupation of choice can only be realised if the necessary reforms have been made. Okin states the following in this regard:

“These conditions are far more likely to be met in a society that does not assign family responsibilities in a way that makes women into a marginal sector of the paid work force and renders likely their economic dependence upon men. Rawls’s principles of justice then would seem to require a radical rethinking not only of the division of labor within families but also of all the nonfamily institutions that assume it.”⁴³³

Furthermore, not only should these gender roles be restructured for occupational freedoms, but also for the sake of political freedoms.⁴³⁴ The Rawlsian “principle of (equal) participation” applies to all members of society capable of political interaction, whether it be voting during public elections, or actively participating in the electoral process by representing the interests of a nominated group.⁴³⁵ Okin explains how the latter part of this liberty has been a stumbling block for women in past times due to its time consuming nature.⁴³⁶ In a society where women are expected to marry and bear children, their political ambitions are often neglected. Fortunately, great strides have been made in South Africa as figures show that gender representation in the political sphere has increased significantly. Figures show that by 2009, 43% of all Members of Parliament were female and 42% of the provincial seats were held by

⁴³⁰ SM Okin *Justice, Gender, and the Family* (1989) 89-109.

⁴³¹ J Rawls *A Theory of Justice* (1971) 274.

⁴³² SM Okin *Justice, Gender, and the Family* (1989) 103. Instead, Rawls would rather have each “be offered a variety of tasks so that the different elements of his [or her] nature find a suitable expression.” J Rawls *A Theory of Justice* (1971) 529.

⁴³³ SM Okin *Justice, Gender, and the Family* (1989) 103-104.

⁴³⁴ SM Okin *Justice, Gender, and the Family* (1989) 104.

⁴³⁵ J Rawls *A Theory of Justice* (1971) 221.

⁴³⁶ SM Okin *Justice, Gender, and the Family* (1989) 104.

women.⁴³⁷ Nonetheless, existing and future political inequalities are only permissible in the event that they are capable of justification under the difference principle.⁴³⁸ In other words, any political inequalities must be arranged in such a way that everyone benefits from it.

Lastly, the Rawlsian principles of justice advocate that self-respect should be considered the most important primary good.⁴³⁹ As rational human beings, no individuals would opt for a dispensation under the veil of ignorance that would place them in a position where they would have a deficient *sense of own value* or do not have the “confidence in [their] ability, so far as it is within [their] power, to fulfill [their] intentions.”⁴⁴⁰ Accordingly, what would be necessary then is for all institutions to be gender neutral in their interactions with men and women. This includes the family structure, the political structure (as was mentioned above), religious institutions, and various other civil institutions that regulate mutual interaction.

Certain issues however are harder to address. For example, if the difference principle allows for certain economic inequalities that are to the benefit of the society as a whole, the situation might arise where everyone might not agree about what is best. There will consequently be certain dominant cultural assumptions that assume that having a “traditional” society is more optimal, namely, letting women be more involved in raising their children due to their nurturing nature, regardless of the economic servitude this places upon them. Such assumptions should constantly be questioned and debated and if necessary transformed for society to evolve into a fully egalitarian state. Fraser recommends the following:⁴⁴¹

“Unlike such approaches, the account proposed here is deontological and nonsectarian. Embracing the spirit of “subjective freedom” that is the hallmark of modernity, it accepts that it is up to individuals and groups to define for themselves what counts as a good life and to devise for themselves an approach to pursuing it, within limits that ensure a like liberty for others. Thus, the account proposed here

⁴³⁷ C Schulze “Press Release: Number of female politicians on the rise” (25/01/2011) *South African Institute of Race Relations* <http://www.sairr.org.za/media/media-releases/Number%20of%20female%20politicians%20on%20the%20rise%20-%2025%20January%202011.pdf/view> (accessed 27 January 2011).

⁴³⁸ SM Okin *Justice, Gender, and the Family* (1989) 104.

⁴³⁹ J Rawls *A Theory of Justice* (1971) 440.

⁴⁴⁰ J Rawls *A Theory of Justice* (1971) 440.

⁴⁴¹ N Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation,” in G Peterson (ed) *The Tanner Lectures on Human Values XIX* (1998) 25.

does not appeal to a conception of self-realization or the good. It appeals, rather, to a conception of justice that can be accepted by those with divergent conceptions of the good.”

4.4.2 Disability

As an outcome of systemic inequalities, disability discrimination is often overlooked in the overall mission towards transformation as it is quite readily subsumed within a larger pool of grounds of discrimination. It should be borne in mind however that this form of discrimination has a certain level of uniqueness that does not warrant this diminution. Disability discrimination derives its inimitability from several factors.

As a minority, the disabled are often marginalised.⁴⁴² Their interests are easily neglected as they are not a strong political constituency which would otherwise have enabled them to campaign for their just deserts.⁴⁴³ The disabled are often the target of general “negative societal attitudes” which render them powerless towards full achievement of equal rights.⁴⁴⁴ The demeaning treatment of the disabled includes “imposed charity, social welfare and undue paternalism”.⁴⁴⁵ Like race and gender discrimination, the disabled are also historically disadvantaged; they are not proportionately represented in the workforce; and, they are in some cases under-remunerated compared to their able bodied counterparts.⁴⁴⁶ The uniqueness of disability discrimination is centred upon the basis of societal biases. The belief that women or black people are incapable of performing highly skilled or technical labour, for example, is clearly unfounded. In the case of the disabled individual’s inability to

⁴⁴² This occurs due to a multitude of factors, which range from the built environment; the education system; the transport system; communication systems; workplaces; recreational amenities, as well as various other societal structures that impede their ability to participate equally in relation to able bodied individuals. C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 167 169; C Ngwena “Deconstructing the definition of ‘disability’ under the employment equity act: legal deconstruction” (2007) Vol 23 *SAJHR* 116 122.

⁴⁴³ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 169.

⁴⁴⁴ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 169.

⁴⁴⁵ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 168.

⁴⁴⁶ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 170; C Ngwena “Deconstructing the definition of ‘disability’ under the employment equity act: social deconstruction” (2006) Vol 22 *SAJHR* 613 613.

perform certain tasks, this is only true to the extent that their immediate environments are not equipped for, and do not accommodate, their specific skills or capabilities.⁴⁴⁷

As a social construct, disability inequalities are to be understood as the interplay between personal experiences and societal factors that mutually “reinforce and perpetuate the subordination of people with disabilities.”⁴⁴⁸ Conversely, the legal construction of disability relates to the functional implications of the disability as such. Therefore, according to the Employment Equity Act, the disabled are defined as “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.”⁴⁴⁹ In this case, the disability is brought directly in line with one’s ability or inability to perform certain tasks, and not necessarily with the role that social structures play in exacerbating the effects of that disability. Whether an individual can be considered to be disabled is also context-dependent. Ngwena informs us that if not properly defined “disability has the potential to include an extraordinarily wide range of people who at some stage in their life experience physical or mental restrictions that are regarded to be a departure from the ‘norm’...”⁴⁵⁰

Disability discrimination’s exclusive status is based on the fact that compared to racial and gender discrimination, very little transformation has taken place.⁴⁵¹ Centred upon the creation of equality, affirmative action should aim to firstly, bring awareness to the plight of the disabled, as it has done in the case of race especially, and secondly, should provide the means toward transforming social structures in order to provide the necessary accommodation for the disabled. Lastly, the effects of the affirmative action course chosen should not exacerbate the stigmatisation and

⁴⁴⁷ Ngwena states that the disabled face “barriers that have been erected by employers as well as society in general on the assumption that every person can hear, see walk run etc. This pervasive implicit assumption of ‘able-bodiedness’ constitutes a real impediment to entering into, or advancing in, employment. Thus it is not just prejudice that must be overcome. Real physical or mental differences must also be taken into cognizance if people with disabilities are to enjoy equal opportunities in the workplace.” C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 171.

⁴⁴⁸ C Ngwena “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the employment equity act from comparative law” (2005) Vol 2 *Stell LR* 210 222.

⁴⁴⁹ Section 1 Employment Equity Act of 1998.

⁴⁵⁰ C Ngwena “Deconstructing the definition of ‘disability’ under the employment equity act: social deconstruction” (2006) Vol 22 *SAJHR* 617.

⁴⁵¹ C Ngwena “Deconstructing the definition of ‘disability’ under the employment equity act: legal deconstruction” (2007) Vol 23 *SAJHR* 155. Due to the lack of the necessary “theoretical and programmatic frameworks” the disabled have been denied their equal dignity and worth that would allow them to freely participate in all (possible) activities in society.

social exclusion that already shadows this vulnerable group, especially when the stigma and social exclusion has very real socio-economic consequences.

The inequalities that are referred to in this regard manifest in a multitude of ways. People with disabilities are denied access to various constitutionally protected rights, including “civil, political, economic, social, cultural, and developmental rights.”⁴⁵² Large-scale unemployment rates amongst the disabled can be ascribed to the inability of most educational institutions, including those that provide vocational training, to accommodate the disabled.⁴⁵³ Accommodation in this sense refers not only to the facilitation of special measures and equipment that would allow the disabled individual to perform the same tasks as able-bodied individuals, but also a sense of common understanding amongst able-bodied individuals that negates biases and negative assumptions about the disabled.⁴⁵⁴

As opposed to racial groups or gender groups, the principal form of discrimination faced by the disabled is the failure to accommodate them within various environments. For this reason a substantive form of equality demands that a case-sensitive approach be taken that would counteract the notion that individual-based difference is to be dealt with by the individual alone. In this regard Ngwena states that:

“[substantive equality] treats existing institutional arrangements, including workplace arrangements, as possible sources of the problem of difference, especially where

⁴⁵² C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 169.

⁴⁵³ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 169.

⁴⁵⁴ For the similarities between reasonable accommodation and affirmative action see C Ngwena “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the employment equity act from comparative law. Part II: Reasonable accommodation” (2005) Vol 3 *Stell LR* 534 537. Reasonable accommodation, in the legal sense, “seeks to overcome a disadvantage arising out of the employment policy or practice by leveling the playing field rather than conferring an advantage on the complainant.” C Ngwena “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the employment equity act from comparative law. Part II: Reasonable accommodation” (2005) Vol 3 *Stell LR* 538. Affirmative action, on the other hand precisely entails conferring certain advantages to those who have been historically disadvantaged as a means to compensate for such past occurrences, as well as to ensure adequate representation in the workplace. Reasonable accommodation is not concerned with adequate representation although in some form or another it can be argued to have compensatory effects. Reasonable accommodation in general demands that the entire spectrum of the social strata be geared toward the facilitation of participation. Affirmative action as a government promoted programme is however limited in its ability to prescribe such facilitation as only certain actors are required to adhere to this programme according to legislation. C Ngwena “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the employment equity act from comparative law. Part II: Reasonable accommodation” (2005) Vol 3 *Stell LR* 539.

the arrangements confirm the distribution of power in ways that are detrimental to the vulnerable and the disadvantaged.”⁴⁵⁵

The pursuit of remedial and restitutionary equality can be helpful in repairing the dignity-based infringements committed against the disabled. Whether or not it is capable of transformative potential is uncertain.

As an essentially backward-looking theory, compensatory justice in this instance would require that we examine past social practices that are relevant in the case of disabled persons. The question to be asked is: were there any social practices that targeted disabled individuals precisely because they were disabled? A surface analysis indicates that no particular *anti-disabled* legislation or government-driven initiative was lodged for the disabled. However, if one accepts that there continue to be rigid social structures that deter full participation of all individuals that are still untransformed and persist in serving as obstacles to entering the workforce, or many forms of involvement in social activities, it becomes apparent that some form of compensation is required. In this instance, the perpetrators are not particular groups but society as a whole as the disabled are not only hindered in their pursuit of careers, but are also often thwarted in their efforts to attain adequate (affordable) education and vocational training, or to participate in recreational activities.

What needs to be done to correct this injustice is to place such individuals in a position they would have been in had it not been for these injustices. To do so society needs to be educated on the needs of the disabled, while constantly being mindful of not perpetuating social exclusion. In a sense, society should be reminded of the common humanity it shares with the disabled, as well as the basic needs that all individuals have, which chiefly include pursuing an education and a career of one's choice without being denied to do so by factors beyond one's control or abilities.

It is arguably easier to conceive of what the situation would have been had the disadvantages related to the treatment of disabled people not occurred, than, for example, imagining what reality would have looked like now had racial discrimination or gender discrimination not occurred, as these forms of discrimination had such far-

⁴⁵⁵ C Ngwena “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” (2004) 29(2) *Journal for Juridical Science* 173.

reaching consequences due to the size of the group discriminated against and are more discernible than the discrimination against the disabled. In the case of disabled individuals, what is needed most is enabling access to the level of schooling that is preferred and being able to apply the knowledge gained in an accommodating environment. Thus, compensatory justice requires us to activate this accommodation and provide the necessary assistance that would allow the disabled to participate at will. Being able to predict more accurately what life would have been like had disability discrimination never occurred is what makes compensatory justice a viable agenda in this case.

The difference principle, on the other hand, requires that social institutions operate in such a way as to not further disadvantage those who are already the most disadvantaged. Or rather, social institutions should be arranged in such a way that they are to the advantage of everyone, especially the least advantaged. Social institutions, therefore, need to be transformed to grant the disabled the necessary accommodation and understanding in order for them to derive the most benefit. A converse arrangement, such as the one we arguably have now, would inevitably deny the disabled any form of expectation for the better. As mentioned above, the current affirmative action strategy is limited in its ability to enable full transformation that would grant the disabled a voice. Usually, only those who are least disabled apply for employment as various obstacles hinder the disabled in their pursuit of a career, including (but not limited to) transport issues and the infrastructure at the particular employment area. The difference principle dictates that such structures be re-analysed and re-evaluated so that the group of individuals who benefit from preferential treatment reserved for disabled individuals consists of a larger number of people. On the one hand, current affirmative action measures reach only those who are less disabled, and in the absence of any real attempts to transform the workplace and to accommodate disabled people, are likely to result in the stigmatization of the group. If, however, this results in real efforts to adapt the workplace to the needs of disabled people, it could result in further-reaching processes of transformation which could perhaps start to filter down to other disabled people.

Redistributive strategies are centred upon a distribution of social resources that is based on notions of equality, dignity and democracy. Cognisance must be taken of outcomes of certain distributional patterns that not only exacerbate economic

inequalities, but also perpetuate social disorder and stereotypes. These patterns of misrecognition are in turn corrected when the necessary focus is placed on the creation of a “difference-friendly world” that does not require “assimilation to the majority or dominant cultural norms” in order to be treated as an equal.⁴⁵⁶ This is particularly relevant with regard to disabled individuals as able-bodiedness is generally the gateway towards an occupation. It can be argued that affirmative action currently only addresses the redistributive spectrum of the redistribution-recognition schema, although not fully in the capacity of a transformative strategy. This *affirmative strategy*, then, provides preferential treatment to the disabled as beneficiaries of affirmative action, but denies them the needed dignity-based considerations. The reason for this is because disabled individuals generally do not seek acclaim and admiration. They do however have the need to be able to participate in everyday life without unnecessary obstacles, such as being marked as being “inherently deficient and insatiable” which is often the consequences of affirmative redistributions.⁴⁵⁷ Fraser states that the “net effect [of affirmative redistributions] is to add the insult of disrespect to the injury of deprivation.”⁴⁵⁸

The Employment Equity Act has attempted to prevent this from happening by requiring employers to “identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups” and the “making [of] reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.”⁴⁵⁹ Unfortunately this legislation is yet to see complete animation. An affirmative action programme that merely provides entrance into the workforce but that fails to accommodate the needs of the disabled is obsolete as it does not give genuine content to the preferential treatment provided for in affirmative action legislation. It is uncertain whether the current affirmative action policy as it pertains to the disabled is capable of being transformative in the long run. Precarious surface reallocations would only cause more harm than good by reinforcing negative preconceptions about disabled individuals. However, if coupled

⁴⁵⁶ N Fraser and A Honneth “Introduction: Redistribution or recognition?” in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 1.

⁴⁵⁷ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 77.

⁴⁵⁸ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 77.

⁴⁵⁹ Section 15(2)(a) and 15(2)(c) Employment Equity Act of 1998.

with broader transformative strategies that relate to the treatment and appreciation of the disabled, affirmative action might have the chance of achieving the status of a transformative strategy in the long run.

Affirmative action as it is structured in South Africa has a further limitation which relates to the size of the vulnerable group that qualifies for preferential treatment. As was mentioned above, working environments are yet to be fully accommodating of disabled individuals and therefore the only individuals who stand to gain from preferential treatment reserved for disabled are those who are the least disabled, i.e. those who come closest to being able-bodied.

As a minority with weak group solidarity, it is particularly hard for disabled individuals to enforce/demand their equal rights. Therefore, just as it is necessary to protect the rights of the poor, women or black people, without causing further stigmatisation, the onus is placed upon both the state and the greater society to campaign for the rights of the disabled *with* them. This is done not because they are to be considered weak, but because a social, economic and political structure has been created and enforced by these actors that has served as an impediment toward the emancipation of the disabled. Ultimately there is a need to transform underlying structures, both economically and culturally, rather than simply affirming them through slightly more inclusive measures.

4.5 Provisional final thoughts

The aim of this chapter was to illustrate how different axes of analysis from various theoretical backgrounds can be applied to different forms of disadvantage. In this case, these theoretical and philosophical tools were used to illustrate that the different harms caused by racial, gender and disability discrimination should be approached in such a way that cognisance is taken of the particular evils that need to be addressed. Race, gender and disability are also what were earlier referred to as two-dimensionally subordinated groups that feature both disadvantages related to recognition as well as redistribution.⁴⁶⁰ Fraser reminds us however that on these

⁴⁶⁰ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 19.

axes it is possible for a specific group to have more recognition than redistribution struggles, or vice versa. Discrepancies related to gender are typically loaded toward redistributive issues rather than recognition, although the latter is still firmly present and needs to be addressed. Economic consequences of the way in which society values and favours masculine attributes are detrimental to the development of women and influence, if not predetermine, their life choices. In terms of disability-related deficiencies, the weight of the axes turns more readily toward issues of misrecognition. Without the transformation of cultural understandings of the capabilities of the disabled, it will be harder to address the unequal distribution of economic opportunities available to the disabled. A dignity-based approach to the treatment of people with disabilities needs to be developed that would be more capable of accommodating members of this group into all different levels of interaction, be it social, political or economic.

The following chapter will present further suggestions of affirmative action programmes that could possibly address issues of recognition and redistribution more pertinently than the current race-based affirmative action programme.

Chapter 5: Class-based affirmative action

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5.1 Introduction

Class-based affirmative action has the potential of being instrumental in the South African endeavour of transformative constitutionalism - its mission being not merely to doctor the symptoms, but to cure the degenerative disease that is the current underlying structure which strengthens mutually enforcing relationships of dependence without creating structures which encourage independence. If properly composed, class-based affirmative action, as a transformative strategy, can thwart the systemic racism and systemic classism so prevalent in society.

In the past few years, academic and non-academic authors have questioned the definition of the group of people who are to benefit from affirmative action. It is argued that the focus should shift from race to the individual's socio-economic position in society.⁴⁶¹ Class-based affirmative action quintessentially juxtaposes "those born with unearned economic advantage...against those born into unearned economic disadvantage."⁴⁶² This approach could remedy the problems of under-

⁴⁶¹ See for example D Herman *The Naked Emperor: Why Affirmative Action Failed* (2007) 82-87; R Kahlenberg "Class-based affirmative action" (1996) 84 *California Law Review* 1037-1099; D Malamud "Class-based affirmative action: lessons and caveats" (1996) Vol 74 *Texas Law Review* 1847-1900; JW Young and PM Johnson "The impact of an SES-based model on a college's undergraduate admissions outcomes" (2004) Vol 45 *Research in Higher Education* 777-797; CD Cunningham and NRM Madhava Menon "Race, class, caste...? Rethinking affirmative action" (1999) Vol 97 *Michigan Law Review* 1296-1310; C Cimino "Class-based preferences in affirmative action programs after Miller v Johnson: a race-neutral option, or subterfuge?" (1997) Vol 64 *The University of Chicago Law Review* 1289-1310.

⁴⁶² R Kahlenberg "Class-based affirmative action" (1996) 84 *California Law Review* 1037 1063.

inclusiveness and over-inclusiveness associated with race-based affirmative action. Rather than simply equating race with socio-economic class, it would focus on the actual material deprivation and real-life contexts of individuals. In this respect, it resonates closely with the idea of substantive equality.⁴⁶³

The aim of this chapter is to examine the potential of a class-based approach to address the current problems of race-based affirmative action. It will commence with a brief outline of the disadvantages of race-based affirmative action and will then investigate to what extent a class-based affirmative action policy is able to overcome them. I will briefly discuss the justifications, goals and advantages of a class-based affirmative action policy, as well as some practical considerations for the definition of the class of beneficiaries. This will be followed by the expected limits of such a system. The chapter concludes with an inquiry into possible alternative approaches to the defined class of beneficiaries so as to adequately bring congruence to the aim of affirmative action and its consequences.

5.2 Problems with race-based affirmative action

Chapter one set out the main problems associated with affirmative action, most of which are the result of an (arguably) ill-defined group of beneficiaries. To briefly recap, the problems are as follows:

The first issue identified was that affirmative action beneficiaries are stigmatised by preferential treatment.⁴⁶⁴ This in turn has been said to foster feelings of inferiority and a lowering of self-esteem, as well as animosity and resentment from opposing groups who seem unconvinced that the appointees are capable to perform the allocated tasks.⁴⁶⁵ This leads us to the second unintended outcome of the race-based policy, which is the perpetuation of racial division and racial identities as this

⁴⁶³ R Roach "Class-based affirmative action" (2003) *Black Issues in Higher Education* 22-26.

⁴⁶⁴ J Rabe *Equality, Affirmative Action, and Justice* (2001) 352; W Feinberg "Affirmative action and beyond: a case for a backward-looking gender- and race-based policy (1996) Vol 97 No 3 *Teachers College Record* 362 375.

⁴⁶⁵ O Dupper "Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States" (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 89 127; S Friedman and Z Erasmus "Counting on 'race': what the surveys say (and do not say) about 'race' and redress" in A Habib and K Bentley *Racial redress and citizenship in South Africa* (2008) 33-74; K Bentley and A Habib "An alternative framework for redress and citizenship" in A Habib and K Bentley *Racial redress and citizenship in South Africa* (2008) 344.

further sensitises society to the issue of race.⁴⁶⁶ Habib and Bentley state that this has also “inhibited the emergence of conditions for the realisation of a cosmopolitan citizenship.”⁴⁶⁷ What this line of reasoning also refers to is the fact that there are certain consequences to the usage of race as method of differentiation. According to the social sciences, race is the means through which we perceive ourselves and fellow human beings, as well as being a discourse that assists us in making sense of the relationships we form with others.⁴⁶⁸ For the most part, its social construction remains hidden from the physical world and its existence is largely accepted as a given reality, although some cameo appearances are made in the advancement of a non-racial ideal. However, race isn’t merely a matter of pigmentation as it is socially constructed and is alive in as much as society values it and uses it to construct and understand its reality. The problem with a fortified racial ideology is that it cements us within a specified racial order which “excludes or suppresses alternatives, other questions that could be raised of the existing order, other visions of the society and its future, other ways of understanding or structuring social relations, other policy proposals.”⁴⁶⁹ We are therefore warned when using “apartheid’s racial grid in the pursuit of redress”.⁴⁷⁰ Given our history, it has become exceedingly difficult to differentiate between race consciousness, and racial stereotypes and race biases. This is not to mean that race as an indicator of disadvantage should be ignored completely, for to do so could perpetuate existing inequalities associated with race because the various racial groups as they stand today came to be as a result of “the original unjust practice of racial discrimination” during the apartheid regime.⁴⁷¹

⁴⁶⁶ Rabe *Equality, Affirmative Action, and Justice* (2001) 353.

⁴⁶⁷ K Bentley and A Habib “Racial redress, national identity and citizenship in post-apartheid South Africa” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 24. For the importance of advancing the notion of “cosmopolitan citizenship” in South Africa, as envisaged by Chapter 2 of the Constitution, 1996, see G Modisha “Affirmative action and cosmopolitan citizenship in South Africa” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 153-178.

⁴⁶⁸ G Mare “Race counts in contemporary South Africa: ‘an illusion of ordinariness’” (2001) Vol 47 *Transformation* 75 77.

⁴⁶⁹ G Mare “Race counts in contemporary South Africa: ‘an illusion of ordinariness’” (2001) Vol 47 *Transformation* 75 79. On the dangers of the usage of race in everyday life, Alexander states that “we also entrench – avoidably – the very racial categories that undermine the possibility of attaining a truly non-racial democratic South Africa” N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture delivered at East-London Campus University of Ford Hare 1 11.

⁴⁷⁰ O Dupper “The beneficiaries of affirmative action” in O Dupper and C Garbers (eds) *Equality In The Workplace: Reflections From South Africa And Beyond* (2009) 305.

⁴⁷¹ O Dupper “The beneficiaries of affirmative action” in O Dupper And C Garbers (eds) *Equality In The Workplace: Reflections From South Africa And Beyond* (2009) 307.

Other problems that have been identified in previous chapters include reduced efficiency; innocent victims; a fear of entrenchment of the policy; increased emigration; and infringement upon the freedom of the individual.⁴⁷² The unfortunate result of many of these problems is that there are inevitable resultant “sub-problems”. It has, for instance, been asserted that affirmative action policies have “negatively affected the growth potential of the economy.”⁴⁷³

Rabe also mentions that affirmative action has benefited and harmed the wrong people.⁴⁷⁴ This in part refers to the fortification of the black elite and upper-middle classes, or as Terblanche refers to them, the *aspirant African petit bourgeois*.⁴⁷⁵ One of the reasons for this, as stated by McGregor, is because the “Employment Equity Act does not recognise that members of the designated groups were not equally affected and disadvantaged by apartheid and patriarchy.”⁴⁷⁶ The level of disadvantage that affirmative action should address is the inability of our policies to grant societal members, citizens and non-citizens alike, the prospects of participating on equal footing with each other. By default this would entail increased representivity of black individuals in the upper levels of society, but when this occurs at the expense of and perpetuates the suffering of the least advantaged, it becomes a matter of urgency to re-evaluate and reformulate the policy in order to be to the benefit of all.

⁴⁷² *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T); *Coetzer and Others v Minister of Safety and Security* 2003 (3) SA 368 (LC) 2003 SA; J Rabe *Equality, Affirmative Action, and Justice* (2001) 358; O Dupper “Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States” (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 127; K Bentley and A Habib “Racial redress, national identity and citizenship in post-apartheid South Africa” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 23.

⁴⁷³ S Terblanche *A History of inequality in South Africa 1652-2002* (2002) 27.

⁴⁷⁴ J Rabe *Equality, Affirmative Action, and Justice* (2001) 356; W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy (1996) Vol 97 No 3 *Teachers College Record* 374, 376.

⁴⁷⁵ M Ndletyana “Affirmative action in the public service” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 95-96; S Terblanche *A History of inequality in South Africa 1652-2002* (2002) 27; M McGregor “Categorisation to determine beneficiaries of affirmative action: Advantages and deficiencies” (2005) Vol 46 No 2 *Codicillus* 1 10.

⁴⁷⁶ M McGregor “Categorisation to determine beneficiaries of affirmative action: Advantages and deficiencies” (2005) Vol 46 No 2 *Codicillus* 9. For similar arguments see K Bentley and A Habib “An alternative framework for redress and citizenship” in A Habib and K Bentley *Racial redress and citizenship in South Africa* (2008) 339 and 342.

Lastly, the policy has also been accused of widening the gap between rich and poor, not only inter- racially but intra- racially.⁴⁷⁷ Beset with censure coming from critics, race-based affirmative action is possibly not the most suited answer to the inequalities faced by South Africa today. One way in which to achieve the goals of affirmative action without catering to its disadvantages, is to implement a class-based preferential policy.⁴⁷⁸ The following section will, in its analysis of a class-based system, hopefully suggest a policy more capable of achieving true equality.

5.3 Class-based affirmative action

The inquiry into class-based affirmative action will be framed, in part, by Nancy Fraser's analysis of the relationship between class and status harms, or rather, between maldistribution and misrecognition.⁴⁷⁹ It will also draw upon a second distinction introduced by Fraser, namely the distinction between affirmative and transformative strategies. While affirmative strategies aim to redress disadvantage without addressing its root cause, transformative strategies seek to transform the "underlying generative framework" which caused the inequalities in the first place. It could possibly be argued that class-based affirmative action would be more deeply transformative as it is directly concerned with material deprivation and could have the effect of transforming, rather than affirming, reified racial identities.⁴⁸⁰

The following section will commence with a discussion of certain theoretical aspects of recognition and redistribution associated with issues of affirmative action, and in

⁴⁷⁷ N Alexander "Affirmative action and the perpetuation of racial identities in post-apartheid South Africa" (2006) Lecture delivered at the University of Fort Hare (25 March) 7.

⁴⁷⁸ This is often also referred to as a socio-economic based model. See JW Young and PM Johnson "The impact of an SES-based model on a college's undergraduate admissions outcomes" (2004) Vol 45 No 7 *Research in Higher Education* 777-797.

⁴⁷⁹ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 7.

⁴⁸⁰ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 75. The value of transformative strategies, as opposed to affirmative strategies, is that they are able to "redress status subordination by deconstructing the symbolic opposition that underlie currently institutionalized patterns of cultural value." On the advantages and shortcomings of transformative strategies, see 77-78. See also, on the link between equality and "transformative constitutionalism", C Albertyn "Substantive equality and transformation in South Africa" (2007) Vol 23 *SAJHR* 253 257; C Albertyn and B Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" (1998) Vol 14 *SAJHR* 248 248; and E Van Huyssteen "The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism" (2000) Vol 59:2 *African Studies* 245 257.

particular race-based and class-based affirmative action. Thereafter a discussion of a broad framework for a class-based affirmative action policy will follow which will include the goals and possible strengths of a policy of this nature.

5.3.1 Theoretical aspects of recognition and redistribution

To understand what class-based affirmative action would entail one should start with what is to be understood by “class”. Far from being diminished to a Marxist coordinate of a group’s relation to the means of production, class-studies have developed into a complex map of social relationships.⁴⁸¹ Class issues are confounded by the various levels of disadvantage present in society – which do not always derive from the economy. Kahlenberg uses the example of a “child of a middle-income steel worker ... [being] more advantaged than the child of a single-parent bank teller.”⁴⁸² This illustrates that a middle class existence does not necessarily equip one with all the opportunities needed to succeed.

Nonetheless the philosophers and economists of old have provided valuable insights into an understanding of this subject. Marx provides a constructive account of how to differentiate between classes: “[I]n so far as millions of families live under economic conditions of existence that separate their mode of life, their interests and their culture from those of the other classes, and put them in hostile opposition to the latter, they form a class.”⁴⁸³ More recent literature describes class as “an individual’s position with respect to the central *economic* and *cultural* institutions of society and, in turn, relates that position to the *social resources* available to the individual.”⁴⁸⁴

Perhaps the most useful adaptation of class for the current purposes can be found in the literature of Weber. His congruous writings on classes and status groups are similar to the distinction made by Fraser between class and status orders in society. Weber describes a class as follows:

⁴⁸¹ See C Seron and F Munger “Law and inequality: race, gender...and, of course, class” (1996) Vol 22 *Annu. Rev. Sociol.* 187 188, for the importance of sociolegal research on class.

⁴⁸² R Kahlenberg “Class-based affirmative action” (1996) 84 *California Law Review* 1073.

⁴⁸³ K Marx *The Eighteenth Brumaire of Louis Bonaparte* (1963) 124, as quoted in DJ Friedman “Marx’s perspective on class structure” (1974) Vol 6 No 3 *Polity* 318 321.

⁴⁸⁴ C Seron and F Munger “Law and inequality: race, gender...and, of course, class” (1996) Vol 22 *Annu. Rev. Sociol.* 188 (own emphasis).

“[A] number of people have in common a specific causal component of their life chances, in so far as ... this component is represented exclusively by economic interest in the possession of goods and opportunities for income, and...is represented under the conditions of the commodity or labour markets.”⁴⁸⁵

Status groups, on the other hand, are defined by the extent of their *social honour* and can be identified by the specific *style of life* that they occupy.⁴⁸⁶

For Fraser, the class order is related to socio-economic disadvantage and the exploitation associated with it. The remedies necessary to counter this “requires restructuring the political economy so as to alter the class distribution of benefits and burdens.”⁴⁸⁷ Conversely, the status order concerns itself with issues of recognition and its injustices are rooted in “society’s institutionalized patterns of cultural value.”⁴⁸⁸ Misrecognition is therefore corrected by recognition. I will return to this point in due course.

Central to this chapter is the fact that one cannot adequately address economic redistributive issues which stem from previous racial discrimination, without addressing the concomitant recognition and status issues as well. The denial of the recognition of black groups and black individuality as valued societal assets is equally destructive of the ability to realise their full potential as is the lack of economic resources. Therefore, any affirmative action policy, whether class-based or race-based, should be crafted in such manner as to take heed of the easily obscured obstacles that impede participation and healthy competition.

Class-based affirmative action lends itself to easier justification than race based policies. To avoid any “inherently unfair” attacks from critics, this policy must prove its worth in terms of utilitarian values and fairness.⁴⁸⁹ This means that in view of the apparent failure of race-based affirmative action, a class-based affirmative action policy must show that it is firstly to the benefit of all members of society, and

⁴⁸⁵ HH Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (1948) 181. I concede that there have been many objections to the relevance of distinguishing class from its relation to the market; however this is not an integral question within this study and will not be discussed.

⁴⁸⁶ HH Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (1948) 186-188; 405.

⁴⁸⁷ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 17.

⁴⁸⁸ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 17.

⁴⁸⁹ RH Fallon “Affirmative action based on economic disadvantage” (1995-1996) 43 *UCLA L. Rev.* 1913 1924.

secondly, that it operates in the name of justice.⁴⁹⁰ Not only was this an excessive abuse of the policy, but it has also exacerbated the effects of poverty in South Africa by not focusing on those most in need.⁴⁹¹

One of the most primary justifications for class-based affirmative action is that it “directly compensates those who have had to overcome financial obstacles”.⁴⁹² This attractive feature nullifies the fear of entrenching an affluent elite class of black people while also exerting its energy into the lower classes of society.⁴⁹³ Furthermore, Kahlenberg posits that this policy has the advantage of being morally, politically and legally justifiable.⁴⁹⁴ Firstly, from a moral perspective, those who benefit from a class-based policy would be justly entitled to it as they would have needed it most. In this way it “indirectly [compensates] for past discrimination...”⁴⁹⁵ With regard to the previous apartheid regime and its extreme racial discrimination, class-based affirmative action with a group of beneficiaries defined in terms of socio-economic status will be able to improve on addressing discrimination as “socioeconomic attainment or lack thereof, is the by-product of that discrimination.”⁴⁹⁶

Furthermore, class-based affirmative action provides a stronger case for equality of opportunity.⁴⁹⁷ The aim of this is “to perfect the meritocracy rather than subvert it.”⁴⁹⁸ This is compatible with the value of substantive equality as it subverts the social barriers constructed in the institutional framework that selectively impede on some and benefit others. As Kleven states with reference to systemic disadvantage, “opportunities to succeed in life are unequally distributed along class and racial lines,

⁴⁹⁰ RH Fallon “Affirmative action based on economic disadvantage” (1995-1996) 43 *UCLA L. Rev.* 1924.

⁴⁹¹ Fallon identifies four types of disadvantage that those in poverty typically face. These are “obstacles to physical health and development”, “impediments to intellectual development”, disadvantages in the development of character and work habits” and difficulties in a pursuit of higher education and employment. RH Fallon “Affirmative action based on economic disadvantage” (1995-1996) 43 *UCLA L. Rev.* 1924. Although affirmative action should not in its entirety be interpreted as a policy solely geared at poverty alleviation, poverty alleviation might still be an inevitable consequence within a well-coordinated framework.

⁴⁹² T Yin “A carbolic smoke ball for the nineties: class-based affirmative action” 31 *Loyola of Los Angeles Law Review* (1997-1998) 213 226; R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1060-1061.

⁴⁹³ T Yin “A carbolic smoke ball for the nineties: class-based affirmative action” 31 *Loyola of Los Angeles Law Review* (1997-1998) 225.

⁴⁹⁴ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1060-1065.

⁴⁹⁵ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1061.

⁴⁹⁶ EM Bernal, AF Cabrera and PT Terenzini “Class-based affirmative action policies: a viable alternative to race-based programs?” (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 1 9.

⁴⁹⁷ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1060-1061.

⁴⁹⁸ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1061.

and [if not remedied]... society's institutions produce and perpetuate this class/race hierarchy."⁴⁹⁹ What this translates to is that depending on which class or race one belongs to, opportunities are largely predetermined. But with this knowledge, it is possible to identify the structures within this underlying framework that enable this deprivation and to remedy this injustice.⁵⁰⁰

Secondly, a class-based policy can be justified from a political perspective as it directs its benefits to a class of individuals who would more likely be considered to be deserving of affirmative action benefits or a boost in socio-economic resources, than say a wealthy black individual who attended private schools. This is significant because the race-based policy currently applied in South Africa does not have the same support and provides for far fewer chances of racial integration. To prevent the ideal of egalitarianism from merely being a *pie in the sky* dream, policies should be fashioned to be "politically productive" so that they do not entrench racial segregation.⁵⁰¹ Lastly, class-based preferences are legally viable because they provide a less objectionable method to attain racial diversity.⁵⁰²

As noted in previous chapters, the Constitutional Court has made it clear that it interprets section 9 of the Constitution in the language of substantive equality. Consequently this entails an intricate level of analysis when dealing with issues of equality due to its multidimensional nature. Substantive equality is sensitive to the distributive-based socio-economic issues in society, as well as the status-based

⁴⁹⁹ T Kleven "Systemic classism, systemic racism: are social and racial justice achievable in the United States?" (2009) *Connecticut Public Interest Law Journal* 207 207.

⁵⁰⁰ The subversion of an underlying generative framework corresponds with Fraser's notion of transformative strategies.

⁵⁰¹ R Kahlenberg. "Class-based Affirmative Action" (1996) 84 *California Law Review* 1063. This applies to state policies as well as government actions as those role players represent the state. A current example of government actions enforcing race consciousness is the actions of the ANCYL (African National Congress Youth League) and their public chants of apartheid songs. Not only are these songs reminiscent of a dark time in South African history, but their content is racially offensive to white South Africans. These songs have been defended as freedom of speech and as valued songs of "the struggle". The lyrics to these songs include phrases such as '*Dubula ama-Bhunu baya raypha*' ("Shoot the farmers, they are rapists") Legalbrief Today "Race-hate charge laid against Malema" 11-3-2010; SAPA "ANC backtracks on Malema" NEWS24 2010-03-10.

⁵⁰² R Kahlenberg. "Class-based Affirmative Action" (1996) 84 *California Law Review* 1064. Within the American legal ambit of affirmative action, race-based measures are considered to be a suspect category and will only pass constitutional muster if they are cleared under the standard of strict scrutiny. Class-based affirmative action undercuts this allegation by not highlighting any arbitrary group, but precisely those who any reasonable individual would acknowledge deserve upliftment.

recognition issues within society.⁵⁰³ This two-tiered investigation does not happen separately but simultaneously. Issues of recognition cannot be remedied in isolation because “[s]tatus-based inequalities both cause and are reinforced by socio-economic disadvantage.”⁵⁰⁴ Similarly, one should be mindful when implementing new redistributive policies as these run the danger of perpetuating status-based inequalities.⁵⁰⁵ Fraser therefore surmises that inequalities such as these are of a multi-dimensional nature. She illustrates this point by stating that the injustices that are rooted in gender inequalities can simultaneously cover the recognition and redistributive spheres but that “neither of these injustices is an indirect effect of the other ... [and] both are primary and co-original.”⁵⁰⁶ For example, women face various obstacles maintaining economic independence in “higher-paid, male-dominated manufacturing and professional occupations”, especially in professions which are traditionally male orientated such as engineering or even medicine.⁵⁰⁷ Likewise, the status-based misrecognition related to gender debases femininity to the realm of the negative by dissociating it with the “strong” “male” norm. For example, statements such as “you throw like a girl” or “stop acting like a girl” are intended to liken the acts of the respondent with a pitiful state by comparing such actions with those of generally known female behaviour. This androcentric reality creates the situation where women are expected to “man up” in order to be respected in everyday life, and especially in professional occupations. To do otherwise might entail facing various gender-based injustices, such as:

“sexual assault and domestic violence; trivializing, objectifying, and demeaning stereotypical depictions in the media; harassment and disparagement in everyday life; exclusion or marginalization in public spheres and deliberative bodies; and denial of the full rights and equal protections of citizenship.”⁵⁰⁸

⁵⁰³ See S Fredman “Providing equality: substantive equality and the positive duty to provide” (2005) *SAJHR* 163-190; S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 215-234.

⁵⁰⁴ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 215 225.

⁵⁰⁵ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 225.

⁵⁰⁶ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 19.

⁵⁰⁷ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 20.

⁵⁰⁸ N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 21.

Substantive equality could be better suited to a class-based affirmative action policy than a race-based policy because in this framework it is more likely to reach its aim of “break[ing] the cycle of disadvantage associated with membership of status-groups” because reparations made by using race as the sole criteria are likely to reinforce racial biases and inequalities rather than negate the differences between various races.⁵⁰⁹ Within the context of this chapter, it refers to the attached burdens of a structure based on systemic-racism. The interrelationship between systemic-classism and systemic-racism on the one hand and redistribution and recognition on the other can be explained as follows: Whereas systemic-classism and systemic-racism (synonymous to class and status issues) are the indicators of an ill-functioning political structure, proper application of redistribution and recognition are needed as radical transformative strategies used to guide its reform. Systemic-classism and systemic-racism can be defined as “the arrangement of society’s institutions so as to deny equal opportunity to succeed in life on account of class status or ethnicity.”⁵¹⁰

Fraser’s two-dimensional approach, addressing recognition and redistribution issues concurrently, corresponds with Feinberg’s *strategy of simultaneity*.⁵¹¹ With the aim of increasing representation of all groups in different spheres of society, the strategy advocates a concerted effort of creating employment and educational opportunities while simultaneously advancing motivation.⁵¹² The interplay between opportunities and motivation entails that the more opportunities a group is given, the more motivation they will have to strive for more.⁵¹³ Feinberg states the following:

“Simultaneity says that certain kinds of roadblocks are rooted deep in historical and cultural practices and that special attempts must be made to remove them. It is a way to break those instances of underrepresentation that are the result of systematic and enforced past discrimination that have resulted in present cultural formations that continue to discriminate and reinforce reduced social standing.”⁵¹⁴

⁵⁰⁹ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 226.

⁵¹⁰ T Kleven “Systemic classism, systemic racism: are social and racial justice achievable in the United States” (2009) 8 *Connecticut Public Interest Law Journal* 223.

⁵¹¹ W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy” (1996) Vol 97 No 3 *Teachers College Record* 378-379.

⁵¹² W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy” (1996) Vol 97 Nr 3 *Teachers College Record* 378.

⁵¹³ W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy” (1996) Vol 97 Nr 3 *Teachers College Record* 378.

⁵¹⁴ W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy” (1996) Vol 97 Nr 3 *Teachers College Record* 379.

Without a class-based affirmative action policy it is unlikely that the current race-based policy will have the ability to address the *roadblocks* referred to above, which is the entrenched systemic-classism and systemic-racism so prevalent in society.⁵¹⁵

Currently race-based affirmative action measures address status and class disadvantage by “attaching socio-economic benefits to those disadvantaged by status” i.e. race.⁵¹⁶ Therefore, race-based affirmative action measures provide key educational and employment opportunities to those previously disadvantaged by virtue of their race. Within the realm of recognition, role models facilitate status elevation by “piercing stereotypes and giving [excluded groups] the self confidence to move into non-traditional positions.”⁵¹⁷ Cultural groups that were previously relegated to performing menial functions such as mining or domestic employment are now in a position where preferential treatment could ensure that they ascend to higher employment positions. Fredman warns, however, that there are a number of risks associated with addressing disadvantage in this way. Firstly, race-based affirmative action policies run the risk of perpetuating the already destructive stereotypes associated with certain status groups.⁵¹⁸ For example, when appointments are made that lead to a drop in the current state of efficiency in the given employment sphere, it damages (or possibly reinforces) the overall perception of the group that was benefitted. Secondly, as race-based measures benefit members of certain status groups, we are likely to assume that the same members of those groups would continually benefit. This would render the policy over- and under-inclusive as a small group of individuals would dominate the playing field so to speak, whereas a large portion of the previously disadvantaged group would not have access to the same benefits.⁵¹⁹ Without any special limitations that would prevent this situation, this would inevitably continue. Thirdly, race-based affirmative action policies can too readily be consigned with the status of “affirmative strategies”, as opposed to a more desired strategy with transformative potential, due to its

⁵¹⁵ What may begin as a cultural and educational difference results in an economic difference that in turn reinforces the ways in which women, for example, are treated both culturally and educationally.

⁵¹⁶ 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) 24

⁵¹⁷ 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) 36.

⁵¹⁸ 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) 24.

⁵¹⁹ 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) 24.

inability to expedite actual structural change instead of mere surface reallocations within visible areas.⁵²⁰

Class-based affirmative action, on the other hand, grants socio-economic benefits to the socio-economically marginalised. This means that issues of redistribution are addressed with a clear redistributive agenda. But that is not where the exercise ends. Due to the high correlation between class and status subordination in present day South Africa, this strategy will also have obvious status benefits. Issues of misrecognition are therefore addressed in a very similar manner as would race-based affirmative action, the caveat being that those benefitting are in fact previously disadvantaged, whether as a result of the past discriminatory regime, or for pure socio-economic reasons. However, the latter would be the case in far fewer instances. Redistributive issues would correspondingly be addressed because measures are aimed at breaking the class barriers within society and in so doing act as transformative strategies that can overcome structural inequality.

5.3.2. Broad framework for a class-based affirmative action policy

The goals of a carefully planned class-based affirmative action policy are diverse. In the first instance it is to improve on all the shortcomings of race-based affirmative action and not merely to perpetuate its stereotypes and burdens. Class-based affirmative action should be used as a transformative mechanism in the light of substantive equality and section 9 of the Constitution. Areas where this has an effect for example include legislation; constitutional amendments and constitutional reinterpretations.⁵²¹ However, policy-makers should be wary when allocating roles and resources to various groups. The point of departure should be that the goal is not to entrench racial stereotypes but to allow individuals within groups to choose their own distinct identities. To date the categories of beneficiaries identified within the Employment Equity Act have done nothing but to undermine “national unity and

⁵²⁰ 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) 24. On the distinction between affirmative strategies and transformative strategies see N Fraser “Social justice in the age of identity politics: redistribution, recognition, and participation” in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 74-75.

⁵²¹ T Kleven “Systemic classism, systemic racism: are social and racial justice achievable in the United States” (2009) 8 *Connecticut Public Interest Law Journal* 238.

social integration and cohesion”.⁵²² This does not mean that all forms of organised group identities are wrong, only that it is wrong insofar as the differentiation between groups amounts to a form of hierarchy. Secondly, organised group identities are also damaging when negative stereotypes are associated with individual groups. Alexander notes that “[t]he basic issue that we must grapple with is the optimal relationship between our national (South African) identity and all manner of sub-national identities.”⁵²³ Furthermore, just as individual group identities are neither favourable nor unfavourable, so too is the dominant identity of a society open to scrutiny. The principle of recognition rejects any policy that requires an individual to “conform to the dominant norm.”⁵²⁴ Fredman values the notion of individual identities as it “enriches and strengthens community ties.”⁵²⁵ Individual identities should therefore be endorsed for as long as the practice serves as a way to promote participatory parity and allows the individual to become a member of society through individual expression.

Unlike class-based policies in the United States, a South African class-based affirmative action policy will face fewer criticisms with regards to the size of the group receiving benefits. A number of studies in the United States have found that a class-based affirmative action policy would neither suit the aims of affirmative action, nor would it result in adequate representation of other races and cultures.⁵²⁶ This is purely for the reason that the majority of individuals in the United States are white and therefore there are a larger number of white individuals (than Black, Latino or Hispanic people for example) facing poor socio-economic conditions. South Africa, on the other hand, has the (dis)advantage of having a strong correlation between

⁵²² N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture originally delivered at the University of Fort Hare (25 March) 12. It can also be argued that it is not only legislation and state policies which reinforce racial stereotypes, but also the actions of state officials. See note 37 above in reference to the anthems sung by members of the ANCYL (African National Congress Youth League).

⁵²³ N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture originally delivered at the University of Fort Hare (25 March) 13.

⁵²⁴ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 226.

⁵²⁵ N Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 226.

⁵²⁶ EM Bernal, AF Cabrera and PT Terenzini “Class-based affirmative action policies: a viable alternative to race-based programs?” (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 1 12; R Roach “Class-based affirmative action: battle over race-conscious approaches pushes idea to the surface – Affirmative Action Watch” (2003) *Black Issues in Higher Education* 22 23; JW Young and PM Johnson “The impact of an SES-based model on a college’s undergraduate admissions outcomes” (2004) Vol 45 *Research in Higher Education* 777 779.

race and people with low socio-economic status.⁵²⁷ In 2008, 18 673 551 of the 19 633 316 people living in relative poverty were black, which makes up a total of 95% of all the poverty-stricken individuals in South Africa at that time.⁵²⁸ A class-based affirmative action policy will therefore have a majority of black beneficiaries. With such a large portion of people being disadvantaged, it is essential to tailor any state policy to their needs.

There are a range of advantages related to class-based affirmative action. These include the following: to start with, it is a more suitable vehicle to provide equality of opportunity.⁵²⁹ The reason for this is twofold. Firstly, it will affect a larger portion of the black group in South Africa as most of them are predominantly economically disadvantaged and secondly, it will also benefit a smaller portion of white, coloured and Indian members of society.⁵³⁰ In this way the policy “creates natural, color-blind integration” while at the same time compensating victims for previous discriminatory harms and this results in the perception that there are no real innocent victims because the sacrifices made are clearly to the benefit of all members of society.⁵³¹ As this policy lends itself to easier acceptance by all members of society, and not only that of the beneficiaries, it avoids the “legal and moral barriers” that currently surround affirmative action.⁵³²

⁵²⁷ *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC) par 85, N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture originally delivered at the University of Fort Hare (25 March) 10 (on the overlap between “class” and “race”).

⁵²⁸ T Dimant and M Roodt *Employment and incomes online: South Africa Survey 2008/2009* (2009) 111. A study done by the Project for Statistics on Living Standards and Development (PSLSD) in 1994 found that 94,7% of the South African population were black and that 64,9% of those individuals were poor. It is unclear at this stage what measurement of poverty was used during the study. DF Neff “Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis” (2007) Vol 80 *Social Indicators Research* 313 321.

⁵²⁹ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1060; JW Young and PM Johnson “The impact of an SES-based model on a college’s undergraduate admissions outcomes” (2004) Vol 45 No 7 *Research in Higher Education* 781.

⁵³⁰ K Bentley and A Habib “An alternative framework for redress and citizenship” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 347.

⁵³¹ EM Bernal, AF Cabrera and PT Terenzini “Class-based affirmative action policies: a viable alternative to race-based programs?” (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 6; R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1060; C Cimino “Class-based preferences in affirmative action programs after *Miller v Johnson*: a race-neutral option, or subterfuge?” (1997) Vol 64 *The University of Chicago Law Review* 1289 1290 at n 6.

⁵³² R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1064; EM Bernal, AF Cabrera and PT Terenzini “Class-based affirmative action policies: a viable alternative to race-based programs?” (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 6; R Roach “Class-based affirmative action: battle over race-conscious approaches

Lastly, a class-based affirmative action policy also has the advantage of not perpetuating racial stereotypes due to the focus on socio-economic disadvantage instead of race.⁵³³

There are various ways in which to construct a class-based affirmative action policy. The individual terms and conditions of such a policy should ideally be determined democratically. This chapter will, however, aim to provide a broad framework. Kleven notes that any “fundamental systemic reform” requires the presence of three pivotal factors.⁵³⁴ These are:

- 1) “a critical historic moment that calls for reform;
- 2) a reform program that develops as the historic moment unfolds; and
- 3) a mass movement of some type that mobilizes people to struggle for reform.”⁵³⁵

When applied to the South African example it is unclear what would constitute a “critical historic moment”. Although many South Africans are dissatisfied with their socio-economic conditions, they nevertheless still have greater representivity within government than before the democratic era. However, this does not mean that their government is as responsive to their needs as it should be. The “reform program” in question, namely class-based affirmative action, will only occur if and when the majority of the working class recognise the need for reform. Alexander agrees that in the South African example, black people have the “civic power to insist on new ways of sharing whatever revenue the state can raise from the productive activities of all

pushes idea to the surface – Affirmative Action Watch” (2003) *Black Issues in Higher Education* 23; JW Young and PM Johnson “The impact of an SES-based model on a college’s undergraduate admissions outcomes” (2004) Vol 45 No 7 *Research in Higher Education* 781. Kahlenberg’s explanation that class-based affirmative action can “provide a bridge to a color-blind future” is reminiscent of Mureinik’s bridge metaphor in which he compares the “deeply divided society” of the past with “a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans”. E Mureinik “A bridge to where? Introducing the interim bill of rights” (1994) Vol 31 *SAJHR* 31 31.

⁵³³ N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture originally delivered at the University of Fort Hare (25 March) 11 (on the benefits of the elimination of racial classification); K Bentley and A Habib “An alternative framework for redress and citizenship” in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 347.

⁵³⁴ T Kleven “Systemic classism, systemic racism: are social and racial justice achievable in the United States” (2009) 8 *Connecticut Public Interest Law Journal* 239.

⁵³⁵ T Kleven “Systemic classism, systemic racism: are social and racial justice achievable in the United States” (2009) 8 *Connecticut Public Interest Law Journal* 239.

the citizens of the country...”⁵³⁶ The allure of major representation in government, compared to the highly undemocratic apartheid regime, might last longer than is healthy. In the meantime, public services are not what they should be. Whatever we decide a reform program to look like, it is vital that it be capable of addressing maldistribution and misrecognition simultaneously as we have noted the stark overlap between race and class.⁵³⁷

There are various ways in which a class-based system can be implemented. For example, the policy can operate on a plus system where the level of one’s socio-economic disadvantage is quantitatively measured according to certain parameters, or, the policy can make use of a set-aside program that allocates a fixed number of positions to disadvantaged persons and thereby ensuring their representation.⁵³⁸ Cimino warns that regardless of how the policy is structured, it must not merely operate as a “subterfuge” for the individuals who oppose affirmative action.⁵³⁹ Instead, it should be “motivated purely by socio-economic concerns.”⁵⁴⁰

Kahlenberg, one of the leading class-based affirmative action supporters, states that there are three important considerations when deciding on a class-based policy. Firstly, all decisions must be based on widening equality of opportunity.⁵⁴¹ Not only will this confer greater legitimacy and acceptability to the system, but it will also increase the pool of beneficiaries. Secondly, the system must be capable of efficient administration.⁵⁴² Having a structure that is overly complicated will merely exasperate officials and policy-makers will be forced to resort back to the familiar race-based policy. Affirmative action operates in various spheres, such as education, employment and public procurement. The optimal state of affairs will be if

⁵³⁶ N Alexander “Affirmative action and the perpetuation of racial identities in post-apartheid South Africa” (2006) Lecture originally delivered at the University of Fort Hare (25 March) 12.

⁵³⁷ T Kleven “Systemic classism, systemic racism: are social and racial justice achievable in the United States” (2009) 8 *Connecticut Public Interest Law Journal* 252. Also see W Feinberg “Affirmative action and beyond: a case for a backward-looking gender- and race-based policy” (1996) Vol 97 Nr 3 *Teachers College Record* 378, on the strategy of simultaneity.

⁵³⁸ T Yin “A carbolic smoke ball for the nineties: class-based affirmative action” (1997-1998) 31 *Loyola of Los Angeles Law Review* 228.

⁵³⁹ C Cimino “Class-based preferences in affirmative action programs after *Miller v Johnson*: a race-neutral option, or subterfuge?” (1997) Vol 64 *The University of Chicago Law Review* 1292 n 13.

⁵⁴⁰ C Cimino “Class-based preferences in affirmative action programs after *Miller v Johnson*: a race-neutral option, or subterfuge?” (1997) Vol 64 *The University of Chicago Law Review* 1292 n 13.

⁵⁴¹ R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1066.

⁵⁴² R Kahlenberg “Class-based Affirmative Action” (1996) 84 *California Law Review* 1066.

a policy can be constructed in such a way that it be able to function on all levels. Kahlenberg's third consideration is that the policy should be able to function within a republican form of government.⁵⁴³ In the South African case this means that it should be a democratically decided sound policy that can be adopted into constitutionally compatible legislation.

Defining the beneficiaries is not as simple as it might seem from the above discussion. There are various indicators of poverty that can be considered when drafting the policy. It is important, however, that the indicators chosen be relevant to the goals of affirmative action. In the previous chapters it was stated that the main goals of affirmative action are primarily to compensate victims for previous discriminatory practices and secondly to use a remedial policy to facilitate the creation of an egalitarian society grounded in democratic ideals. One might want to consider an array of factors such as language; geographic location or household income which are likely to be indicators of disadvantage based on previous discriminatory practices. It is important, however, that there be a connection between the indicators of disadvantage and the affirmative action goals.

According to Kahlenberg's sophisticated definition for socio-economic class, one should factor in the following variables: income;⁵⁴⁴ education; wealth; schooling opportunities; neighbourhood influences;⁵⁴⁵ and family structure, which includes parental education, parental occupation and family income.⁵⁴⁶ Using these multidimensional variables in a calculated system could possibly address the recognition and redistribution aspects of status harms and economic disadvantage. Sander warns that in the absence of a verification program, individuals might be likely

⁵⁴³ R Kahlenberg "Class-based Affirmative Action" (1996) 84 *California Law Review* 1066.

⁵⁴⁴ Depending on the situation in question, the income variable would either refer to the income of parents (for example for educational purposes), or to the current income of the individual (such as the income of applicants in the employment sector). Similar considerations are made for the other variables mentioned.

⁵⁴⁵ RH Sander "Experimenting with class-based affirmative action" (1997) Vol 47 No 4 *Journal of Legal Education* 472 476-478. Sander lists three advantages of taking an applicant's neighbourhood background into account. Firstly, it has as much legitimacy in terms of disadvantage as does "family hardships", secondly, participants have in the past more readily disclosed information of this nature and it is therefore a practical measure. Lastly, this category is partial to groups who are largely underrepresented when selection processes favour academic excellence.

⁵⁴⁶ R Kahlenberg "Class-based Affirmative Action" (1996) 84 *California Law Review* 1078-1083; EM Bernal, AF Cabrera and PT Terenzini "Class-based affirmative action policies: a viable alternative to race-based programs?" (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 9. Certain datasets also indicate that one should consider items in the home to determine socio-economic status.

to circumvent the policy measures in order to gain preference.⁵⁴⁷ Punitive measures should therefore be implemented should this occur.

This thought experiment has so far illustrated that class-based affirmative action has the potential to address the current pitfalls of race-based affirmative action. Unfortunately, any “prodigious” solution invariably has its drawbacks.

5.4 Limits/critique of class-based affirmative action

Several foreseen and unforeseen problems occur as soon as one considers the implementation of class-based affirmative action. Malamud explicitly rejects this policy on several grounds. Firstly, her *principle of the return of the repressed* states that some variables, such as social capital, that inevitably influence our level of economic disadvantage are harder to measure than purely simple indicators (for example family income).⁵⁴⁸ Therefore the group of people identified as economically disadvantaged is not a true representation of reality.⁵⁴⁹

The second critique, entitled *the principle of the top of the bottom* and *the principle of the close swap* entails that there is a virtual exchange of ranking where individuals who were previously in the lowest ranking of a privileged class are now ranked at the top of the most disadvantaged class which deems them fit as class-based affirmative beneficiaries.⁵⁵⁰ This *cosmetic disadvantage* allows them to benefit from affirmative action policies where they previously, under a race-based affirmative action scheme, would not have.⁵⁵¹ As Malamud states, “affirmative action programs tend to benefit the best-off among those who have been deemed sufficiently disadvantaged to be

⁵⁴⁷ RH Sander “Experimenting with class-based affirmative action” (1997) Vol 47 No 4 *Journal of Legal Education* 481.

⁵⁴⁸ DC Malamud “Assessing class-based affirmative action” (1997) Vol 47 *Journal of Legal Education* 452 457-458; 460.

⁵⁴⁹ RH Sander “Experimenting with class-based affirmative action” (1997) Vol 47 No 4 *Journal of Legal Education* 499-500. Sander explains that the group of class-based affirmative action beneficiaries will be “atypical of the group” and they will receive a disproportionate share of the benefits at the expense of those who are more deserving.

⁵⁵⁰ DC Malamud “Assessing class-based affirmative action” (1997) Vol 47 *Journal of Legal Education* 458; RH Sander “Experimenting with class-based affirmative action” (1997) Vol 47 No 4 *Journal of Legal Education* 500-501.

⁵⁵¹ RH Sander “Experimenting with class-based affirmative action” (1997) Vol 47 No 4 *Journal of Legal Education* 500.

eligible for affirmative action.”⁵⁵² This critique would not hold much standing as race-based policies are generally critiqued for having a similar effect where the most affluent individuals of the identified racial groups are generally the beneficiaries.

Another very serious consideration is whether class-based affirmative action is capable of benefitting the individuals living in very serious poverty-stricken conditions.⁵⁵³ A certain level of qualification is generally needed when applying for educational or occupational opportunities and the reality in South Africa is that such a large portion of the “least advantaged” group are so far behind that they would not meet the mandatory requirements. This once again has a very real effect on the stigma attached to group membership. Should the standards be lowered, they would inevitably “question their own abilities, much the same way that racial minorities supposedly question themselves.”⁵⁵⁴ Inasmuch as socio-economic status is not as palpable a variant as race, beneficiaries should not experience as much external stigma as with race-based policies. This, however, will not necessarily be the case in South Africa as there is a very clear and marked correlation between race and socio-economic standing and, therefore, one can expect the contemporary external stigma of the current race-based policy to persist.⁵⁵⁵

One major obstacle for class-based affirmative action comes into play when defining the range for socio-economic disadvantage. The aim of this project is not to explore this in too much detail. Suffice it to say that the chosen method of defining the class of beneficiaries will determine whether the policy receives public support or not. As

⁵⁵² DC Malamud “Assessing class-based affirmative action” (1997) Vol 47 *Journal of Legal Education* 458.

⁵⁵³ RH Sander “Experimenting with class-based affirmative action” (1997) Vol 47 No 4 *Journal of Legal Education* 501.

⁵⁵⁴ T Yin “A carbolic smoke ball for the nineties: class-based affirmative action” (1997-1998) 31 *Loyola of Los Angeles Law Review* 254-255.

⁵⁵⁵ For Malamud it is a misconception that there is such a clear correlation between race and socio-economic status. This is an understandable observation in the American context for two given reasons. Firstly, due to a majority of the American population being white, the majority of the “lower class” consists of white people and not the more disadvantaged racial minorities. Secondly, having been disadvantaged by not only poverty, but race too, the “bottom of the bottom are thus likely to be underrepresented as beneficiaries of poverty-based affirmative action in comparison with their proportion among the poor.” DC Malamud “Assessing class-based affirmative action” (1997) Vol 47 *Journal of Legal Education* 465. This is a very real concern as it has been empirically proven that policies aimed at individuals from low socio-economic backgrounds will benefit fewer black (students) than race-based policies. Bernal *et al* agrees that due to this lack of correlation between race and socio-economic status, class-based affirmative action is unlikely to produce the racial diversity it seeks to achieve. EM Bernal, AF Cabrera and PT Terenzini “Class-based affirmative action policies: a viable alternative to race-based programs?” (1999) Paper presented at the Annual Meeting of the Association for the Study of Higher Education 14.

stated by Weiss, the implementation of class-based affirmative action will be challenging if “alternative definitions of disadvantage result in very different pools of eligible applicants.”⁵⁵⁶

5.5 Possible alternatives?

Given that no clear research has been done on a fitting class-based affirmative action strategy for the South African reality, it might prove valuable to consider other alternatives. One of these, albeit similarly unexplored in this field, is Sen’s Capability Approach. The reason why this approach is chosen lies in its ability to be applied to individual circumstances, depending on the society in question. Different societies have different levels of inequalities and solutions should be sought accordingly.

Largely influenced by Rawls, the capability approach holds that institutional support and social policies, as well as the “evaluation of well-being, inequality, poverty, and justice” should be orientated in such a way that individuals have the ability to live the life and reach the goals they seek to achieve.⁵⁵⁷ As stated by Clark, “neither opulence...nor utility...constitute or adequately represent human well-being and deprivation”, which makes it clear that one’s achieved happiness does not depend explicitly on monetary valuations, but on the freedoms available in attaining this state, if so chosen.⁵⁵⁸ Sen’s theory consists of various elements, which include

⁵⁵⁶ JA Weiss “Race-based versus class-based affirmative action in college admissions” (1998) Vol 17 No 1 *Journal of Policy Analysis and Management* 94 103. See also DC Malamud “Class-based affirmative action: lessons and caveats” (1996) Vol 74 *Texas Law Review* 1847 1860-1895 on the difficulties of measuring economic inequality.

⁵⁵⁷ DA Clark “The Capability Approach: Its Development, Critiques and Recent Advances” (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 1 2; I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) 10(4) *Constellations* 538 543. However, Sen’s capability approach also explicitly distances itself from Rawlsian literature, contending that primary goods are not to be the principal index for measuring equality. Rather, primary goods should be considered as “merely means to other things, in particular freedom.” A reading of the capability approach would illustrate that justice, then, should be judged in the light of the “opportunity to fulfil ends and the substantive freedom to achieve those reasoned ends.” A Sen *The idea of justice* (2009) 234.

⁵⁵⁸ In illustration of this point, research has shown that the Ndebele group, who attained an education rank of 14 of a possible 15, and an income rank of 12, scored a surprising rank of 6 out of 15 in terms of subjective well-being. This is surely due to an array of factors, but implicit to these findings is that there is not necessarily a direct correlation between one’s overall level of happiness and well-being on the one hand, and one’s wealth and educational attainment on the other. DF Neff “Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis” (2007) 80 *Social Indicators Research* 330.

functionings and capabilities. In general the functionings refer to one's "beings and doings", which in essence, collectively, refer to our achieved states of being, for example, being healthy or well-educated.⁵⁵⁹ They are the product of our efforts when available commodities are utilized to produce valuable outcomes.⁵⁶⁰ Capabilities, in turn, refer to one's ability to attain the functionings he or she values most and can, therefore, be referred to as a "potential functioning".⁵⁶¹ Sen states that a person can only achieve certain functionings if he or she has the necessary capability set which he acquires by "applying all the feasible utilisations to all attainable commodity bundles."⁵⁶² Capabilities are, therefore, the real opportunities one has to develop into the person one has the potential to become.⁵⁶³ Furthermore, the corollary to this informational focus for the very real options available is that we are able to identify the *societal barriers* that prevent individuals from obtaining even greater achievements.⁵⁶⁴ Indeed, Sen states that the capability approach indicates the "central relevance of the inequality of capabilities in the assessment of social disparities."⁵⁶⁵

⁵⁵⁹ A Sen "Justice: Means versus Freedoms" (1990) Vol 19 No 2 *Philosophy and Public Affairs* 111-113; DF Neff "Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis" (2007) 80 *Social Indicators Research* 318; I Robeyns "Is Nancy Fraser's critique of theories of distributive justice justified?" (2003) 10(4) *Constellations* 543; MC Nussbaum "Capabilities as fundamental entitlements" in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 44; 47. Various capabilities valued by Sen and Nussbaum include "political liberties, freedom of association, the free choice of occupation, and a variety of economic and social rights."

⁵⁶⁰ DA Clark "The Capability Approach: Its Development, Critiques and Recent Advances" (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 4.

⁵⁶¹ DA Clark "The Capability Approach: Its Development, Critiques and Recent Advances" (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 4; I Robeyns "Is Nancy Fraser's critique of theories of distributive justice justified?" (2003) 10(4) *Constellations* 544; DF Neff "Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis" (2007) 80 *Social Indicators Research* 318.

⁵⁶² A Sen *The idea of justice* (2009) 233; A Sen "Justice: Means versus Freedoms" (1990) Vol 19 No 2 *Philosophy and Public Affairs* 114; DA Clark "The Capability Approach: Its Development, Critiques and Recent Advances" (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 4.

⁵⁶³ A focal point of the capability approach is that human beings have the capacity to choose valuable capabilities themselves. This in turn lends itself to transferring the responsibility to individuals to account for their actions and the choices that they have made. Sen states that this accountability allows for deontological demands which allow for certain duties toward society. A Sen *The idea of justice* (2009) 18-19.

⁵⁶⁴ A Sen *The idea of justice* (2009) 232-233; MC Nussbaum "Capabilities as fundamental entitlements" in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 44.

⁵⁶⁵ A Sen *The idea of justice* (2009) 232. For a summary on the criticisms against the capability approach, see DA Clark "The Capability Approach: Its Development, Critiques and Recent Advances" (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 1 5-6.

Robeyns indicates that there are certain conversion factors that facilitate the conversion of commodities and resources into functionings.⁵⁶⁶ These are personal, social and environmental conversion factors. Personal conversion factors refer to matters relating to the individual him/herself, such as gender, adaptability, personal health and intelligence. Social conversion factors are those forces that the individual cannot (necessarily) change but still affect how he/she makes life choices. Examples are the legal institution, social practices and norms and gender or race hierarchies. Lastly, environmental factors should not be left out of the equation as elements such as “climate, infrastructure, institutions, [and] public goods” also have the potential to either facilitate or hinder human functionings.⁵⁶⁷

The capability approach, too, can be contrasted with formal equality as it does not advocate the equal treatment of all individuals in a like manner. Instead, it acknowledges that individuals have different needs and various circumstances and, therefore, it would take different measures for individuals to attain the same level of personal satisfaction.⁵⁶⁸ Thus, the aim is to “equalize the capability each has to enjoy valuable activities and states of being” and not merely to ensure that there is an equal distribution of monetary assets.⁵⁶⁹

The process of choosing which capabilities to expand and which to limit, depends on the needs of the individuals and society in question. One possibility is to identify a list of capabilities through a process of public deliberation. Individuals themselves are in the best position possible to identify the capabilities necessary to fulfil their sought after functionings.⁵⁷⁰ A formal process, such as participatory democracy,

⁵⁶⁶ I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) 10(4) *Constellations* 544.

⁵⁶⁷ I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) 10(4) *Constellations* 544.

⁵⁶⁸ DA Clark “The Capability Approach: Its Development, Critiques and Recent Advances” (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 3.

⁵⁶⁹ DF Neff “Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis” (2007) 80 *Social Indicators Research* 318.

⁵⁷⁰ DA Clark “The Capability Approach: Its Development, Critiques and Recent Advances” (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 8.

Nussbaum differs in her application of the capabilities approach in that she clearly advocates a list of “central human capabilities”, whereas Sen confers the deliberation on valuable capabilities onto the group or society in question. The list is as follows: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and political and material control over one’s environment. MC Nussbaum “Capabilities as fundamental entitlements” in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 51-60; DA Clark “The

might be required to facilitate this activity.⁵⁷¹ An ideal outcome of this process would not only depend on the *quantity* of opportunities supplied, but also on their *quality*.⁵⁷² In practice, one would start by viewing the available capability set. In this sense it would become clear what role public institutions and social norms play when it comes to the opportunities individuals have.⁵⁷³ The aim of this exercise is to strive to expand the capabilities of all without limiting some of the existing capabilities in the process.⁵⁷⁴ Practically speaking, the appropriate decision-maker in this scenario is the state (the entity that has a positive duty to ensure a fair and reasonable capability set), and, therefore, it has a “strong duty to guarantee the social basis of each person’s basic human capabilities based on a principle of each person as an end.”⁵⁷⁵ Similar to the Rawlsian *difference principle* that allows for selected restrictions – should they be to the advantage of society as a whole – the capability approach, too, confers on the state the opportunity to limit certain freedoms if it is beneficial to the

Capability Approach: Its Development, Critiques and Recent Advances” (2005) *Global Poverty Research Group Working Paper 32* <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 6-8.

⁵⁷¹ S Alkire “Public debate and construction in Sen’s approach” in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 135-136. In this sense, democracy is valued for its intrinsic, instrumental and its constructive advantages.

⁵⁷² DA Clark “The Capability Approach: Its Development, Critiques and Recent Advances” (2005) *Global Poverty Research Group Working Paper 32* <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 9.

⁵⁷³ For an example of the application of the capability approach to gender division of labour, see I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) 10(4) *Constellations* 545-548.

⁵⁷⁴ I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) 10(4) *Constellations* 547. One must at all times be mindful of the normative influences that come into play when individuals are expected to make decisions about their lives. The capability approach incorporates this consideration into its theory by taking heed of “preference formation, socialization, subtle forms of discrimination and the impact of social and moral norms.” See also S Alkire “Public debate and construction in Sen’s approach” in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 135-136 on the public process of making value judgments and the importance of procedural considerations.

⁵⁷⁵ S Liebenberg “The value of human dignity in interpreting socio-economic rights” (2005) Vol 21 *SAJHR* 1 10. The Constitutional Court has similarly endorsed the notion of positive state duties by enforcing several socio-economic rights that are necessary for the expansion of human capabilities. See, for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC). For Nussbaum this vital positive state duty consists of “affirmative material and institutional support”. An example of appropriate state action is the implementation of redistributive policies in societies where current distributional paradigms do not afford the necessary empowerment to all its members. Nussbaum uses the example of the Indian quota system that was brought in to subvert the institutional barriers that denied opportunities to selected castes. MC Nussbaum “Capabilities as fundamental entitlements” in A Kaufman (ed) *Capabilities equality: basic issues and problems* (2006) 49-50.

expansion of all human capabilities.⁵⁷⁶ Failure to do so in the first place denies all members of society the right to the capabilities required to achieve valued functionings, and secondly, it impoverishes society of the lack of full participation by all its members.⁵⁷⁷

A valuable aspect of the capability approach is its compatibility with Fraser's theory on recognition and redistribution.⁵⁷⁸ The deconstruction of the referent, i.e. prevailing dictates or ideologies that inhibit freedom of choice is tantamount to Fraser's transformative strategies that "aim to correct unjust outcomes...by restructuring the underlying generative framework."⁵⁷⁹ Both also advocate the importance of societal involvement in the decision-making process. In the case of the capability approach, it is imperative that not only government elites make the decisions, but that especially those who are affected by the outcomes play a role in the selection of vital capabilities. For Fraser, this function is served by her emphasis on participatory parity.⁵⁸⁰

Robeyns argues, however, that there are four key differences between Sen's capability approach and Fraser's participatory parity. In short, these are the following: Firstly, the capability approach is able to incorporate more issues of recognition by allowing certain actions that are not only functional but also serve an intrinsic purpose.⁵⁸¹ She uses the example of children in the Netherlands that are not allowed to take the names of both their parents. In this case the capability approach would, out of respect to both parent and child, allow the sought choices to be made. Secondly, it appears that participatory parity is simply limited to those individuals who

⁵⁷⁶ S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) Vol 21 *SAJHR* 10. These restrictions of freedom may once again only take place if they do not come at a cost to the human capabilities of others.

⁵⁷⁷ S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) Vol 21 *SAJHR* 2-3. Liebenberg states that "both the individual and the society are impoverished by our collective failure to ensure living conditions worthy of the dignity of people as both individual and social beings."

⁵⁷⁸ I Robeyns "Is Nancy Fraser's critique of theories of distributive justice justified?" (2003) Vol 10(4) *Constellations* 545.

⁵⁷⁹ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 74.

⁵⁸⁰ N Fraser "Social justice in the age of identity politics: redistribution, recognition, and participation" in N Fraser and A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 36-37; 42-45.

⁵⁸¹ I Robeyns "Is Nancy Fraser's critique of theories of distributive justice justified?" (2003) Vol 10(4) *Constellations* 548. I am not completely convinced of this argument as Fraser's two-dimensional approach to social and distributional issues might indeed be flexible enough to address these issues of misrecognition.

are capable of making informed decisions and can function on equal footing with others as peers. Conversely, the capability approach does not ascribe to this “reliance on normality” and is geared toward enlarging the capabilities of all members of society, including children and the disabled.⁵⁸² The third difference refers to the “genuine and intrinsic reasons for redistribution and recognition.”⁵⁸³ In some cases political participation is far less of an ideal than is the mere capability to have basic needs such as health and rest met. In the last instance, Robeyns states that the capability approach can be applied to a broader range of issues which are not only limited to questions of justice. For Robeyns it is unclear whether participatory parity has the capacity to be applied to such an array of normative issues as the capability approach.⁵⁸⁴

The operationalisation of the capability approach has seen many interesting developments. This has chiefly occurred in the development of the Human Development Index (HDI) as part of the United Nations Development Programme (UNDP) *Human Development Report* of 1990.⁵⁸⁵ The focus in human development is on expanding the opportunities, in particular those of poor and developing countries. The *Report* identifies three key choices that it aims to expand, namely “a long and healthy life, to acquire knowledge and to have access to resources needed for a decent standard of living.”⁵⁸⁶ Of the 182 listed countries, South Africa is currently ranked at number 129, with Namibia and Botswana ranking slightly higher. The second application of the capability approach, the Human Poverty Index (HPI-1), applies the criteria used in the HDI to measure the poverty rates according to predetermined thresholds. According to the last recorded data, South Africa is ranked at 85th place of a possible 135 countries. These unfortunate statistics are a clear indication that a lot of work still needs to be done in order to achieve a working capability set.

⁵⁸² I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) Vol 10(4) *Constellations* 549.

⁵⁸³ I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) Vol 10(4) *Constellations* 549.

⁵⁸⁴ I Robeyns “Is Nancy Fraser’s critique of theories of distributive justice justified?” (2003) Vol 10(4) *Constellations* 550.

⁵⁸⁵ United Nations Development Programme *Human Development Report* (1990); DF Neff “Subjective well-being, poverty and ethnicity in South Africa: insights from an exploratory analysis” (2007) 80 *Social Indicators Research* 318.

⁵⁸⁶ United Nations Development Programme *Human Development Report* (1990) 1 10.

Should the capability approach be applied to affirmative action in South Africa, one might speculate that this would be preceded by an in-depth analysis of the current opportunities and choices that members of this society currently have. In some cases, adequate education and basic levels of healthcare are not viable options at present. Clark's research in South Africa established that when asked about their most basic desires, most participants vied for the following list: "jobs, housing, education, income, family and friends, religion, health, food, good clothes, recreations and relaxation, safety and economic security."⁵⁸⁷ What this seems to indicate is that the need of developing countries to attain a basic level of adequate survival for its members is experienced as more pressing than seeking justice and procedural fairness. The capability approach can, therefore, be used to realise social justice if it is aimed at addressing the large degrees of deprivation and suffering, instead of acquiring adequate levels of representation. The latter of course, which is currently being strived for in South Africa, has to date not addressed the necessary lacking capabilities of South African residents, the effects of which are obvious when one witnesses the appalling living conditions in large numbers of townships. In this respect, Nussbaum states the following:

"[M]aking capabilities the goal entails promoting for all citizens a greater measure of material equality than exists in most societies, since we are unlikely to get all citizens above a minimum threshold of capability for truly human functioning without some redistributive policies."⁵⁸⁸

By focusing on the needs, this respect-based approach will also inevitably benefit the majority of black people in South Africa. Poverty and deprivation in South Africa have reached such levels of magnitude that whichever approach is chosen, it needs to be understood that there is no other alternative but to direct it to the most destitute.

The capabilities approach can facilitate a process of reasoned policy-making or resource allocation by placing the focus on those resources that are most needed to enlarge the capability sets of everyone, especially those most deprived of access to equal opportunities. If decided that redistributive policies need to be enacted, which

⁵⁸⁷ DA Clark "The Capability Approach: Its Development, Critiques and Recent Advances" (2005) *Global Poverty Research Group Working Paper* 32 <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-032.pdf> (accessed 7 April 2010) 8.

⁵⁸⁸ MC Nussbaum *Women and Human Development – the Capabilities Approach* (2000) 86 as quoted in S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) Vol 21 *SAJHR* 10.

is already the case, the capabilities approach can be applied to the policy of affirmative action with a primary focus on the groups disadvantaged by apartheid who, as it so happens, are also the largest group of disadvantaged people. With the focus being more on the material needs of the beneficiaries of affirmative action than on numerical representation in different spheres of government; employment and education, the beneficiaries should in time acquire the necessary means to participate on equal footing in all the spheres mentioned due to their application of the newly acquired capability sets with far fewer foreseeable reductions in efficiency.

5.6 Concluding comments

This chapter has shown that a class-based affirmative action policy is better equipped to address the destructive consequences of apartheid. Unfortunately, as was stated above, it is unclear whether this policy is capable of reaching the most deprived individuals in society. Research is yet to show that a class-based affirmative action policy can, and will, be to the benefit of all, and not only those who have merely managed to scramble their way to the top ranks of the lowest classes.

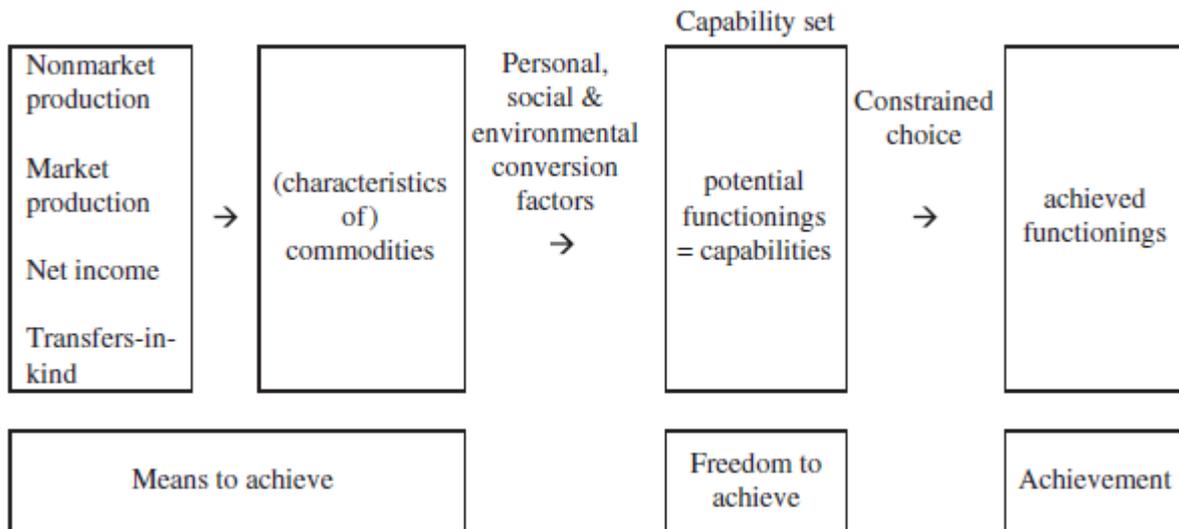
Where class-based affirmative action has to date mostly featured in selected United States college admission policies, the capability approach has managed to be actively implemented into human development research. In this, the focus has shifted from purely income-based assessments to actual measurements of human life on a multi-dimensional scale, including dimensions such as education, healthcare and personal security. Even if it is not applied as an alternative to affirmative action policies, South Africa would nevertheless benefit by implementing this approach in some shape or form in poverty relief programs. In conclusion, affirmative action should rather be viewed as a change of mind-set rather than a set of mandatory provisions that regulate not only our day-to-day lives, but also our future. Having a shared, common, goal is clearly what this country needs. In other words, statutory provisions notwithstanding, affirmative action as a strategy can only succeed if the whole nation buys into the underlying principles.

The next chapter will draw on the theory provided in preceding chapters in an attempt to clarify the affirmative action routes taken in India, Malaysia, and Brazil

respectively. Each has been chosen for particular reasons and for the valuable lessons that they can provide.

Figure 1:

The following is a schematic representation of the operationalization of the capability approach:⁵⁸⁹



⁵⁸⁹ I Robeyns "Is Nancy Fraser's critique of theories of distributive justice justified?" (2003) Vol 10(4) *Constellations* 544.

Chapter 6: International perspectives on affirmative action

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Various affirmative action policies enforced worldwide share certain similarities to the course South Africa has chosen to take. This chapter will explore the affirmative action policies of Malaysia, Brazil and India respectively. Malaysia was chosen as an important case study because, just as in South Africa, the defined group of beneficiaries comprise the majority of the citizens. As in the case of South Africa, Malaysian affirmative action is aimed at “returning people who had been excluded from the political dispensation to their legitimate position.”⁵⁹⁰ There are, however, stark differences in the ways in which each nation chose to implement the program which will be discussed at length. This chapter will also explore the Brazilian application of affirmative action due to its race-based approach. In doing so, it should become apparent whether the problems faced in South Africa are unique to South Africa, or rather a general symptom of a race-based policy. Finally, India was chosen as a unique example of a class- or caste-based system. A thorough study of its policy could bear valuable fruit (in terms of lessons and warnings) if South Africa should ever decide to introduce similar methods of addressing inequality.⁵⁹¹ Specific attention will be paid to the legal and historical justifications for this policy, with particular reference to the beneficiaries.

⁵⁹⁰ D Herman *The Naked Emperor* (2007) 25.

⁵⁹¹ Affirmative action in India is “aimed at addressing the hierarchical differences in the caste system.” D Herman *The Naked Emperor* (2007) 55.

The main elements of each affirmative action policy to be highlighted during each analysis are the following: Who is receiving preferential treatment and why? In which spheres do these policies operate? Are the policies formally enacted, and if so, where? Are there any timelines given for the duration of the policy and was it intended to be terminated after the said period elapsed? This chapter will conclude with a few remarks on the relevance of the case studies to South Africa.

6.1 Malaysia's New Economic Policy

The Malaysian and South African historical milieu have a common colonial and multi-racial thread.⁵⁹² British colonial rule had not seen to it that various structures, especially economic, be set up in order to ensure ethnic integration.⁵⁹³ This,

⁵⁹² I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 15. Malaysia primarily consists of three dominant ethnic groups. These are the Malays, who are also known as the Bumiputras, meaning "sons of the soil", as well as the Chinese and the Indians, who are collectively known as "non-Bumiputras". The terminology *Bumiputras* does not only refer to the Malay population, but also to all the smaller indigenous groups of Malaysia, although the Malay segment of this group is by far the largest proportion. In this chapter the terms "Bumiputra" and "Malays" are used interchangeably.

⁵⁹³ J Castle "Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia" (1995) Vol 19 *South African Journal of Labour Relations* 6 20-21. Although it needs to be added that colonialists did in fact allow for partial preferential treatment of local Malays in certain spheres: "allocation of land; admission to the public service; permits for the operation of certain businesses; and bursaries and scholarships for higher education." See also E Phillips "Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom" in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 345; LH Guan "Affirmative action in Malaysia" (2005) *Southeast Asian Affairs* 211 212. Furthermore, Article 153 of the 1957 Constitution of the Federation of Malaysia, especially Articles 153(1) and (2), authorises the use of preferential measures to safeguard the economic position of the Malays. This section was initially intended to be a temporary measure to promote the interests of the native Malays and would therefore have been repealed 15 years later. The 1969 riots however proved that racial tensions were still prevalent and therefore Article 153 is now permanent. E Phillips "Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom" in Hart W G (ed) *Discrimination: the Limits of Law* (1990) 348. The relevant sections for current purposes state the following:

153 (1) It shall be the responsibility of the Yang di-Pertuan Agong (the Supreme Malaysian Head of State) to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

153(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special provision of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

supported by the affirmation/endorsement of *laissez-faire* capitalism, made it possible for Chinese and Indians, citizens and non-citizens alike, to prosper economically, predominantly due to overall Malayan inexperience and lack of education in economically profitable spheres. Malaysia finally gained independence in 1957 and for an extensive period since had experienced rapid economic growth.⁵⁹⁴ The National Alliance government, which had during this period come into power, relied primarily on this economic growth to smooth over the very noticeable disproportionate distribution of social and economic resources.⁵⁹⁵

The Malaysian affirmative action policy, primarily known as the New Economic Policy (NEP) was born from the 1969 riots which came as a result of large-scale Malay discontent due to economic suppression and political unrest.⁵⁹⁶ The local Malays had mostly been confined to the rural spheres of society for various reasons including out of their own volition. The Chinese and Indians who came to settle had been largely prosperous in lucrative financial and economic activities and were therefore in a more advantaged position.

The state realised that in order to harmonise the interests of the Malays, Chinese and Indians, it would need to take a more interventionist approach.⁵⁹⁷ The NEP was introduced in the *Second Malaysia Plan 1971 - 1975* which stated the following:⁵⁹⁸

“The Second Malaysia Plan represents a new strategy in which national priorities are re-ordered and efforts intensified to deal with the economic and social problems

⁵⁹⁴ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 58; FW De Klerk Foundation “Affirmative action in Malaysia” (2004) *Study by the FW de Klerk Foundation* https://www.givengain.com/cause_data/images/2137/Study_Malaysia_AA_C.pdf (accessed 16 July 2009) 1 1. Although Article 8 of the Federal Constitution of Malaysia of 1957 also establishes the right to equality (as in the case of section 9 of the South African Constitution), it nevertheless clearly states in Article 8(5)(c) that this does not negate “any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service”. In other words, just as section 9(2) of the South African Constitution is not an exception to the right of equality, but an integral part of it, so too does Article 8(5)(c) clearly express a defense of preferential measures.

⁵⁹⁵ FW De Klerk Foundation “Affirmative action in Malaysia” (2004) *Study by the FW de Klerk Foundation* https://www.givengain.com/cause_data/images/2137/Study_Malaysia_AA_C.pdf (accessed 16 July 2009) 1. Economic growth occurred predominantly as a result of the expansion of the rubber and tin industries.

⁵⁹⁶ E Phillips “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in Hart W G (ed) *Discrimination: the Limits of Law* (1990) 350. For a brief summary of the factors that gave rise to the 1969 riots see J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 21-22.

⁵⁹⁷ J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 22.

⁵⁹⁸ RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 235 239.

confronting the country. Economic policies and development will be considered in their relationship to social development in general and the over-riding need for national unity in particular. The strategy takes full recognition of these problems and needs in a multi-racial society. It incorporates policies and measures to eradicate poverty through raising income levels and generating new employment opportunities, and to restructure Malaysian society to correct racial economic imbalance.”⁵⁹⁹

The NEP had the principal objective of creating “national unity through greater emphasis on social integration and more equitable distribution of income and opportunities.”⁶⁰⁰ The two *prongs* set out in the *Second Malaysia Plan 1971 - 1975* deemed fit to achieve this were the following: firstly to reduce the instance of *poverty* of all Malaysians, and secondly, in a more redistributive sense, to correct structural economic inequalities by reducing and eliminating the *identification of race with economic function*.⁶⁰¹ Similar to the Rawlsian difference principle, this was to occur without detriment to any of the existing groups.⁶⁰² In other words, Malaysia aimed to address its “deep-seated structural problems” with a policy which was premised on a rapidly growing economy which was understood to support its redistributive policies.⁶⁰³ Economic growth was used as an aid to address interethnic inequality as well as by supplying the government with the necessary resources to fund affirmative action endeavours.⁶⁰⁴ The ultimate goal was to ensure that the Malays, or *Bumiputras*, would have 30% of the corporate ownership by 1990.⁶⁰⁵ It was believed that poverty had a distinctive racial and geographical character.

⁵⁹⁹ *Second Malaysia Plan 1971 – 1975* “Chapter I: The New Development Strategy” Kuala Lumpur (1971) 2.

⁶⁰⁰ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 25; HK Leong “Dynamics of policy-making in Malaysia: the formulation of the New Economic Policy and the National Development Policy” (1992) Vol 14 No 2 *Asian Journal of Public Administration* 204 210.

⁶⁰¹ *Second Malaysia Plan 1971 – 1975* “Chapter I: The New Development Strategy” (1971) Kuala Lumpur 2. For a comprehensive account of the two prongs see I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 27-49; FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 189 201-204; RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 239-240.

⁶⁰² Federal Constitution of Malaysia Article 153(8); RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 235 240.

⁶⁰³ J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 21.

⁶⁰⁴ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 83.

⁶⁰⁵ J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 22; T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 61; I Emsley *The Malaysian Experience of Affirmative*

The NEP had a fairly smooth initiation into the Malaysian political arena. Several Chinese bureaucrats were involved in the drafting process and were mandated to look out for the interests of their Chinese counterparts.⁶⁰⁶ Other mechanisms used to pre-empt any opposition were intimidation ploys that the past riots would be repeated if national unity was not achieved.⁶⁰⁷ The state also appealed to the financially stable Chinese and Indians to recognise the imbalanced economic circumstances of the majority of Malays.⁶⁰⁸ The “carrot and stick” metaphor is quite suitable in this scenario as the Chinese and Indians were invited to join the coalition government as an incentive to share political power.⁶⁰⁹ Furthermore the state created the *Rukunegara* ideology in an attempt to consolidate national unity and to support the NEP.⁶¹⁰ As was stated earlier, the NEP operated successfully in a strong and healthy economy, but during times of economic recession, the government prevented

Action: Lessons for South Africa (1996) 51; HK Leong “Dynamics of policy-making in Malaysia: the formulation of the New Economic Policy and the National Development Policy” (1992) Vol 14 No 2 *Asian Journal of Public Administration* 206, 211; FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 201; E Phillips “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 351; AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 1 14. Before this clear target was set the Malays owned no more than 2% of Malaysia’s corporate equity.

⁶⁰⁶ A clear distinction between the Malaysian and South African affirmative action policies is the *quid pro quo* bargain that was reached between the Malays and the non-Malays. The latter agreed to the induction of Article 153 of the Federal Constitution of Malaysia as they were promised citizenship “based on the principle of *jus soli* if they did. D Sabbagh “Elements toward a comparative analysis of affirmative action policies” (2004) *Annual Meeting of the American Political Science Association* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/6/3/pages59633/p59633-1.php (13 July 2009) 1 4. White South Africans, on the other hand, did not have this or any similar incentive other than that it was *the right thing to do*.

⁶⁰⁷ FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 207.

⁶⁰⁸ Emsley states that in 1973 “78 per cent of all poor were Bumiputra.” I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 26.

⁶⁰⁹ FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 214-215.

⁶¹⁰ FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 214-215; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 20. The Rukunegara “declares the national objectives and values and the fundamental principles to guide the citizens and the nation, has evolved from close consultation and deliberation in the National Consultative Council and represents a national consensus and commitment to the task of creating a united, socially just, economically equitable and progressive Malaysian nation.” *Second Malaysia Plan 1971 – 1975* “Chapter I: The New Development Strategy” (1971) Kuala Lumpur 2-3.

uprisings by the Chinese and the Indians by “relax[ing] the ethnic equity requirements of the Industrial Coordination Act.”⁶¹¹

Great care was taken to ensure the longevity of the NEP. Amongst others, the Constitution (Amendment) Act was implemented in 1971 to outlaw any discussions or debates on “sensitive” issues regarding the government’s preferential policies.⁶¹² Following this, the 1948 Sedition Act was amended to stipulate that questioning of any of the preferential policies will be considered an offence and is punishable by law.⁶¹³ The Bumiputra acquisition of 30% equity was also facilitated by the Industrial Co-ordination Act of 1975. Unlike BEE (Black Economic Empowerment) in South Africa, this legislation only focused on certain emerging industries and imposed a 30% Bumiputra equity share of all outputs.⁶¹⁴

The NEP was designed to grant Malays preferential treatment in various spheres, including education, government employment and the private sector by means of quotas and special assistance.⁶¹⁵ In practice, the NEP entailed the following: “modernization of rural life, a rapid and balanced growth of urban activities and the creation of a Malay commercial and industrial community in all categories and at all levels of operations.”⁶¹⁶ Further transformation occurred by means of the National Language Act of 1967 which established Bahasa Malaysia as the national language. Consequently a timeline was given for the restructuring of the educational sector so

⁶¹¹ FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 216.

⁶¹² E Phillips E “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 351.

⁶¹³ Sedition Act of 1948 section 3(1)(f); *Fan Yew Teng v Public Prosecutor* [1975] 2 MLJ 235; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 20; J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 23; E Phillips “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 350-352.

⁶¹⁴ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 51-52. Duties of compliance with the Industrial Co-ordination Act were however relaxed when it was shown that their equities and value of fixed assets were below certain levels (which were later increased as a result of economic growth), as well as in cases of export-based industries.

⁶¹⁵ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 61; J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 22; D Sabbagh “Elements toward a comparative analysis of affirmative action policies” (2004) *Annual Meeting of the American Political Science Association* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/6/3/pages59633/p59633-1.php (13 July 2009) 6; AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 14.

⁶¹⁶ RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 239.

that within a prescribed period all education was to be converted to the Malay medium instead of English.⁶¹⁷ Major efforts were also made to enable Malays who were predominantly settled in the rural areas to migrate to the urban areas where they would be better placed to benefit economically.⁶¹⁸ Due to the interplay between race and geographical location, it was believed that a superficial upsurge of rural incomes would not only be costly, but would also not comply with the ideal of eliminating the identification of race with economic function. Instead, a more transformative approach was followed by restructuring the composition of society so that the increase of income, i.e. the eradication of poverty, would in effect be a product of this transformation.⁶¹⁹ Achieving this end was no menial task as it entailed major “investment in Bumiputra human capital by a programme of education and training”, as well as the creation of job opportunities for the educated and trained Malays in the urban areas.⁶²⁰

Of all the efforts made, education was key to “modernise society, to equalise opportunities for all and to promote national unity.”⁶²¹ In fact, the role that education came to play in elevating Malay participation in commercial enterprises cannot be overstated. As in South Africa, many Malays in rural areas had limited access to adequate educational facilities that would have advanced their opportunities in life and would have enabled them to compete on equal footing with the Chinese and the Indians.⁶²² In order to overcome this, the Malaysian government significantly increased public expenditure on education and instituted racial quotas in tertiary

⁶¹⁷ D Sabbagh “Elements toward a comparative analysis of affirmative action policies” (2004) *Annual Meeting of the American Political Science Association* http://www.allacademic.com//meta/p_mla_apa_research_citation/0/5/9/6/3/pages59633/p59633-1.php (13 July 2009) 6.

⁶¹⁸ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 37. In fact, it was thought that urbanisation would allow rural Malays access to improved healthcare and education, a wider variety of employment opportunities and finally a “flexible hierarchy in which those of talent may ascend.” I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 48.

⁶¹⁹ According to Emsley the following actions were taken in order to address the undertaking of the eradication of poverty: increasing rural productivity; upgrading education and health in rural areas; restructuring the agriculture industry; and rapid economic growth. I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 26-35.

⁶²⁰ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 37.

⁶²¹ J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 23.

⁶²² I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 38. Primary, secondary and tertiary educational facilities were developed and improved for the Malays. In terms of tertiary opportunities, special technical colleges were instituted primarily to upgrade the Malay’s technological and scientific knowledge-base.

institutions to increase the racial representations of Malays.⁶²³ This was made possible by the growing economy.⁶²⁴ Underlying structures were further transformed by the substitution of the standard English language as medium of instruction for indigenous Bahasa Malaysia.⁶²⁵ Many of these efforts did not come without unfortunate consequences. Malaysia experienced its own “brain drain” during the periods of transformation, but unlike the South African example, this blow was softened by the return of most Chinese and Indian graduates after receiving tertiary education elsewhere.⁶²⁶

It was clear that most Malays did not have the necessary training to compete on equal footing with their Chinese and Indian counterparts, and therefore special agencies were set up to function in the interest of individuals by acquiring existing shares and businesses.⁶²⁷ These institutions were used as a means to achieve the desired quotas and goals of the NEP and would do so until Malays are qualified and experienced enough to take over the business ventures and shares.⁶²⁸ These agencies offered the following support to Malays: “training and education, including scholarships; managerial and technical advice; credit facilities; establishment of commercial, industrial transportation...provision of commercial premises, hotels and offices for Malays [and entering] into joint ventures with domestic investors.”⁶²⁹

What sets the Malaysian affirmative action apart from many international counterparts, but which relates it to South African affirmative action, is that it confers preferential treatment to the majority of the members of society. In the Malaysian

⁶²³ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 39-40. However, some of these measures were later relaxed as it produced an over-representation of Malays which caused racial resentment.

⁶²⁴ Malaysia was in such a fortunate position in terms of added resources due to the growing economy, that it had an approximate “sevenfold increase in real resource flows over the 1970-85 period.” I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 39.

⁶²⁵ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 40.

⁶²⁶ I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 41-42.

⁶²⁷ FH Abdullah “Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty” (1997) Vol XV No 2 *Ethnic Studies Report* 203; RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 243-250; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 56. These agencies were the following: The National Trading Corporation (PERNAS), the Council of Trust for Indigenous People (MARA), State Economic Development Corporations (SEDCs), Urban Development Authority (UDA), Federal Agricultural Marketing Authority (FAMA), and the National Equity Corporation (PNB).

⁶²⁸ RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 244.

⁶²⁹ RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 245. Unfortunately this endeavour was not without its drawbacks. Issues stemmed from duplication of functions between institutions to corruption and “pervasions of their objectives” (246-247).

example the Bumiputras roughly consist of 67% of society.⁶³⁰ Similarly, Black South Africans make up more or less 79% of all South Africans.⁶³¹ Another crucial resemblance between the two nations is that the groups placed at the receiving end of these preferential policies are also the groups that have enacted these policies.⁶³² The reason for the necessity of each policy, however, differs markedly. The NEP came as a result of the Bumiputra's economic handicap relative to the Chinese and Indian economic success. As stated earlier, South African affirmative action was compelled due to decades of discrimination and subordination.

The NEP was originally devised as a 20 year policy that would elapse in 1990.⁶³³ Despite the initial expiration date, the New Economic Policy was later in 1991 replaced by the National Development Policy (NDP) in the *Sixth Malaysia Plan 1991-1995* which continued to provide preferential treatment to the Bumiputras.⁶³⁴

Due to the fact that Malaysia has had its NEP/NDP policy for over forty years, it is possible to assess whether the implementation of this policy can be considered largely successful. It is therefore also possible to identify any spheres that are still lacking in adequate development, if any.

As a result of the introduction of preferential policies, there has been a considerable increase in middle-class Bumiputras.⁶³⁵ This group (as well as Malaysia overall) has also encountered a great deal of reduction in overall poverty, although new poverty-stricken groups have emerged.⁶³⁶ Fortunately this was not as a result of the NEP/NDP but rather due to external economic pressures. Despite this, advocates of

⁶³⁰ Malaxi "A 28,96m people in year 2010" http://www.malaxi.com/population_size_age_structure2001_2010.html (accessed 28 September 2010).

⁶³¹ Statistics South Africa: Mid-year population estimates 2010 <http://www.statssa.gov.za/PublicationsHTML/P03022010/html/P03022010.html> (accessed 28 September 2010).

⁶³² D Sabbagh "Elements toward a comparative analysis of affirmative action policies" (2004) *Annual Meeting of the American Political Science Association* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/6/3/pages59633/p59633-1.php (13 July 2009) 1.

⁶³³ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 63; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 24.

⁶³⁴ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 63; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 24.

⁶³⁵ J Castle "Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia" (1995) Vol 19 *South African Journal of Labour Relations* 23; LH Guan "Affirmative action in Malaysia" (2005) *Southeast Asian Affairs* 218.

⁶³⁶ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 66; I Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) 24; LH Guan "Affirmative action in Malaysia" (2005) *Southeast Asian Affairs* 219.

the NEP/NDP policy argue that the role of affirmative action was not to alleviate the state of affairs for the poor, but rather to fortify cooperation between ethnic groups.⁶³⁷ The Bumiputras have also received major educational benefits as a result of improvements in the educational sector which allowed them, in time, to compete equally with the Chinese and Indian elite in economic affairs.⁶³⁸ These improvements in the socio-economic standing of the Bumiputras have to a large extent served the goal of eliminating the identification of race with economic function by ensuring adequate representation of Bumiputras in all spheres of society, especially in the economy and upper-management. Many of these advantages would not have occurred had it not been for the favourable economic climate and strong economic growth.⁶³⁹ Continuous foreign investment and the decision to shield the private sector allowed the economy to grow at the necessary rate that would allow the state to have access to funds that would supply the revenue for affirmative action and general poverty programmes.

Despite being known world-wide as the affirmative action “success story” Malaysia nevertheless had a number of setbacks. For instance, the agencies which were established to promote Bumiputra interests were not as successful in fulfilling their mandates. Bumiputra capital ownership has to date risen to an estimated 20%, which is short of its 30% goal.⁶⁴⁰ Various reasons have been put forward for this failure. For one, rent-seeking behaviour spurred what is known as the “Ali Baba” phenomenon. This refers to Malay business officials acting as frontmen (Ali) in order to acquire contracts and licenses and thereafter handing them over or selling them to non-Malays (Baba) for a profit.⁶⁴¹ Furthermore, trade officials and certain Malay elite

⁶³⁷ J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 24.

⁶³⁸ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 68; AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 29.

⁶³⁹ AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 29.

⁶⁴⁰ AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 15-16.

⁶⁴¹ RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 258; J Castle “Affirmative action in three developing countries: lessons from Zimbabwe, Namibia and

have largely benefitted from government concessions which in turn lead to a “culture of cronyism” and a lack of incentive to perform.⁶⁴² Actions of this genus limited the distributive advantages of affirmative action to the Malay elite and prevented the expected trickledown effect to poor Malays.⁶⁴³ Secondly, only the individuals who had access to the benefits on offer could acquire capital ownership. Those at the bottom socio-economically speaking were often not fortunate enough or in any position to do so.

Malaysia also experienced a period of Chinese “brain drain” as South Africa did and continues to do with white and other professional South Africans leaving the country. The major difference however is that most studies tend to indicate that students who left Malaysia later returned upon completion of their studies abroad. Unfortunately the same cannot be said for professionals who left Malaysia. Sowell states that though hard to determine, “an estimated \$12 billion worth of capital left Malaysia” between 1976 and 1985.⁶⁴⁴

A major criticism of Malaysia’s racial policies is geared towards their counter-democratic sedition laws which criminalise what could be healthy political debates on the efficiency and need for the policies in the first place.⁶⁴⁵ These *draconian* laws stifle civil society’s ability to grow and develop and through a process of free political participation, choose what it deems just and equitable. Other problems that Malaysia has encountered in recent times include the decline of educational standards, the increase of intra-ethnic inequalities, and the increase of xenophobia.⁶⁴⁶

Malaysia” (1995) Vol 19 *South African Journal of Labour Relations* 23; E Phillips “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 351; AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 20-21.

⁶⁴² Political Outlook “Reforming race relations” (2005) *South East Asia* 7 7; T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 74.

⁶⁴³ AS Murphy “Affirmative action in a deeply divided society: lessons for South Africa from Malaysia’s successful redistribution policies” (2005) *Proceedings of the 2005 Annual Meeting of the American Political Science Association, September 1-4, University of California, Los Angeles, USA* http://www.allacademic.com/meta/p40408_index.html (accessed 16 August 2010) 20; RS Milne “The politics of Malaysia’s New Economic Policy” (1976) Vol 49 No 2 *Pacific Affairs* 259.

⁶⁴⁴ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 68.

⁶⁴⁵ T Sowell *Affirmative Action Around the World: An Empirical Study* (2004) 75.

⁶⁴⁶ E Phillips “Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom” in WG Hart (ed) *Discrimination: the Limits of Law* (1990) 354; T Sowell *Affirmative Action Around the World:*

In essence, Malaysia has been tasked with the protection of its locals against the economic prowess and ingenuity of other competing nations. Brazil, on the other hand, with its dark history of slavery, has had to overcome covert institutional discrimination.

6.2 Brazil's affirmative action policy

The Brazilian government structure operates as a federation. The various states within its borders are therefore entitled to enact and enforce their own legislation and policy, which should be in line with the Brazilian constitution. Because of this, Brazil does not have a single set of affirmative action measures that apply throughout. Instead, a national policy is prescribed and each state can apply the measures in such manner as it sees fit, provided that it be in accordance with national policy. This is clearly different to the approach that South Africa has taken where the affirmative action policy was visibly enacted within national legislation such as the Employment Equity Act, the Labour Relations Act and the Public Procurement Act, for instance, which stemmed from its authorisation in the South African Constitution's equality clause.

Brazil does not share the same colonial past with South Africa, Malaysia or India. Instead, Brazil gained independence from Portugal in 1822 but had a long history of slavery which was finally abolished in 1888.⁶⁴⁷ Upon the increase of slave importations in the 15th century, the racial demographics of Brazil gradually began to change. A once predominantly white culture soon had a vast number of black members. It is no surprise that as time went by the process of miscegenation produced a wide spectrum of complexions ranging from pale (which is closely associated with being white) to very dark skinned (which is associated with being black). After a period of authoritarian military rule (1964-1985), during which time antiracist propaganda was expressly forbidden, Brazil finally obtained its democratic

An Empirical Study (2004) 75; FW De Klerk Foundation "Affirmative action in Malaysia" (2004-04-02) 13.

⁶⁴⁷ TE Skidmore "Racial mixture and affirmative action: the cases of Brazil and the United States" (2003) *American Historical Review* 1391-1392; CIA "The World Factbook: Brazil" <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (accessed 4 October 2010).

status in 1985.⁶⁴⁸ Subsequently, the Brazilian constitution found its footing in 1988.⁶⁴⁹ Prior to this, several policies and practices saw to it that people of colour did not receive the necessary consideration. Furthermore, there were definite attempts to increase the White population by “encouraging European immigration” during the late nineteenth century lasting until the mid-twentieth century, but this came to a rapid end at the advent of the Second World War as the Brazilian elite found it unfavourable to be associated with Nazi supremacist ideologies.⁶⁵⁰ Ever since, and especially since the democratic period, Brazil has come to embrace a society consisting of a myriad of races but in the process has turned a blind eye to severe racial inequalities. These inequalities are, as in South Africa, exacerbated by the concomitant social hardships experienced by these groups. Black people, in both nations, are generally faced with being “lower-class, lacking opportunities, working as a servant, and living in bad neighborhoods.”⁶⁵¹

As Afro-Brazilian movements became more vocal and mobilised in campaigning for the rights of those suppressed by a system of pseudo-equality (albeit not nearly to the same extent as South African liberation movements) it became clear that positive action would be needed to overcome this.⁶⁵² It was not until an international event, namely the 2001 United Nations Conference on Racism in Durban, South Africa, that

⁶⁴⁸ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 3 11; S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 787 792; M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 60 65.

⁶⁴⁹ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 796.

⁶⁵⁰ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 11; M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 61; C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 203 211; LC De Sousa and P Nascimento “Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity” (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 129 131. This policy, entitled *embranquecimento* was endorsed by the Brazilian elites to prevent the population becoming “too black”. T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 11.

⁶⁵¹ M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 74; C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 211.

⁶⁵² M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 65.

Brazil would finally give affirmative action policies serious consideration.⁶⁵³ During its participation at this event, the Brazilian government, and more specifically the Ministry of Agrarian Development and the Ministry of Justice, declared that it would adopt affirmative action measures in the form of percentage quotas in order to grant black Brazilians adequate representation in higher education and public employment.⁶⁵⁴ In 2002 the then President Fernando Henrique Cardoso, who had been campaigning for the rights of Afro-Brazilians ever since being elected, signed the National Program for Affirmative Action after a public admission that Brazil is not the peaceful *racial democracy* it presents itself to be.⁶⁵⁵ Htun, in defining “racial democracy”, states that it entails “that the absence of segregation, a history of race mixing and the social recognition of intermediate racial categories have upheld a unique, multi-tiered racial order.”⁶⁵⁶ In South Africa however, it is preferred that one rather refer to the creation of a *non-racial* democracy. The difference in each case is that whereas South Africa is striving for this ideal, Brazil had contended for decades

⁶⁵³ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 12; M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 62. Htun aptly states that the events that transpired at the World Conference on Racism “served as the catalyst for a cascade of affirmative action policy announcements” and created the ideal platform that advocates for such a policy needed to convince the remaining populace of its necessity. M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 62. The formal application of these policies that were soon to follow was in a sense unavoidable.

⁶⁵⁴ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 12; S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 803-804; EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 72; M Htun “Racial quotas for a “racial democracy”” (2005) *NACLA Report on the Americas: Report on Race, Part 2* 20 21. Percentages ranged from 20% to 30%. Htun elaborates on the extent of the policies and states that they included “social programs targeted at black neighborhoods, job training programs, preparatory courses for university entrance exams and support for black-owned businesses.” M Htun “Racial quotas for a “racial democracy”” (2005) *NACLA Report on the Americas: Report on Race, Part 2* 22.

⁶⁵⁵ Decree no. 4,288 of 13 May 2002; TE Skidmore “Racial mixture and affirmative action: the cases of Brazil and the United States” (2003) *American Historical Review* 1391 1394; M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 67,69; EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 73; MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 211 213. In the past Brazil had been labeled a “racial democracy” which conveys the image of a “mixed-race nation where people of different race live harmoniously.” C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 211. The Cardoso government was succeeded by the Lula government who vied to continue with the affirmative action endeavours implemented by its predecessors. Amongst others, it established the Secretariat for the Promotion of Racial Equality. M Htun “Racial quotas for a “racial democracy”” (2005) *NACLA Report on the Americas: Report on Race, Part 2* 24.

⁶⁵⁶ M Htun “Racial quotas for a “racial democracy”” (2005) *NACLA Report on the Americas: Report on Race, Part 2* 20.

that it had already achieved such a state. As part of the National Program for Affirmative Action a Presidential Decree introduced in 2002 relating to federal public administration foresaw a number of goals for its enactment. Firstly, as in South Africa, it envisaged the necessary representation of affirmative action beneficiaries in senior administrative posts.⁶⁵⁷ Secondly it called for “clauses of adherence to the program in terms of negotiated transfer of resources within the Federal Public Administration.”⁶⁵⁸ Thirdly, special benefits would be conferred in public procurement to companies complying with program goals and in the fourth instance special terms and conditions would prescribe the percentage goals for affirmative action beneficiaries in contracts between governing agencies and international bodies.⁶⁵⁹

Other states and educational institutions have added that the policy should serve a compensatory role as well as “contribute to the diversity of experiences and perspectives on campus, and raise understanding of what it means to be black in Brazil.”⁶⁶⁰ This abstruse statement presupposes that those who are by definition (and by definition only) black, would necessarily embody what it signifies to be of Afro-Brazilian decent. As indicated earlier, most Brazilians had erroneously thought of themselves as a racial democracy void of any racial issues and would therefore not spontaneously *act black*.

There are various arguments that support the necessity for an affirmative action policy in Brazil. For one, this is a nation with deep-seated racial inequalities and the concomitant social injustices that underlie these disparities have made attempts at democratic participation increasingly difficult, especially in spheres of “education, status, and employment.”⁶⁶¹ Currently, the Brazilian population is estimated to

⁶⁵⁷ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 804.

⁶⁵⁸ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 804.

⁶⁵⁹ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 804; M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 68; C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 211.

⁶⁶⁰ AM Francis and M Tannuri-Piato *Racial wage inequality in Brazil: Preliminary evidence on quotas in university admissions* (2010) Working Paper, Department of Economics, Emory University 1 6.

⁶⁶¹ MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 218. Moses further states that affirmative action in Brazil is used as a vehicle for “addressing racism, increasing equity, and fostering social justice.” MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 218.

consist of roughly equal percentages of whites (*Branco*) on the one hand, and mixed-race (*pardo*) and blacks (*preto*) on the other.⁶⁶² All people of colour, and therefore everyone except for white Brazilians, are considered Afro-Brazilians. This group does not enjoy proportionate representation within various governing bodies or public and private employment.⁶⁶³ Furthermore, this group also makes up the larger part of the group of poor Brazilians.⁶⁶⁴ A possible explanation for this phenomenon is that it is the result of inadequate government delineation of the various races that are represented in Brazil which in turn lead to a lack of collective action by various racial groups which would have campaigned for adequate representation in all spheres of society.⁶⁶⁵

In order to overcome this tacit oppression, a race-based policy that would favour people of colour was thought to be the best remedy.⁶⁶⁶ But what makes this policy remarkable is that because of generations of inter-mixing between different races, it is no longer possible to determine a person's race with certainty. The policy therefore grants possible beneficiaries the opportunity to identify themselves as members of a certain race. The Brazilian government also saw to it that preferential policies are implemented in favour of women and disabled individuals as well.⁶⁶⁷

The Brazilian affirmative action policy is based on a system of quotas.⁶⁶⁸ Various percentages have been specified for Afro-Brazilians in a range of spheres. These

⁶⁶² AM Francis and M Tannuri-Piato *Racial wage inequality in Brazil: Preliminary evidence on quotas in university admissions* (2010) Working Paper, Department of Economics, Emory University 2; MS Moses "Moral and instrumental rationales for affirmative action in five national contexts" (2010) Vol 39 No 3 *Educational Researcher* 218.

⁶⁶³ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) *The Western Journal of Black Studies* 12.

⁶⁶⁴ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) *The Western Journal of Black Studies* 12. An estimated 70% of Afro-Brazilians are below the poverty line. Although more recent studies show that this figure has increased to 90%. MS Moses "Moral and instrumental rationales for affirmative action in five national contexts" (2010) Vol 39 No 3 *Educational Researcher* 215.

⁶⁶⁵ M Htun "From 'racial democracy' to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 64. Afro-Brazilians were especially underrepresented in the "legislature, state bureaucracy, the military, and the private sector." C Yang, GC D'Souza, AS Bapat and SM Colarelli "A cross-national analysis of affirmative action: an evolutionary psychological perspective" (2006) Vol 27 *Managerial and Decision Economics* 211.

⁶⁶⁶ LC De Sousa and P Nascimento "Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity" (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 130.

⁶⁶⁷ M Htun "From 'racial democracy' to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 *Latin American Research Review* 61.

⁶⁶⁸ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) Vol 27 *The Western Journal of Black Studies* 12; M Htun "From 'racial democracy' to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 61; MS Moses "Moral and instrumental rationales for affirmative action in five

include federal government employment, reservations in special government projects aimed at skills development, and scholarships.⁶⁶⁹ To prevent quota benefits from going to uneducated and under-skilled recipients, the Brazilian government implemented the *Bolsa Escola* to provide special school attendance grants to the poor (who are mostly Afro-Brazilian) to encourage those in need to send their children to school.⁶⁷⁰ Several Brazilian (public and private, and state and federal) higher education institutions have also voluntarily enforced the quota system in admissions to increase the number of Afro-Brazilian students.⁶⁷¹ These include, for example, selected reservations set out by the Ministry of Foreign Relations in the Rio Branco Institute, a highly reputable institution for training future diplomats, and quotas in universities in Rio de Janeiro, the State University of Bahia and the University of Brasília.⁶⁷² The Federal government also instructed all educational

national contexts" (2010) Vol 39 No 3 *Educational Researcher* 218. The latest legislation relating to affirmative action in Brazil was recently enacted in June 2010. Section 39 of the *Statute for Racial Equality* Law No. 12,288, DE20 July 2010 now states that "The government will promote actions that ensure equal opportunity in employment for black people...[by] encouraging the adoption of similar measures in enterprises and private organizations." Despite legislation that makes the promotion of the interests of Black Brazilians a national priority, it nonetheless still remains vague to what extent preferential treatment for Black Brazilians is.

⁶⁶⁹ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) Vol 27 *The Western Journal of Black Studies* 12; MS Moses "Moral and instrumental rationales for affirmative action in five national contexts" (2010) Vol 39 No 3 *Educational Researcher* 218.

⁶⁷⁰ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) Vol 27 *The Western Journal of Black Studies* 12-13. The *Bolsa Escola* programme later became the *Bolsa Família* programme which transformed it into an all-encompassing welfare programme which combined the *Bolsa Escola* with other social policies such as the *Cartão Alimentação* (a food stamp programme), the *Bolsa Alimentação* (which provides basic nutrition to vulnerable women and children) and the *Vale-Gás* (a basic grant for the acquisition of gas bottles to be used for preparation of food). VM De Castro and M Bursztyn "Social inclusion or poverty alleviation? Lessons from recent Brazilian experiences" (2008) *CID Graduate Student and Research Fellow Working Paper No. 27 Center for International Development at Harvard University* 1 1.

⁶⁷¹ The University of Brasilia was the first federal university to introduce preferential policies and voluntarily instituted a 20% racial quota for black and mixed-race students on the advice of their Department of Anthropology. LGM Tavolaro "Affirmative action in contemporary Brazil: two institutional discourses on race" (2008) Vol 19 *Int J Polit Cult Soc* 145 154,156; AM Francis and M Tannuri-Piato *Racial wage inequality in Brazil: Preliminary evidence on quotas in university admissions* (2010) Working Paper, Department of Economics, Emory University 2, 6.

⁶⁷² TE Skidmore "Racial mixture and affirmative action: the cases of Brazil and the United States" (2003) *American Historical Review* 1394; S Da Silva Martins, CA Medeiros and EL Nascimento "Paving paradise: The road from "racial democracy" to affirmative action in Brazil" (2004) Vol 34 No 6 *Journal of Black Studies* 807-808; SR Bailey "Group dominance and the myth of racial democracy: antiracism attitudes in Brazil" (2004) Vol 69 *American Sociological Review* 728 728; M Htun "From "racial democracy" to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 71, 72; EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 72-73; LC De Sousa and P Nascimento "Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity" (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 129 134; LGM Tavolaro "Affirmative action in contemporary Brazil: two institutional discourses on race" (2008) Vol 19 *Int J Polit Cult Soc* 146, 152; MS Moses "Moral and instrumental

institutions to include “African and Afro-Brazilian history and culture” in school curricula.⁶⁷³ In 2002 a law was passed which called for the implementation of 20% quotas for Afro-Brazilians in “all civil service entrance competitions, public and private universities and funding for poor students, and compulsory affirmative action programs for private businesses competing for public funds and commissions.”⁶⁷⁴ Moreover, the Federal Government was concerned about the public image of candidates in political parties and instructed “public authorities to engage in publicity campaigns promoting positive images of this population.”⁶⁷⁵ Even the arts were included in affirmative action measures. Quotas were introduced for Afro-Brazilians starring in television programs and television advertisements.⁶⁷⁶

Since 2002 a range of councils, special bodies and task forces have been created to oversee the implementation of affirmative action policies as well as the protection of Afro-Brazilians from various forms of racism. This includes the Federal Council to Combat Racism and the Special Federal Secretariat for Policies Promoting Racial Equality.⁶⁷⁷ The Brazilian Constitution has also formally criminalised any forms of racism for which there is now no statute of limitations and no bail can be posted.⁶⁷⁸

The new policies did not come without any resistance from opposing groups.⁶⁷⁹ Many felt that the policies were outright racism and that “any criterion other than merit

rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 218.

⁶⁷³ Federal Law No. 10.639 of January 9, 2003; S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 794.

⁶⁷⁴ PL 650/99; S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 805.

⁶⁷⁵ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 805.

⁶⁷⁶ M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 71; C Yang, GC D’Souza, AS Bapat and SM Colarelli “A cross-national analysis of affirmative action: an evolutionary psychological perspective” (2006) Vol 27 *Managerial and Decision Economics* 211; LC De Sousa and P Nascimento “Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity” (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 135.

⁶⁷⁷ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 803-804; LC De Sousa and P Nascimento “Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity” (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 135; MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 218.

⁶⁷⁸ M Htun “Racial quotas for a “racial democracy”” (2005) *NACLA Report on the Americas: Report on Race, Part 2* 21.

⁶⁷⁹ In 2003 a large group of white students were denied entrance into the State University of Rio de Janeiro because of the newly introduced quotas and subsequently approached the courts in an attempt to bring the constitutionality of the policy under question. Following this the previous quota of

is unjust in principle.”⁶⁸⁰ But this is not the biggest obstacle that the state had to face. As mentioned earlier, centuries of miscegenation has produced a nation with various degrees of “blackness”, which makes it exceptionally difficult to differentiate between who is black and who is *pardo* (mixed-race).⁶⁸¹ Officials and panels who have been tasked with identifying beneficiaries for quotas have had to resort to superficial methods and non-beneficiaries of affirmative action policies have been known to “try their luck” by applying for benefits.⁶⁸² It is possible for a person whose complexion is dark enough to gain unwarranted access to affirmative action benefits because applicants are self-classified as the race of their choice. In truth, matters of race are predominantly relegated to physical appearance, rather than “other criteria to define the black identity”.⁶⁸³ The university vestibular (entrance exam) is the main instrument used to determine acceptance within the university. Opinions of the negation of meritocracy could arguably be unfounded because of the institutional discrepancies within the Brazilian educational system. Some students, generally white, are better prepared specifically for the vestibular than those who did not enjoy the same standard of primary and secondary education.⁶⁸⁴ This points more to institutional discrimination from a younger age than it does to the undesirability of higher educational standards. Therefore, socio-economic policies aimed at

40% for all Afro-Brazilian students was reduced to a 20% quota. S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 808; LGM Tavoraro “Affirmative action in contemporary Brazil: two institutional discourses on race” (2008) Vol 19 *Int J Polit Cult Soc* 150-152.

⁶⁸⁰ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 808.

⁶⁸¹ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 810.

⁶⁸² SR Bailey “Group dominance and the myth of racial democracy: antiracism attitudes in Brazil” (2004) Vol 69 *American Sociological Review* 730. For example, in 2007 two twins applied to be accepted at the University of Brasília which had a 20% quota for Afro-Brazilian students. However, only one of the two twins was considered “black enough” to enter the university as the other had a slightly lighter complexion. This case illustrates the ambiguity of the policy and the unfavourable scope that it leaves for human error. T Marotto “Brazilian secret 93 million don’t want to talk about is racism” (2008) *Bloomberg*

<http://www.bloomberg.com/apps/news?sid=alezjRWRd5Tk&pid=newsarchive> 1 9 (accessed 27 September 2010).

⁶⁸³ LGM Tavoraro “Affirmative action in contemporary Brazil: two institutional discourses on race” (2008) Vol 19 *Int J Polit Cult Soc* 156. This creates the situation where it is more important to appoint a potential employee or admit a potential student into a university who “looks” black, and not those who “are” black.

⁶⁸⁴ S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 810-811. It is therefore argued that the vestibular is nothing more but an examination of “one’s capacity to perform on the vestibular”, and not a measure or indication of a person’s ability to succeed in university or later in their career. S Da Silva Martins, CA Medeiros and EL Nascimento “Paving paradise: The road from “racial democracy” to affirmative action in Brazil” (2004) Vol 34 No 6 *Journal of Black Studies* 810-811.

eradicating poverty, instead of race-based preferential measures, are in theory more likely to address this problem. Some researchers have found that despite quotas being introduced to increase the number of Afro-Brazilian students at universities and to diversify the racial composition, the number of Afro-Brazilian students who were admitted only showed a slight increase.⁶⁸⁵ They further indicate that those who were admitted would most likely have attended a university, even in the absence of quotas, and that, in addition, affirmative action did not have a significant impact on the wage discrepancy between Afro-Brazilians and white people after leaving university.⁶⁸⁶

Others have warned that the attempt at imitation of United States racial policies is inappropriate for the Brazilian social structure as the fluidity of race also fosters a *harmonious* and *complementary* dispensation.⁶⁸⁷ Though it is unclear whether it is a positive or a negative outcome, the implementation of quotas have had a significant impact on the Brazilian society's consciousness of race.⁶⁸⁸ Whilst some have rediscovered their cultural heritage, others resent the classifications.

Not all opponents of the policy are white Brazilians. Some Afro-Brazilians have taken exception to the quotas by arguing that it is insulting, insinuates that they are incompetent and more importantly, "fail[s] to address the cause of black exclusion, which [is] social not racial".⁶⁸⁹ For this reason Brazil too has had proponents of need-based policies who insist that socio-economic standing should be the criterion for preferential treatment, and not race.⁶⁹⁰

It is therefore essential to have an affirmative action policy that is capable of addressing systemic injustices that perpetuate racial injustices. Moreover, some also consider the Brazilian affirmative action policy to be disjunctive in its application as

⁶⁸⁵ AM Francis and M Tannuri-Piato *Racial wage inequality in Brazil: Preliminary evidence on quotas in university admissions* (2010) Working Paper, Department of Economics, Emory University 3.

⁶⁸⁶ AM Francis and M Tannuri-Piato *Racial wage inequality in Brazil: Preliminary evidence on quotas in university admissions* (2010) Working Paper, Department of Economics, Emory University 3.

⁶⁸⁷ LGM Tavolaro "Affirmative action in contemporary Brazil: two institutional discourses on race" (2008) Vol 19 *Int J Polit Cult Soc* 147.

⁶⁸⁸ C Yang, GC D'Souza, AS Bapat and SM Colarelli "A cross-national analysis of affirmative action: an evolutionary psychological perspective" (2006) Vol 27 *Managerial and Decision Economics* 211.

⁶⁸⁹ M Htun "From "racial democracy" to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 73.

⁶⁹⁰ LGM Tavolaro "Affirmative action in contemporary Brazil: two institutional discourses on race" (2008) Vol 19 *Int J Polit Cult Soc* 153; EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 256-259.

there is no uniform application of the policy in all the government bureaus.⁶⁹¹ This facilitates insubstantial and ineffective implementation and prevents measures that were initially envisioned to accelerate the formation of a racial democracy from achieving this goal.

Ultimately, Brazil has managed its preferential policies as fairly as it could see fit, considering the various obstacles. However, racial issues are still exacerbated by impediments created by white upper management. Unless the Brazilian government can find a way to change this state of affairs / status quo, Afro-Brazilians will continue to struggle for equal recognition. As Telles states, “Brazil needs to develop a set of policies to reduce Brazil’s hyperinequality with race-conscious affirmative action that can break the glass ceiling and alleviate racist culture.”⁶⁹²

Unlike Brazil, the Indian society is not structured around issues of race or ethnicity. Here, however, society is ordered into a strict hierarchy according to historical occupations.

6.3 India’s positive discrimination

The Indian national system of *positive discrimination* was set in motion by British colonialists during the late 19th century.⁶⁹³ In fact, it has been said that India possibly has the “largest affirmative action program in the world.”⁶⁹⁴ This system was originally based on the prescribed castes into which the Hindu religion divides society which “assumes that certain traits, qualities, functions, characteristics or powers are

⁶⁹¹ M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 84.

⁶⁹² EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 250.

⁶⁹³ J Fobanjong *Understanding the backlash against affirmative action* (2001) 154-155, 158; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 1 3. MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 216; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 11; T Sowell *Affirmative action around the world: an empirical study* (2004) 23. Although India gained its independence in 1947 and formally adopted affirmative action measures soon thereafter, certain individual states in India had already adopted similar measures by 1895 and by the 1920’s it had become more common. J Fobanjong *Understanding the backlash against affirmative action* (2001) 154; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 3.

⁶⁹⁴ D Kumar “The affirmative action debate in India” (1992) Vol 32 *Asian Survey* 290 290.

inherent in and definitive of each of the *varnas*.”⁶⁹⁵ Accordingly the *varnas*, a hierarchy of five castes, consisted of the “*Brahmans* (priests), *Kshatriyas* (warriors), *Vaisyas* (traders), *Sudras* (laborers), and *Ati-Suderas* (those who do the “unclean” work, who are ritually “polluting”).⁶⁹⁶ It is therefore not surprising that the *Brahmans* also dominated the political and economic sectors of India.⁶⁹⁷ Within the *varnas* there is an additional hierarchy of thousands of *jati*, or castes, which further predefines one’s status within society.⁶⁹⁸

Upon independence in 1947 and the adoption of the Indian Constitution, India formally established an affirmative action system that would protect the rights of certain backward groups and members of lower castes, namely the Scheduled Castes, otherwise known as the “untouchables” or the *Dalits* and the Scheduled Tribes, otherwise known as the *Adivasis*.⁶⁹⁹ Historically Scheduled Castes were excluded from various forms of activities necessary to participate equally in society. These included certain occupations as well as “access to property rights, education and civil rights and all source of livelihood (except manual labour, and certain occupations which were considered to be polluting.)”⁷⁰⁰ As in the case of racial discrimination in South Africa, the caste system was notorious for its institutionalised discrimination against members of lower castes and affirmative action, or *positive discrimination*, was therefore necessary to “outweigh the imbalances of the past.”⁷⁰¹ In fact, this all-encompassing discrimination was not merely limited to caste.

⁶⁹⁵ T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 28 30; J Fobanjong *Understanding the backlash against affirmative action* (2001) 154.

⁶⁹⁶ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 81-82; A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdiou *Race and inequality: world perspectives on affirmative action* (2006) 64; T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 31.

⁶⁹⁷ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 10.

⁶⁹⁸ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 82.

⁶⁹⁹ L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 747 753-754; T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) *The Western Journal of Black Studies* 8; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 13; J Fobanjong *Understanding the backlash against affirmative action* (2001) 155.

⁷⁰⁰ S Thorat and M Mahamallik “Chronic poverty and socially disadvantaged groups: analysis of causes and remedies” (2007) *Chronic Poverty Research Centre Working Paper No 33* 1 4.

⁷⁰¹ J Fobanjong *Understanding the backlash against affirmative action* (2001) 154; T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) *The Western Journal of Black Studies* 3; T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 33.

Individuals were also victimised on grounds of race, ethnicity, gender and region.⁷⁰² This affected the recipients of these prejudices in all spheres of life. Though some have managed to acquire economic strength and occupational success, the stigma of untouchability is inescapable.⁷⁰³ The following list describes the typical discriminatory practices that backward groups had to face:

“(1) denial of access to public facilities, wells, schools, post offices and courts; (2) prohibition against entering Hindu temples; (3) exclusion from professional occupations; (4) residential segregation; (5) denial of access to restaurants, theatres and barber shops; (6) prohibition from using horses, bicycles, umbrellas, or wearing jewelry; (7) restrictions involving maintaining prescribed distance from persons of higher caste while on roads and streets.”⁷⁰⁴

Although all forms of “untouchability” have been declared illegal in 1949, societal discrimination in this regards nevertheless remains a threat.⁷⁰⁵ In fact, pervasive negative stereotyping of certain castes still persists to this day, mostly due to historic practices and beliefs and the concomitant status disadvantage, and so much so that this necessitated the adoption of the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities Act) 33 of 1989.⁷⁰⁶ The consequences of these enduring stigmatisations have been reported to include “various aspects of violence, exclusion and rejection.”⁷⁰⁷

Fortunately the state accepted its responsibility to protect the interests of certain organised groups. This sense of obligation is evident from the phrasing of Section 46 of the Indian Constitution which states the following: “The State shall promote with special care the educational and economic interests of the weaker sections of the

⁷⁰² MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 220.

⁷⁰³ J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 5.

⁷⁰⁴ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 8.

⁷⁰⁵ Section 17 of the Indian Constitution reads as follows:

17. Abolition of Untouchability.—“Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

⁷⁰⁶ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 85; A Deshpande “Affirmative action in India and the United States” (2006) *Equity and Development, World Development Report 2006* 1 6, 7. Of all the backward groups in India, the Dalits experiences the most grievous forms of discrimination, ranging from “personal indignities to outright atrocities.” TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 85.

⁷⁰⁷ A Deshpande “Affirmative action in India and the United States” (2006) *Equity and Development, World Development Report 2006* 7.

people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”⁷⁰⁸ For this reason sections 15(4) and 16(4) of the Indian Constitution ensure special reservations for “socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”⁷⁰⁹ However, it soon became clear that the Scheduled Castes and the Scheduled Tribes were not the only Indian groups who were experiencing social and economic hardships. A commission was appointed to investigate this issue and in 1981 the Mandal Commission published their report which recommended that another group of beneficiaries receive preferential treatment.⁷¹⁰ This group was identified as the “Other Backward Classes”, also known as the OBCs.⁷¹¹ Unfortunately this report was not received very well from the upper-caste Hindus when Prime Minister V.P. Singh indicated that the recommendations were to be implemented in 1990. This resulted in major riots and even mass suicides.⁷¹² Nevertheless the Indian Supreme Court finally ruled that the Other Backward Classes will also receive preferential treatment, but added the caveat that this will be subject to certain limitations.⁷¹³ The most prominent of these

⁷⁰⁸ It is worth noting that the preferential protection of backward groups in political representation as provided in Section 334 of the Indian Constitution was initially intended to be strictly temporary and were effective for 10 years only. Subsequently, these policies were maintained, having been renewed every decade through constitutional amendments. The other areas where affirmative action is known to operate, namely in government employment and education, did not receive a prescribed cut-off date as it was asserted that preferential policies would cease when Scheduled Castes and Scheduled Tribes no longer require assistance of this nature. A Singh *Affirmative Action Programme: A Comparative Study of India and U.S.* LL.M thesis European Academy of Legal Theory Brussels (2002-2003) 40; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 12, 14; T Sowell *Affirmative action around the world* (2004) 34-35; S Thorat *Policy Brief 14: Affirmative Action, India* (2006) http://www.odi.org.uk/inter-regional_inequality 1 4 (accessed 18-8-2010); T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 37; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 15.

⁷⁰⁹ Section 15(4) and 16(4) of the Indian Constitution.

⁷¹⁰ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 14-15.

⁷¹¹ Dudley Jenkins defines the OBC groups as an “amalgam of groups facing socio-economic disadvantages. These include other lower (but not untouchable) castes and similarly situated non-Hindu groups or castes.” L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 754. However, Sowell argues that the reason for the inclusion of this group as affirmative action beneficiaries is because of “their own inadequacy and their resentment of other groups who were more successful in education and the economy.” T Sowell *Affirmative action around the world* (2004) 51.

⁷¹² D Kumar “The affirmative action debate in India” (1992) Vol 32 *Asian Survey* 290; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 15; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 9.

⁷¹³ *Indra Sawhney v. Union of India* (All India Reporter, 1993, S.C. 477). In determining whether an individual qualifies for affirmative action benefits, the Court declared that one’s caste is not the only determining factor of backwardness. Consequently, other criteria are to be considered, for example,

is that the upper crust of this group, known as the “creamy layer”, will be excluded from any preferential treatment as they are already socially and economically prosperous due to “land reform policies in the 1970s and partly as a result of effectively mobilising political power” and therefore are in no need of any advancement.⁷¹⁴ Furthermore, the Indian Supreme Court also ruled that national reservations would be limited to 50%, and as the Scheduled Castes and Scheduled Tribes were already receiving roughly 23% of the reservations, the Other Backward Classes would only receive 27% of the remaining reservations, notwithstanding the fact that they made up nearly 52% of the population at that stage.⁷¹⁵ Women too have also been recognised as deserving of preferential treatment.⁷¹⁶ There is currently a 33% quota of women’s reservations at local government level, an instance that was no mean feat to accomplish.⁷¹⁷ Disabled people however do not enjoy the same legislative or judicial protection.⁷¹⁸

Religion also plays a significant role in India’s positive discrimination scheme. Reservations are only applicable to Hindu Scheduled Castes and Scheduled Tribes. Christian or Muslim Indian citizens who fall under the OBC category fortunately do qualify for preferential treatment but Dalit Muslims or Dalit Christians however do

social and educational limitations. To establish whether an Other Backward Class individual falls within the “creamy layer” of this class, the Court ordered that an “economic means test” be applied.

⁷¹⁴ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 35; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 1 9; J Fobanjong *Understanding the backlash against affirmative action* (2001) 157; L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 771.

⁷¹⁵ *Indra Sawhney v. Union of India* (All India Reporter, 1993, S.C. 477) par 68; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 14; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 9. Reservations and similar benefits for Scheduled Castes (15% of the population) and Scheduled tribes (7,5% of the population) are based on their percentage share of the population. L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States” (2003-2004) Vol 36 *Conn. L. Rev.* 756, 776. It should also be mentioned that there are varied estimates on the precise size of the Other Backward Classes group. Others have estimated that this group in fact only comprises 35% of the overall population. J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 4.

⁷¹⁶ T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 40; A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 68-69. Section 15 of the Indian Constitution expressly prohibits any form of discrimination on grounds of religion, race, caste, sex or place of birth. Furthermore, Section 15(3) of the Indian Constitution states the following: “Nothing in this article shall prevent the State from making any special provision for women and children.”

⁷¹⁷ A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 68; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 5.

⁷¹⁸ T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 37.

not.⁷¹⁹ This has been a crucial point of contention as this could lead to various forms of overlapping disadvantage. For instance, someone may experience socio-economic and status disadvantages for firstly being a member of a lower caste, secondly for being a Muslim or a Christian and thirdly for being a women.

One of the most marked differences between Scheduled Castes and Scheduled Tribes on the one hand, and Other Backward Classes on the other, is the ability to identify and distinguish them from one another. Unlike Other Backward Classes, Scheduled Castes and Scheduled Tribes have an identity “outside the realm of affirmative action.”⁷²⁰ The term “Other Backward Classes” was created as a collective noun for a variety of Indian citizens who were socio-economically disadvantaged. Accordingly, the group of affirmative action beneficiaries once again, as in the case of South Africa (and Malaysia above) comprise of the majority of the Indian population.⁷²¹

In India the aim has been to provide support to the oppressed classes and castes as a means to improve and expand their social and economic positions, as well as to ensure democratic participation in all societal activities, to “overcome historic patterns of discrimination and backwardness” and to make up for centuries of injustice and oppression.⁷²² It also aims to subvert the convergence of power, political and otherwise, in the hands of a concentrated caste elite whilst simultaneously elevating a number of backward castes and classes to elite status.⁷²³ Consequently, *inter-group economic disparities* are addressed by focussing affirmative action policies on the individuals identified as victims of the caste system for centuries as well as the economically downtrodden.⁷²⁴

⁷¹⁹ L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States” (2003-2004) Vol 36 *Conn. L. Rev.* 778; J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 7.

⁷²⁰ F De Zwart “The logic of affirmative action: caste, class and quotas in India” (2000) Vol 43 *Acta Sociologica* 235 235.

⁷²¹ MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 220.

⁷²² T Sowell *Affirmative action around the world* (2004) 24; A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 65.

⁷²³ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 30; MS Moses “Moral and instrumental rationales for affirmative action in five national contexts” (2010) Vol 39 No 3 *Educational Researcher* 217.

⁷²⁴ A Deshpande “Affirmative action in India and the United States” (2006) *Equity and Development, World Development Report 2006* 5.

The Indian affirmative action scheme currently operates by means of reservations and quotas which are to a large extent based on the preferential group's percentage of the population, except in the case of Other Backward Classes as indicated above.⁷²⁵ These preferences are applied in the spheres of public education institutions,⁷²⁶ especially in university admissions, appointments in the public sector or "government appointments at union and state level" (which has the largest total of the workforce in India),⁷²⁷ as well as "congressional representation" in the House of the People and in the Legislative Assembly in the case of Scheduled groups.⁷²⁸ More specifically, educational benefits entail "exemption from school fees, provision

⁷²⁵ J Fobanjong *Understanding the backlash against affirmative action* (2001) 154; L Dudley Jenkins "Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 749, 756; A Deshpande "Affirmative action in India and the United States" (2006) *Equity and Development, World Development Report 2006* 10.

⁷²⁶ See Section 15(4) of the Indian Constitution: Section 15 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: 15(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

⁷²⁷ T Deane "A commentary on the positive discrimination policy of India" (2009) Vol 1 *PER* 37. Section 16(4), which authorizes preferential treatment for Scheduled Castes and Scheduled Tribes in public employment states the following:

Section 16 Equality of opportunity in matters of public employment (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

⁷²⁸ J Fobanjong *Understanding the backlash against affirmative action* (2001) 155, 156; L Dudley Jenkins "Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 749, 756; T Deane "A commentary on the positive discrimination policy of India" (2009) Vol 1 *PER* 36. Other Backward Classes are excluded from preferential treatment for representation in legislative bodies. This privilege is only granted to Scheduled Castes and Scheduled Tribes. Section 330 of the Indian Constitution relates to reservations in the House of the People, whereas Section 332 in a similar fashion relates to reservations within Legislative Assemblies of the states. Section 330 reads as follows:

330. (1) Seats shall be reserved in the House of the People for —(a) the Scheduled Castes; (b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and (c) the Scheduled Tribes in the autonomous districts of Assam.(2) The number of seats reserved in any State [or Union territory] for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State [or Union territory] in the House of the People as the population of the Scheduled Castes in the State [or Union territory] or of the Scheduled Tribes in the State [or Union territory] or part of the State [or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State [or Union territory].

of stipends, scholarships and book grants, merit scholarships” and special coaching in certain cases.⁷²⁹

What sets its policy starkly apart from South Africa’s affirmative action policy is that the private sector is completely excluded from *positive discrimination* responsibilities in so far as they do not receive government subsidies or monetary assistance of any kind.⁷³⁰ As indicated above, certain shared physical characteristics between various castes (and classes) often make it exceedingly difficult to differentiate between them. This system operates by way of individuals selecting predetermined race and caste checkboxes during application and census stages.⁷³¹ Individuals are expected to register their membership of specific social categories as a means of acquiring the benefits bestowed to the aforementioned groups.⁷³² For obvious reasons it is not incomprehensible that this procedure can be easily manipulated, and often is. Furthermore, this method of identification can also be criticised for reifying social identities which further entrenches the hierarchy between various castes and classes. Complaints have surfaced that due to a lack of adequate education and training, many of the available reservations and quotas are not utilised as the number of trained beneficiaries who can take advantage of the reservations are insufficient.⁷³³ Fortunately it was recognised that preferential treatment alone cannot facilitate all social and economic empowerment without additional reinforcement.⁷³⁴ General and anti-poverty government programmes serve as necessary support to affirmative action by fortifying the human capital base. Most of these programmes are aimed at the society as a whole, but as the Scheduled Castes and Scheduled

⁷²⁹ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 10; T Sowell *Affirmative action around the world* (2004) 31.

⁷³⁰ J Fobanjong *Understanding the backlash against affirmative action* (2001) 155-156; TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 17; D Sabbagh “Elements toward a comparative analysis of affirmative action policies” (2004) *Annual Meeting of the American Political Science Association* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/6/3/pages59633/p59633-1.php (13 July 2009) 3; S Thorat *Policy Brief 14: Affirmative Action, India* (2006) http://www.odi.org.uk/inter-regional_inequality (accessed 18-8-2010) 3.

⁷³¹ L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 758.

⁷³² F De Zwart “The logic of affirmative action: caste, class and quotas in India” (2000) Vol 43 *Acta Sociologica* 237.

⁷³³ Deshpande notes however that this is not the case within the electoral sphere as most, if not all allocations to Scheduled Castes and Scheduled Tribes are taken advantage of. A Deshpande “Affirmative action in India and the United States” (2006) *Equity and Development, World Development Report 2006* 14.

⁷³⁴ J Heyer and NG Jayal “The challenge of positive discrimination in India” (2009) *CRISE Working Paper No. 55* 14.

Tribes make up a disproportionately large segment of the poor, they are therefore the largest group of recipients. Additional special programmes implemented for corresponding purposes are aimed at Scheduled Castes and Scheduled Tribes exclusively.⁷³⁵

From the above discussion it is therefore clear that India's affirmative action programme, akin to that of South Africa, is "constitutionally mandated".⁷³⁶ Much of the application of this prescribed programme has been left to judicial interpretation however.⁷³⁷ Whereas the Indian Constitution has five sections dedicated to the right to equality, namely sections 14 to 18, the South African Constitution only has one (section 9). In previous Supreme Court decisions it was argued that affirmative action measures constitute an exception to the right to equality as enshrined in Section 16 of the Indian Constitution. The Court however disagreed with this and in a similar fashion as the South African Constitutional Court in the *Van Heerden* case, stated that this is in fact an expression of equality and Section 16(1), rather than an exception thereto.⁷³⁸

India's affirmative action endeavours have to date had many encouraging achievements. The most obvious of these is that many individuals from backward groups have been granted certain opportunities that they otherwise would not have had access to, especially educational and public employment opportunities.⁷³⁹ Deshpande also states that the "vast majority of Dalits [(Scheduled Classes)] are not directly affected by affirmative action, but reserved jobs bring a many fold increase in

⁷³⁵ J Heyer and NG Jayal "The challenge of positive discrimination in India" (2009) *CRISE Working Paper No. 55* 14.

⁷³⁶ J Fobanjong *Understanding the backlash against affirmative action* (2001) 154, 155.

⁷³⁷ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 16.

⁷³⁸ *State of Kerala v N.M. Thomas*, (1976) 2 SCC 310; Singh A *Affirmative Action Programme: A Comparative Study of India and U.S.* LL.M thesis European Academy of Legal Theory Brussels (2002-2003) 43.

⁷³⁹ S Thorat *Policy Brief 14: Affirmative Action, India* (2006) http://www.odi.org.uk/inter-regional_inequality (accessed 18 August 2010) 3; A Deshpande "Chapter 3: Affirmative action in India" in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 71. Figures show that even though representation of backward groups have increased significantly in recent decades, these groups are yet to see adequate proportional representation in all spheres, especially in what is referred to as grade A and B jobs, i.e. upper management. Furthermore, some studies have also found that female members of backward groups are still very much underrepresented in the educational sector. MS Moses "Moral and instrumental rationales for affirmative action in five national contexts" (2010) Vol 39 No 3 *Educational Researcher* 211. Sowell confirms that many of the positions filled by backward groups, especially during the 1990s, are "concentrated at the bottom." T Sowell *Affirmative action around the world* (2004) 32.

the number of families liberated from subservient roles.”⁷⁴⁰ Areas of education and occupations are now much more representative of India’s societal composition than before. In fact, of all the opportunities to be attained, a previous affirmative action beneficiary was fortunate enough to attain the presidency in 1997.⁷⁴¹ Central government representation in the executive branch as well as the national legislature has been largely successful due to specific reservations for Scheduled Castes and Scheduled Tribes. However, progress has been delayed because reservations are based on the backward classes population during the 1980’s, and have not been updated since.⁷⁴²

Unfortunately contemporary fluidity of race and caste has made it increasingly difficult to accurately identify the correct affirmative action beneficiaries. Conversely, as briefly mentioned above, highly regulated procedures that are applied during the distribution phase of *reservation benefits* could have an adverse effect on the sought-after goal of an equal society through the reification of societal categories of castes and classes.⁷⁴³ A great deal of time and resources are often spent on adequate identification of the correct categories for preferential treatment.⁷⁴⁴ Fortunately the reality is not as bleak as it would seem. Through the opened opportunities that granted the necessary education and training, those that were generally seen as *ignorant* and *incompetent* now have the ability to shatter this stigma.⁷⁴⁵ However, this can only occur if the individuals selected for the occupations and positions to which they would not have had access otherwise have the necessary training to be successful.

⁷⁴⁰ A Deshpande “Affirmative action in India and the United States” (2006) *Equity and Development, World Development Report 2006* 15.

⁷⁴¹ J Fobanjong *Understanding the backlash against affirmative action* (2001) 156.

⁷⁴² S Thorat *Policy Brief 14: Affirmative Action, India* (2006) http://www.odi.org.uk/inter-regional_inequality 3 (accessed 18 August 2010).

⁷⁴³ L Dudley Jenkins “Race, caste and justice: social science categories and antidiscrimination policies in India and the United States: (2003-2004) Vol 36 *Conn. L. Rev.* 758, 768-769. Some are skeptical of the value of these preferential programmes and have stated that instead it has “made caste more of an issue; precisely because of the value it confers on the backward communities.” T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 11.

⁷⁴⁴ Unfortunately this process also opens up opportunities for abuse. There have been cases where students have committed fraud by bribing officials in order to get a backward status. S Ghoshal “Affirmative action in India” (2002) Vol 166(11) *Canadian Medical Association Journal* 1456 1456.

⁷⁴⁵ A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 71.

Conflicts and resentment occur between beneficiaries and non-beneficiaries, especially younger generations, who feel that their opportunities are being limited in some shape or form.⁷⁴⁶ India also faces strong discontent from members of upper castes who now face more competition from each other for limited positions, whereas the number of suitably qualified members of backward classes is far fewer and therefore there is less opposition to face.⁷⁴⁷ A similar occurrence manifests itself in government employment. Disgruntlement is further exacerbated when individuals are employed in order to fill reservations without having the necessary qualifications. In South Africa white employees experience similar distrust in the “suitably qualified” criteria for employment when “black” candidates are appointed in a Black Economic Empowerment (BEE) capacity.⁷⁴⁸ A further dual occurrence in both states is that positions are often left unfilled owing to a lack of supply of suitably qualified affirmative action candidates.⁷⁴⁹ Furthermore, members from lower castes in rural areas are yet to receive much of the prospective benefits that the policy could provide.⁷⁵⁰

The restriction of the policy to public, or government, employment, also adds to its limited success status in empowering backward groups. An increasing number of public enterprises such as education are being privatised which is beyond the reach of preferential policy measures.⁷⁵¹ Ultimately, it seems that the biggest danger to India’s affirmative action reservations is that it perpetuates class consciousness, or “exacerbate[s] consciousness of ethnic differences”.⁷⁵² An ever increasing number of castes are surfacing, claiming that they too deserve reservation and quota benefits and very little changes have occurred in the social and caste composition of India.⁷⁵³

⁷⁴⁶ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 3-4; 11; T Sowell *Affirmative action around the world* (2004) 32.

⁷⁴⁷ T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 41.

⁷⁴⁸ Section 15 EEA of 1998.

⁷⁴⁹ T Sowell *Affirmative action around the world* (2004) 30; T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 44.

⁷⁵⁰ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 11.

⁷⁵¹ A Deshpande “Chapter 3: Affirmative action in India” in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 75.

⁷⁵² TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 36, 244. A very sad outcome of the reservation policy is that it “eliminated whatever goodwill the upper castes had for the lower castes.” T Sowell *Affirmative action around the world* (2004) 26.

⁷⁵³ D Kumar “The affirmative action debate in India” (1992) Vol 32 *Asian Survey* 299; F De Zwart “The logic of affirmative action: caste, class and quotas in India” (2000) Vol 43 *Acta Sociologica* 236; T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 45-46.

Sowell suggests that much of the disproportionate representation of groups can be ascribed to inadequate elementary and secondary education, compared to members of upper castes.⁷⁵⁴ In this regard he states the following: “These educational handicaps can lead to employment handicaps. Patterns of unused quotas have existed in government employment, in part because of difficulties in passing the relevant examinations.”⁷⁵⁵

The following section will compare the three selected jurisdictions and will conclude with a few brief remarks on the relevance of their experience to affirmative action in South Africa.

6.4 Possible lessons for South Africa?

Though many nations around the world have also implemented affirmative action policies, the three case studies above were each chosen for their individual links or similarities to South Africa. From the above discussion it is evident that there are certain common threads running through the experience of different countries. For instance, the policies inevitably result in the redistribution of societal resources, although with varying degrees of success. They also have a prominent compensatory focus, especially in the case of India’s Scheduled Castes and Scheduled Tribes. Lastly, rather than expecting affirmative action policies to be the panacea for socio-economic deprivation, each of the three countries has situated its policies within a more encompassing framework of intersecting policy strategies.

6.4.1 Defining the group of beneficiaries

Malaysia, with a policy that is aimed at remedying the cultural injustices that are faced by the majority of the citizens, is most commonly known as the affirmative action success story. It was recognised that, without the special opportunities reserved exclusively for the Bumiputras, the Chinese and Indians would continue to dominate the Malaysian economy. However, Malaysian affirmative action policies

⁷⁵⁴ T Sowell *Affirmative action around the world* (2004) 31-32.

⁷⁵⁵ T Sowell *Affirmative action around the world* (2004) 32.

have been subjected to similar criticisms as South African policies and are accused of fortifying an “already well-off” elite.⁷⁵⁶ Corrupt activities of upper-management officials within the various special agencies that were created to promote the interests of Bumiputras have restrained the ability of Malaysia’s preferential policy to redistribute resources to those in need. Fortunately the Malaysian economy is safeguarded for the most part because affirmative action in general does not function at the expense of the most underprivileged members of society as the isolation of the private sector encourages competition and generates taxation revenue that can fund social policies.

Brazil was selected as an illustration of another country where race-based policies are being implemented. Racial discrimination in Brazil is an issue that is more “subtle and shameful” rather than “explicit or structural” during a period in which Brazil presented itself as a *racial democracy*.⁷⁵⁷ The structural racial discrimination referred to here pertains to the absence of explicit racial segregation legislation, for instance, that prohibited equal participation of any nature. Instead, people of Afro-Brazilian descent were prevented from achieving certain achievements by experiencing obstacles, such as inadequate education. Prominent figures shattered Brazil’s international façade of a *racial democracy* which exposed the veiled economic oppression of Afro-Brazilians.⁷⁵⁸ Affirmative action measures were subsequently used to thwart this discriminatory substructure by empowering Afro-Brazilians in the areas where officials deemed fit. Perhaps other measures than quotas would be more appropriate to address the underlying generative framework that perpetuates racism, however covert, and deprives Afro-Brazilians of true democratic participation. There are several factors that impede on the policy’s ability to reach its goals. These include fraudulent representations by persons who present themselves as Afro-Brazilians. This highlights problems relating to the identification of beneficiaries. Also, there is not a coherent implementation of the policy throughout Brazil, without which Brazil cannot hope to achieve its racial democratic status. Many Afro-

⁷⁵⁶ T Sowell *Affirmative action around the world* (2004) 62.

⁷⁵⁷ M Htun “From “racial democracy” to affirmative action: changing state policy on race in Brazil” (2004) Vol 39 No 1 *Latin American Research Review* 73.

⁷⁵⁸ President Fernando Henrique Cardoso officially acknowledged the existence of racism during his term of office and enforced racial quotas to counter this. Prior to this the United Nations Educational, Scientific and Cultural Organisation (UNESCO) conducted a research project which concluded that “racial democracy was an oversimplified and too optimistic depiction of racial relations in Brazil.” LC De Sousa and P Nascimento “Brazilian national identity at a crossroads: the myth of racial democracy and the development of black identity” (2008) Vol 19 *Int. J. Polit. Cult. Soc.* 132.

Brazilians have attained economic successes however, but it is unclear whether these accomplishments would have been realised regardless of preferential measures.

The caste system in India divided all Hindus into a predefined hierarchy and affirmative action now serves as an instrument to compensate those at the lower castes for their cultural suppression. Not only were there significant status harms but these were accompanied by economic hardships. Wealth and power was also centred within the upper-castes. The affirmative action policy is therefore used to upgrade lower caste Indians in all senses of the word. The aim is to create a stronger Scheduled Caste and Scheduled Tribes middle class, as well as to alleviate the instance of poverty amongst these groups. Although India still faces extensive poverty-related dilemmas, ameliorative measures have succeeded in increasing the democratic participative capability of affirmative action beneficiaries of all categories. Members from lower castes are much more widely represented in legislative and executive bodies and many have overcome the stigma associated with being a member of a Scheduled Caste or Scheduled Tribe. But regardless of the policy successes, many of the available affirmative action benefits are still not utilised as the educational system still does not prepare the potential beneficiaries adequately to compete with their higher-caste counterparts.

The risk that most affirmative action programmes pose is that the benefits of such programmes are not distributed equally amongst the entire group of beneficiaries. In this respect it is vital that policies should be clear on whether the goals are to facilitate the upper mobility of members of Scheduled Castes, Scheduled Tribes and Other Backward Groups into the middle class, or whether it seeks to aid all members of the aforementioned groups. In India's case it was found that once again it was only the most prosperous members of these groups who were benefitting from reservations and quotas.⁷⁵⁹ Others have found that there are income disparities within occupational fields where lower castes are receiving less remuneration than

⁷⁵⁹ TE Weisskopf *Affirmative action in the United States and India: a comparative perspective* (2004) 36; T Sowell *Affirmative action around the world* (2004) 30, 33; A Deshpande "Affirmative action in India and the United States" (2006) *Equity and Development, World Development Report 2006* 15; A Deshpande "Chapter 3: Affirmative action in India" in E Kennedy-Dubourdieu *Race and inequality: world perspectives on affirmative action* (2006) 71.

members from upper castes, though this, it is argued, is due to insufficient literacy capabilities.⁷⁶⁰

6.4.2 Overcoming the divisions of the past

Of the countries discussed above, Malaysia has the fewest issues concerning the identification of beneficiaries. Those that are benefitting from affirmative action measures are local Malays who can be clearly distinguished from Chinese and Indian citizens. Research indicates that these distinct groups have largely remained separate units without much miscegenation between ethnic groups. It can also be argued that race consciousness has not been exacerbated by preferential policies too much as the three ethnic groups have throughout history acted and specialised in various economic activities in isolation from each other.

It is unclear whether Brazil's race-based affirmative action has succeeded in furthering good relations between white and Afro-Brazilians. Previously hidden racial tensions have arguably become more noticeable and Brazilians are now more race conscious than ever. Brazil's history is of course different from South Africa's, where racial division and segregation have always been very much in the foreground. What South Africa has succeeded with more recently is creating a national affirmative action policy which promotes certainty and uniformity. However, only time will tell whether this policy will contribute to the normalisation of racial relations, or exacerbate existing tensions even further.

As noted above, adequately identifying the correct beneficiaries of Indian positive action have presented a major problem in terms of accuracy as well as large (and arguably unnecessary) expenditure. India's general and anti-poverty government programmes give affirmative action measures the necessary backing to focus its policies on specific targets. By including the OBC's in preferential measures India has expanded its social benefits to another indigent group that has been identified as socio-economically, rather than culturally, disadvantaged (as seen above, the

⁷⁶⁰ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) Vol 27 *The Western Journal of Black Studies* 3 9. It is calculated that the literacy rate of Scheduled Castes and Scheduled Tribes are 30% and 24% respectively, whereas the overall literacy rate of India is 52%.

disadvantage of Scheduled Castes and Scheduled Tribes is culturally based, although it is accompanied by socio-economic deprivation). Perhaps the South African government could look into the possibility of expanding policies to the poor/socio-economically disadvantaged so that its policies can reach poverty-stricken white people as well. As stated in the previous chapter, this should not affect the majority of the current group of affirmative action beneficiaries too much as the number of poor white South Africans is marginal compared to the number of poor black South Africans.

In conducting this comparative study, it was hoped that India's preferential measures could shed more light on class-based affirmative action and provide possible alternatives for South Africa. However, it appears that the route India has chosen to take is so specifically tailored to its own society – which has an unprecedented assortment of various groups in terms of caste, religion, class and race – that it is not clear whether the lessons learned in India can simply be transferred to the South African context.

6.4.3 Impact on efficiency

In a period when social policies diverted large portions of revenue towards the alleviation of poverty of the Bumiputras, and the Malaysians in general, a steadily growing economy and the prioritisation of education served as the backbone for further social and economic advancement. Had it not been for this, it could be argued that the outcome would have been bleak for the under-educated and under-skilled Bumiputras. The Malaysian government saw to it that social policies were not to the detriment of a stable economy and generally excluded the private sector from any responsibilities other than the usual taxation.

The most important question to ask in relation to South Africa and Malaysia, is whether South Africa currently has the ability or the prospects to emulate Malaysia's success? This is very doubtful for various reasons. Firstly, South Africa has applied its preferential policies not only to government employment, but has included the private sector as well. Many have argued that this has come at the price of efficiency and in this volatile economic climate such practices should take a backseat to

economic growth. Secondly, although South Africa has prioritised education at the tertiary level, not enough is being done about educational standards at primary and secondary levels. Institutional inequalities still leave those most in need ill-equipped to compete with other groups and this leads to a wide range of problems ranging from resentment to unemployment and the deprivation of human dignity. Unless these issues are addressed, South Africa is unlikely to reach the same level of success as Malaysia.

In both South Africa and Brazil it can be argued that educational standards are lacking. Brazil has managed to implement the *Bolsa Escola* educational programme which provides free schooling to certain poor pupils, which later became the *Bolsa Família*, a basic welfare programme as stated above. South Africa is yet to give substantive content to basic rights such as the right to education and there still remains uncertainty regarding the meaning of the right.⁷⁶¹

As in Malaysia, India also insulated the private sector from preferential policy responsibilities. This was seen as a way to uphold the standards of efficiency and to protect the economy as the lower caste individuals still do not have the same educational backgrounds as many of their potential competitors in the private sector.

6.4.4 Creamy layer issues

India has taken an unusual route with its policies by *skimming off the top* of the group of beneficiaries regarding the OBCs. As this group does not generally fit into the caste system but still experiences socio-economic deprivation, special allowances were made for this as well. This could prove to be a valuable tool for South Africa as it is counter-productive and very expensive to sustain a small elite without reaching the majority of those in need.

The previous chapter has indicated that the strong correlation between race and class (socio-economic standing), may provide the necessary margins for incorporating some of the class-based affirmative action elements in South Africa.

⁷⁶¹ See P De Vos "On going to school in a mud hut" (2010) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/on-going-to-school-in-a-mud-hut/> (accessed 5 October 2010); S Blaine "Schools sue state over lack of resources" (2010) *Business Day* 5/10/2010 <http://www.businessday.co.za/Articles/Content.aspx?id=122748> (accessed 5 October 2010).

For instance, South Africa could consider imposing similar “creamy layer” exclusions in its own policies so that very affluent black individuals do not profit any further from preferential measures, and so that other disadvantaged individuals may be granted the opportunity to benefit as well.

6.4.5 Impact on race relations

Since the introduction of affirmative action in Malaysia and South Africa, both countries for the most part managed to avoid violent uproars from opposing races and ethnic groups, even though both had a history of violence.⁷⁶² However, although there have not been any overt hostility amongst Bumiputras or black South Africans, it has become clear in recent times that resentment is building up between the poorest and the elite of each group.⁷⁶³ Corruption, exploitation, nepotism and cronyism have solidified the power positions of the elite, but have also hampered the potential trickle-down effect that their new found economic success has produced.

In Brazil it is unclear whether race-based affirmative action has done much to further race relations between white and Afro-Brazilians. Previously hidden racial tensions are arguably more noticeable than ever. South Africa will do well to heed this warning as racial tensions are continually on a thin edge.

It is briefly mentioned above that India’s reservation policy is running the risk of exacerbating caste and class consciousness. From the research done it becomes apparent that as soon as one identifies a specific group for preferential treatment, that identification can very easily turn into a tool used to magnify the importance of the distinctive characteristic, whether it be race, ethnicity, religion or class.

6.4.6 Compensatory and redistributive justifications for affirmative action

⁷⁶² Malaysia had had the 1969 riots as stated earlier and South Africa had a variety of violent upheavals between the state and black liberation movements.

⁷⁶³ A clear exception to this is the recent xenophobic attacks aimed against African foreigners by local black South Africans. It is unnecessary for current purposes to expand on this, but suffice it to say that these actions have jeopardised the plight of black South Africans internationally which portrays this group not as the oppressed victims of apartheid but as ruthless nationalists who have no desire to facilitate a harmonious dispensation.

In the previous chapters, compensatory and redistributive justifications for affirmative action were considered. The comparative study in this chapter illustrates the currency of this distinction. At the same time, however, it also illustrates the complexity of some situations, which require overlapping justifications.

Brazil serves as an example of a redistributive policy with compensatory elements. To justify compensatory action, one looks to the cause of injury. In Brazil's case this is arguably the practice of slavery which extended over three centuries. The legacy of slavery as well as the policy of *embranquecimento* as mentioned above, which encouraged white immigration to Brazil during the 1930's, fostered racist rhetoric which has a lasting legacy even today.⁷⁶⁴ Racist practices are common in present-day Brazil. For example, as recently as 2002 a presidential candidate announced that the governor's residence in Rio de Janeiro was to be *disinfected* after black governor Benedita da Silva vacated the premises before his wife, the new governor, would move in.⁷⁶⁵ Brazilian affirmative action also aims to compensate for class discrimination by white elites that had gone unchallenged for decades. The state's actions in this regard played a crucial role in on-going societal discrimination. The absence of racial classifications, it is argued, prevented group formation that would have led to the necessary social mobilisation that would vie for the interests of Afro-Brazilians.⁷⁶⁶ In the redistributive sense, Brazilian affirmative action aims to remedy the disparate distribution of social and economic resources. For example, for decades there had been very limited representation of Afro-Brazilians in government or legislative bodies, as well as within the diplomatic corps.⁷⁶⁷ In a more economic sense, Afro-Brazilians have also had to deal with skewed distribution of wealth and income.

Ultimately a culture of racist rhetoric had prevented Brazil from achieving an egalitarian state and it is no wonder that the state was reproached by social and political scientists for feigning a "racial democracy" façade.

⁷⁶⁴ T Boston and U Nair-Reichert "Affirmative action: perspectives from the United States, India and Brazil" (2003) Vol 27 *The Western Journal of Black Studies* 11.

⁷⁶⁵ EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 151-152.

⁷⁶⁶ M Htun "From "racial democracy" to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 64.

⁷⁶⁷ M Htun "From "racial democracy" to affirmative action: changing state policy on race in Brazil" (2004) Vol 39 No 1 *Latin American Research Review* 69.

Malaysian affirmative action on the other hand does not have the same compensatory justifications. Here, affirmative action is predominantly justified as a means to facilitate the redistribution of societal resources. The wealth accumulated by the Chinese and the Indians had made it particularly difficult for local Bumiputras to overcome their dismal economic state. Bumiputras were economically oppressed for a very long period and without any measures that would ensure their upliftment, this state would have gone unchanged.

Finally, in India matters are clearly more multifaceted. Affirmative action measures aimed at Scheduled Castes and Scheduled Tribes are predominantly compensatory in nature. In fact, in this regard the policy is even referred to as “compensatory discrimination”.⁷⁶⁸ Here Scheduled Castes and Scheduled Tribes are compensated for the suppressive caste hierarchy in India which fuelled misrecognition and caused status harms, and ultimately ensured that members from certain castes would never progress to any other occupations than those that they were born into. This latter aspect was the concomitant maldistribution to the misrecognition mentioned.

Conversely, redistributive justifications are met by including Other Backward Classes as affirmative action beneficiaries. Due to social and economic inequalities the state recognised that without the necessary upliftment, these groups would be bound to a destitute existence.

6.4.7 Final remarks

A sufficient amount of time has possibly elapsed and the current policies have served their goal of compensating victims of past racial discriminations. What might be needed now is to focus on South Africa as a united nation where preferential measures can serve another goal namely the creation of a more equal society. Large quantities of members of various races are deprived in a number of ways. Potential options to alleviate this can be either to create social policies that are aimed at all socio-economically deprived South Africans and thus to reinforce affirmative

⁷⁶⁸ T Boston and U Nair-Reichert “Affirmative action: perspectives from the United States, India and Brazil” (2003) Vol 27 *The Western Journal of Black Studies* 3; T Deane “A commentary on the positive discrimination policy of India” (2009) Vol 1 *PER* 40.

action measures, or the inclusion of an additional group of beneficiaries in the current affirmative action policy so that the poor are directly represented.

Everything possible should be done to prevent true non-racial democratic citizenship from being relegated to a mere pipedream. As Htun states, “[t]he goals of AA, whether race conscious or not, should be to improve racial justice, create role models for young blacks, strengthen the sense of self-worth among blacks and promote racial diversity at all class levels.”⁷⁶⁹ Whether or not South Africa will expand its horizons and apply the lessons learned from its international counterparts is uncertain. South Africa will do well to, at least, consider some of the implications of its policies as the negative consequences of a poorly formulated and initiated strategy are clearly discernible in other contexts and other parts of the world, including within South Africa.

The most important question to ask in relation to South Africa and Malaysia, is whether South Africa currently has the ability or the prospects to emulate some of Malaysia’s successes? This is very doubtful for various reasons. Firstly, South Africa has applied its preferential policies not only to government employment, but has included the private sector as well. Many have argued that this has come at the price of efficiency and in this volatile economic climate such practices should take a backseat to economic growth. Secondly, although South Africa has prioritised education at tertiary levels, not enough is being done about the educational standards at primary and secondary levels. Institutional inequalities still leave those most in need ill-equipped to compete with other groups and this leads to a wide range of problems ranging from resentment to unemployment and the deprivation of human dignity. Unless these issues are addressed, South Africa is unlikely to reach the same level of success as Malaysia.

⁷⁶⁹ EE Telles *Race in another America: the significance of skin color in Brazil* (2004) 250. This is said in the Brazilian context but is suitably apt in the case of South Africa.

Chapter 7: Conclusion

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7.1 Summary of preceding chapters

Two of the main aims of this thesis were, firstly, to outline the aims and shortcomings of the current race-based affirmative action policy of South Africa, and secondly, to posit what alternatives are available to rectify the situation if necessary. This chapter will consist of a basic rundown of the most important aspects of the preceding chapters. The section that follows will contain an example of what course this policy could take if amended.

Based on the goals outlined in the Employment Equity Act the working definition chosen for affirmative action was: “an affirmative action programme is a programme designed to give preferential treatment to certain groups in order to redress the imbalances of the past, to facilitate the elimination of unfair discrimination and to create equal employment opportunities, with the eventual goal of creating a more equal society”.⁷⁷⁰ The equality clause in the South African Constitution permits the implementation of “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”, and therefore the affirmative action policy as it stands today is a central part of this instruction.⁷⁷¹ Following this, various other legislative initiatives followed, including the Employment Equity Act 55 of 1998, the Labour Relations Act 66 of 1995, the Preferential Procurement Policy Framework Act 5 of 2000 and the Higher Education Act 101 of 1997.

Justifications for the existence of an affirmative action policy are primarily based on considerations of redress and/or the creation of a more equal society. These considerations can, in turn, be labelled as either backward-looking or forward-looking respectively. Committing to one fixed conceptualisation could have the unintended

⁷⁷⁰ Employment Equity Act 55 of 1998.

⁷⁷¹ Section 9(2) of the Constitution of the Republic of South Africa.

outcome of limiting the scope and prospects of success of the enacted policy. By supporting backward-looking justifications for affirmative action, one ascribes to a set of measures that are designed to compensate for the injustices of the past. Unfortunately the drawbacks to this approach include the target-specific nature of the group gaining preference and the uncertainty surrounding the nature of reparations that would adequately make up for the denial of equal rights in the past. By shifting the focus towards forward-looking justifications of affirmative action, one zooms in on the present-day hardships experienced by disadvantaged groups, whether as a result of the apartheid era or not. Forward-looking endeavours include attitude-changing arguments and integrative arguments.⁷⁷² Forward-looking justifications for affirmative action can be criticised for creating the impression that past injustices are unimportant and that the sole purpose today is to move forward and deny the past.

Once established that affirmative action itself is a necessity, one turns to the outcome of the implemented policy. Although great strides have been made toward the upliftment of large group of individuals, several unintended outcomes have unfortunately harmed the success rate of affirmative action. This diverse assortment of problems range from issues of stigmatisation to the perpetuation of racial division; a reduction in efficiency and the denial of certain freedoms. Not having a predetermined cut-off date for affirmative action has also presented the threat of permanent entrenchment of the policy.

One of this policy's greatest limitations is that it is simultaneously over- and under-inclusive. By benefiting a small segment of black individuals who have come to be known as the black elite, the policy's over-inclusiveness is emphasised. The reason for this is that a large portion of these individuals were not disadvantaged by previously discriminatory practices. Conversely, by not distributing the benefits of affirmative action, such as the creation of more opportunities, to those most in need, the policy is critically under-inclusive.

Chapter two set out to bring more focus to the Constitutional Court's equality jurisprudence by firstly focussing on the two main forms of equality advocated by the Constitutional Court, that is, substantive equality and remedial and restitutionary equality. Secondly, these theoretical underpinnings were employed in a critical

⁷⁷² O Dupper "Remedying the past or reshaping the future?" (2005) *International Journal of Comparative Labour Law and Industrial Relations* 89 114-116.

analysis of the Constitutional Court's decision in *Minister of Finance and Another v Van Heerden*.⁷⁷³

By examining the content of the individual parts of section 9, it was established that there are certain similarities between the purpose of the subsections; the visions of equality sought; and, different forms of justice. Whereas remedial and restitutionary equality as typically envisaged by section 9(3) of the Constitution (the anti-discrimination clause) is typically group-orientated, backward-looking and brought about in the pursuit of compensatory justice, substantive equality is otherwise forward-looking, goal-orientated and animated by endeavours toward distributive justice. It was also established that through substantive equality's transformative potential, structural changes in the future are viable possibilities. Whilst both remedial and restitutionary equality and substantive equality are geared towards the creation of an equal society, remedial and restitutionary equality aims to do so by remedying the scars of the past. Substantive equality, on the other hand, does so through the recognition and valuation of group differences that should ultimately break the shackles that bind us and prevent us from moving forward.

The Constitutional Court's decision in *Van Heerden* is a useful indication of how one can go about debating the various aspects of section 9. It is curious to see how different judges categorise the issues of one case under various subsections of the equality clause. Whilst Moseneke J confines the dispute of affirmative action measures undertaken within a pension scheme as a section 9(2) matter, Mokgoro J conversely locates it within the ambit of section 9(3). Sachs J's judgment points to a possible harmonisation of these views through its merger of the internal tests of section 9(2) and section 9(3) respectively. He states that whether a measure was designed to promote equality (last leg of section 9(2) test) would ultimately determine whether the aim of the policy or measure could be considered to amount to unfair discrimination (last leg of section 9(3) test). Sachs J's judgment serves as a reminder that future matters similar to this case should avoid rigid categorisation. There are no fixed interpretations of equality or affirmative action and therefore searching within other fields such as moral philosophy and political theory could aid and enrich our legal understanding of affirmative action.

⁷⁷³ *Minister of Finance and another v Van Heerden* 2004 (12) BCLR 1125 (CC).

As a theory that primarily operates in situations where there are obvious injustices committed in the past that clearly justify correction, compensatory justice as an ideal requires that the beneficial treatment necessary be determined according to the injustice committed. Similarly, those who should benefit are also identified accordingly. Finding such ties between the perpetrators and victims of apartheid on the one hand, and victims of apartheid and beneficiaries of affirmative action on the other, are problematic to say the least. The correct action that needs to be taken is also a thorny matter.

As a collective set of individual theories, distributive justice is concerned with the just distribution of societal assets. One of these theories as coined by John Rawls, is the *difference principle*. Chapter three outlined the operationalisation of the *difference principle* and examined how it applied to affirmative action, just as it had done in the case of compensatory justice and affirmative action. One of the central assumptions of this thesis is that not only can affirmative action be seen as a policy employed within a range of measures authorised by section 9(2) in order to achieve equality, but it can also in itself be viewed as a distributional vehicle that aims to create a more optimal dispensation of societal resources in society. Consequently, the ideal distributional outcome envisaged by the *difference principle* requires that any such distribution should not be to the detriment of the least advantaged individuals of society. Unfortunately, many of the potential benefits of the current affirmative action policy employed by South Africa do not reach those who are least advantaged. Although this policy typically applies to the employment arena where it is expected that the beneficiaries at least have the basic skills to perform the expected tasks, it has been observed countless times that the same individuals benefit time and again from preferential policies, whereas many others are left to their own devices.

Because many of apartheid's dysfunctional effects are still visible today, a forward-looking approach such as the mentioned distributive justice can have transformative potential. This also eliminates the necessity to identify the true victims and true perpetrators of apartheid.

Chapter four introduced a number of additional axes upon which to locate disadvantaged groups, including Fraser's theories of recognition and redistribution, as well as her distinction between affirmative and transformative strategies. The

ideal outcome is suggested to be the ensurance of participatory parity, that is, a situation where all individuals regardless of race, gender, disability, status, sexuality or otherwise, are able to compete and interact on equal footing with their peers without fear that arbitrary characteristics imbedded in the underlying structure would impede their life chances. This chapter also illustrated how the above mentioned theories of equality and justice can interact with one-another in various ways depending on the form of discrimination in question. As an affirmative action programme geared toward addressing race-based discrimination, an approach that incorporates substantive equality initiatives guided by the *difference principle*, could arguably have stronger transformative capabilities than an approach based on remedial and restitutionary equality that incorporates the guidelines prescribed by compensatory justice.

The causes and nature of disadvantage pertaining to gender and disability discrimination differ markedly from that of race discrimination. A complex notion of equality informs us, therefore, that different forms of disadvantage should be dealt with differently, depending on the harm in question. In the case of gender discrimination, what is needed is the dismantling of societal conceptions of gender roles and the expectations that arise from these preconceived roles. Women in general face both issues of misrecognition (via the endorsement of androcentrism as the price for equal respect) and maldistribution (via the perpetuation of gender divisions within the labour force, for example). Accordingly, an affirmative action policy that seeks to correct this reality, will most likely be successful if forward-looking approaches that employ the *difference principle* and substantive equality, are used. Disability disadvantage, on the other hand, has stronger ties with issues of misrecognition as the maldistributive effects are generally caused by the erroneous preconception that the disabled are wholly incapable of being employed. Unfortunately, affirmative action in relation to disability is currently only focussing on the redistribution spectrum and matters of misrecognition still need to be addressed.

It is undesirable to force affirmative action measures based on different forms of disadvantage (for example race, gender and disability) into a conceptual and theoretical straightjacket. In each case, an argument needs to be made whether backward-looking compensatory motives (which include the achievement of remedial and restitutionary equality) can or should be sought, or whether calls for forward-

looking distributive justice (which are endorsed by claims for substantive equality) are a better fit.

The question now arises: How should a more ideal version of affirmative action be conceptualised that is capable of addressing the claims for equality and justice endorsed by the Constitutional Court and is attentive both to issues of recognition and redistribution? Chapter five presented alternatives to the current race-based affirmative action policy that South Africa has. The current policy has been criticised inter alia for the reification of racial identities. Had this not been the case, more flexible notions of black and white would be allowed to develop. This chapter set out to ascertain whether class-based affirmative action has greater transformative potential than race-based affirmative action. As many of the problems with the current race-based affirmative action policy can be either directly or indirectly related to the re-enforcement of racial division, class-based affirmative action should be able to bypass some of these problems by focusing its benefits on those whom a greater portion of society would consider to be more deserving, and not those who continually profit from it, i.e. the growing black elite. In a country where such a large number of South Africans are affected by poverty, policies aimed at the creation and promotion of equality should be mindful from the start not to exacerbate these hardships.

Throughout chapter five Fraser's language of redistribution and recognition is employed, both as a useful mechanism to make sense of the complexity of the issues, and as an example of a more ideal social structure that focuses both on important redistributive arrangements whilst simultaneously answering calls for recognition. The central thought behind class-based affirmative action is that it compensates the financially least advantaged individuals in society. By doing so, it counteracts many of the disadvantages associated with race-based affirmative action. For example, this policy is less likely to fortify a black elite class who find themselves perpetually advantaged by preferential treatment. Chapter five argued not only that class-based affirmative action can overcome many of the problems created and reinforced by race-based affirmative action, but that it is also better fitted to promote substantive equality by supporting the notion of "break[ing] the cycle of

disadvantage associated with membership of status groups.”⁷⁷⁴ Race-based affirmative action can also be argued to be more in danger of perpetuating racial stereotypes and thereby exacerbating the status order and promoting misrecognition. Due to the high correlation between class and status in South Africa, a class-based policy would only disseminate socio-economic benefits to the socio-economically marginalised.

Two key advantages of class-based affirmative action are both related to the advancement of equality of opportunity. First, it should affect a larger portion of black South Africans because of the widened pool of beneficiaries. Secondly, it does not deny white individuals with similar economic adversities the opportunity to benefit from redistributive programmes.

The operationalisation of this system might prove to be problematic as there is such a wide range of indicators that can be applied to measure socio-economic disadvantage. However, the indicators used must be relevant to the goals of affirmative action and correlate with the grievances of the past that the policy seeks to overcome. Other than potential difficulties associated with its enactment, class-based affirmative action can also be criticised for a multitude of reasons, including its inability to reach the most deprived members of society as well as the fact that it is more likely to benefit the “best-off among those who have been deemed sufficiently disadvantaged to be eligible for affirmative action.”⁷⁷⁵

Sen’s capability theory is another alternative to race-based affirmative action that could be considered. Essentially, this theory entails that the arrangement of social resources in society be set up to enable all individuals to realise their full potential if they so choose. Examples of basic healthcare and adequate education are given to illustrate how certain capabilities are lacking that would ultimately enable the acquisition of preferred functionings. Much of the research indicates that the enhancement of material equality would be necessary to sustain a larger pool of capabilities.

The capability approach is more likely to address inequalities created by past practices. It is uncertain whether it can bring relief to all, but it is nevertheless more

⁷⁷⁴ S Fredman “Redistribution and recognition: reconciling inequalities” (2007) 23 *SAJHR* 215 226.

⁷⁷⁵ DC Malamud “Assessing class-based affirmative action” (1997) Vol 47 *Journal of Legal Education* 452 458.

likely to facilitate the creation of an egalitarian society than race-based affirmative action. Chapter five also recommended that should the capability approach not be applied in affirmative action considerations, it would nevertheless be beneficial to apply it in more general social and poverty-relief programmes.

Chapter six contained a juxtaposition of three affirmative action models, namely those of Malaysia, Brazil and India. As was stated earlier, each was chosen for certain characteristics that were particularly relevant with regards to the South African model. In brief, Malaysia too has a policy that sets out to benefit a majority of its citizens, as the Bumiputras claim to be economically disadvantaged compared to the Malaysian Chinese and the Malaysian Indians. Brazil, on the other hand, has an affirmative action policy that uses race as a measure to identify its beneficiaries. India has chosen to follow a dual approach and therefore a wider range of individuals are now beneficiaries of affirmative action. Firstly, Scheduled Tribes and Scheduled Castes receive affirmative action benefits by virtue of the suppression enabled by the Hindu caste system. Secondly, Other Backward Classes have been identified as in need of beneficial treatment as these individuals fall outside the realm of Hindu castes but nonetheless experience grievous economic hardships. This latter group is also an illustration of how a class-based affirmative action policy could operate.

The indicators that were used to compare each affirmative action model with the others were as follows: the definition of the group of beneficiaries; how affirmative action aims to overcome past divisions; what impact affirmative action has had on efficiency; whether affirmative action has enabled the formation of a disproportionate economically prosperous elite class; what impact has affirmative action had on race relations; and, what are the compensatory and redistributive justifications for affirmative action.

In their pursuit of economic independence, the Bumiputras of Malaysia have also had to endure an array of setbacks. Corruption in upper-management echelons threaten the potential success of affirmative action policies, as do intra-racial hostility caused by corruption, exploitation, nepotism and cronyism. Fortunately the policy is reasonably easily managed as beneficiaries are easily identifiable and the policy itself is only applicable to the public sector. Through the growing economy and the prioritisation of education social change is enhanced. There are no clear

compensatory-related arguments for the justification of affirmative action. Instead, the focus is predominantly on the redistribution of social resources to the natives of the land.

The subtle suppression of Afro-Brazilians through the limitation of educational opportunities or the existence of glass ceilings hindering career advancement, has provided the basic justification of the necessity of an affirmative action programme in Brazil. Various obstacles still prevent preferential benefits from attaining much success. These include the level of difficulty of adequately identifying the beneficiaries due to the absence of racial classifications; false claims of Afro-Brazilian descent by non-beneficiaries; and the fact that the policy is not applicable at the national level. Great efforts have been made, however, to upgrade the educational standards of Afro-Brazilians which ultimately grant them the economic independence they seek. Although racial inequalities and tensions are more visible than before due to the public acknowledgment of the existence of racism by prominent figures, Brazil is now in a better position to overcome these disparities. The affirmative action policy is justifiable under compensatory and redistributive arguments and the legacy of slavery has provided the foundation for backward-looking policies of preferential treatment. Conversely, present day class discrimination aids redistributive justifications for affirmative action.

The socio-economic consequences that flow from the Hindu caste system have placed Scheduled Castes and Scheduled Tribes in such a position that without ameliorative measures they would otherwise be unable to attain economic emancipation. The aim of affirmative action is to enlarge the Scheduled Castes and Scheduled Tribes middle class, as well as to alleviate poverty in general. Therefore affirmative action in this sense can be justified under compensatory arguments: backward-looking remedies are applied to compensate the individuals suppressed under the Hindu caste system. Because not all Indian citizens fall within the caste system (due to the existence of a multitude of cultures and religions) it was accepted that the affirmative action policy had to be expanded to include Other Backward Classes (OBC's) which effectively transformed this aspect of affirmative action into a class-based policy. In this case forward-looking arguments were employed to justify the application of affirmative action measures. It was accepted that these groups were severely socio-economically deprived, but that there are also a select few who

have attained economic independence. These individuals, collectively known as the creamy layer, are explicitly excluded from any affirmative action benefits.

Many benefits have come from the implementation of this policy, for instance, it has increased the democratic participative capability of lower castes. With the backing of general poverty relief schemes, affirmative action can proceed to focus on broader representivity issues. Nevertheless, the educational system still bears a large portion of the responsibility to prepare lower castes for the competition they would face in future regarding career advancement and maintaining social well-being. Should this situation not improve, the policy of affirmative action could be argued to bear a disproportionate responsibility to ensure the advancement of these individuals. Furthermore, many of the benefits reserved for Scheduled Castes and Scheduled Tribes are utilised by the more prosperous individuals within these groups. This also ensures the socio-economic suppression of the most deprived individuals in this society. Some have also argued that affirmative action runs the risk of exacerbating caste and class consciousness.

As in the case of Brazil, it is at times difficult to identify the correct beneficiaries of affirmative action and it is not uncommon for those falling outside the class of beneficiaries to apply for posts reserved under the auspices of the affirmative action programme. Also similar to Brazil, the predominant isolation of the private sector has allowed taxation to fund many of the government programmes aimed at poverty alleviation and social upliftment as many of the lower castes are still unable to compete with individuals in the private sector.

7.2 Towards the future

The question now arises whether we should continue with the race-based policy implemented or whether this policy should be re-evaluated and transformed into one that is, first, better able to compensate the victims of previous discrimination and, secondly, more attuned towards the creation of an egalitarian society. In a previous chapter it was suggested that a class-based policy might have the ability to bring about the necessary transformation. It should be noted, however, that the potential benefits will not realise if sufficient transformation does not take place in the

educational sector. The reason for this is that, without an adequate level of education that would at the very least enable the socio-economically deprived individuals to compete for career advancement, for instance, they would remain socio-economically deprived and the size of the group of black individuals who would benefit from this form of affirmative action would, consequently, be limited.

But let us suppose that the educational sector remains unchanged for the time being, which would make a class-based policy a less viable option for effecting transformation. One option that could be explored is the amendment of the current race-based policy so as to prevent further reification of racial identities. As we have seen, Fraser's social theory of redistribution and recognition implores us to look at how an action affects both the class order and the status order of society. Are the outcomes fair in terms of distribution whilst simultaneously not negatively affecting the human dignity of, in this case, the beneficiaries and non-beneficiaries of the policy?

There are valuable lessons to be learnt from each of the foreign jurisdictions examined in chapter six. Even if the race-based policy is maintained, there are still ways in which we can ensure that the policy targets the correct people. For instance, the Malaysian experience shows that creating new enterprises that are reserved for affirmative action beneficiaries exclusively, will not only decrease the instance of unemployment amongst these individuals, but it will also provide a valuable platform for such individuals to gain the necessary training for competing with the rest of the nation at a later stage. South Africa should also heed the warning that follows from this experience by ensuring that corruption and mismanagement not jeopardise the success of the venture. A crucial lesson in social transformation that Malaysia had realised from the start was that without a sound education, the Bumiputras would never match the economic prowess of the Chinese and the Indians. A large amount of revenue was injected into upgrading the education provided to the Bumiputras. This had been possible only because the growing economy (largely driven by the Chinese and Indians) had generated the necessary funds. In South Africa, economic growth has been affected negatively by a range of factors. These include, but are not limited to, the following. Firstly, the incidence of skills shortages places employers in a position where they have to appoint individuals who are not wholly qualified for the posts. The Employment Equity Act prescribes the appointment of individuals who

are “suitably qualified” but expands this concept to encompass a wide range of abilities which include “formal qualifications; prior learning; relevant experience; or [the] capacity to acquire, within a reasonable time, the ability to do the job.”⁷⁷⁶ It is therefore reasonable to assume that having an individual fill a post that cannot immediately assume all the responsibilities required of him or her, can leave a company functioning at less optimal levels. Another indirect impediment to a growing economy is the number of vacant positions that are unfilled due to the lack of appropriate candidates. This has proven to be the case in both the private and the public sector. Thirdly, not appointing skilled individuals who fall outside the range of affirmative action beneficiaries constitutes a gross misuse of resources.⁷⁷⁷ Without a growing economy South Africa will be unable to fund other transformative programmes such as poverty relief programmes and the upgrading of the educational sector. Furthermore, South Africa needs to bear in mind the importance of being globally competitive.

The lessons that South Africa should take from Brazil are the dangers that lay in casting too much weight onto the notion of race. The labels of “black” and “brown” now carry with them strong social and economic consequences. Furthermore, animosity is harboured by pre-selected beneficiaries of affirmative action when non-beneficiaries represent themselves as a race other than their own. South Africa has however succeeded in generating a national affirmative action policy that applies throughout the nation. This, at least, ensures a degree of certainty for all the affirmative action beneficiaries, as well as informs such individuals that the guarantee of equality is a national priority.

At this stage of the South African democracy it is possible to argue that the groups identified as affirmative action's beneficiaries need to be scrutinised. The instances of gender discrimination have decreased significantly and as noted in a previous chapter, women have managed to get adequate representation in legislative

⁷⁷⁶ Section 20(3) Employment Equity Act 55 of 1998

⁷⁷⁷ These individuals are then often left with no other recourse than to emigrate as they are unable to support themselves financially as they would have been able to do had they been in the position progress in their careers. This phenomenon is generally referred to as the “brain drain” but is not limited to South Africa alone. Another country who experienced this was Malaysia after implementing the New Economic Policy. A number of Chinese and Indian citizens chose to follow other educational and career opportunities elsewhere, although some of them chose to return to Malaysia.

bodies.⁷⁷⁸ Disability discrimination, on the other hand, is still a matter to be addressed and therefore maintaining this group as affirmative action beneficiaries is essential, largely because of the socio-economic consequences that flow from the misrecognition of these individuals as valuable assets to society. Finally, the Indian example shows that whilst a group itself can be identified as an affirmative action beneficiary through markers such as race, culture or religion, it is simultaneously possible to place limitations on the benefits awarded to that group. In their case, Other Backward Classes have been identified as so socio-economically deprived that without preferential treatment, their indigence would persist. But although this had been the case for the majority of the group, there had been a select few, an upper crust, which had managed to attain economic prosperity. It was accepted that it would not serve the ends of justice to benefit such individuals any further and therefore this *creamy layer* was excluded from affirmative action reservations. In South Africa, a select few have also managed to attain economic prosperity. Various reasons for this exist. For example, some accumulated their wealth abroad during the apartheid era and were not present in the era of white suppression. Others have become very wealthy through political connections and continually exchange benefits to mutual political connections. Lastly, some were already part of an urban elite under apartheid who had better opportunities and access to education and social capital than others. It was also submitted earlier that affirmative action has to date not managed the trickle-down of wealth to a greater majority of black people as it was expected to do. As a matter of policy and in light of the aims and goals of affirmative action, it is therefore possible to argue that we should consider the exclusion of a socio-economically prosperous upper crust from affirmative action benefits. This would firstly widen/enlarge the size of the group receiving benefits and secondly provide South Africa with a stronger black middle class. One can also posit that having a wider range of potential employees creates healthy competition amongst individuals who aspire to gain economic independence. Whether this at least would suffice to tame racial tensions is unclear.

⁷⁷⁸ By 2009 women had exceeded 40% of Members of Parliament and provincial seats. C Schulze "Press Release: Number of female politicians on the rise" (25/01/2011) *South African Institute of Race Relations* <http://www.sairr.org.za/media/media-releases/Number%20of%20female%20politicians%20on%20the%20rise%20-%2025%20January%202011.pdf/view> (accessed 27-01-2011).

In the light of Fraser's theory of redistribution and recognition, one can only speculate what the effects of the exclusion of the prosperous black group would be on them as a group and on society as a whole. The key question in this regard is: Would the effect that this would have on the status and class order be of such a nature that it would render the said exclusion unjust? All evidence provided in this thesis indicates that this group should be able to continue their financial and economic activities without experiencing any harm to their status. Furthermore, one could speculate that by not being affirmative action beneficiaries anymore, their lives as they know it should remain unchanged as they have already accumulated sufficient economic prosperity.

How one should go about identifying the black elite can prove to be a thorny matter. For instance, should the level of education, family income, land ownership or social standing determine whether a person falls within this elite class? Or should one use a cumulative set of indicators? In India, creamy layer categories are generally determined by the constitutional posts or service categories under which a person's parent(s) fall, as well as certain public sector posts, service in the armed forces, or parents that fall within the professional class. Professional posts include the following: "doctor, lawyer, chartered accountant, income tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status."⁷⁷⁹ Lastly, certain classes of property owners and individuals who earn more than a predetermined gross national income shall not be deemed eligible as affirmative action beneficiaries.

South Africa can follow a similar example by stating that persons who, and children of persons who, earn a joint income higher than for instance R50 000 per month shall not be eligible for preferential treatment. Other categories that could be considered include owning property that is valued higher than R2 000 000 or certain categories of professional posts as indicated above in the Indian example. The aim should clearly be to exclude an elite class of individuals only and not to exclude middle-class black South Africans (or coloured and Indian, women or disabled individuals either).

⁷⁷⁹ Government of India: National Commission for Backward Classes "Persons/Sections Excluded from Reservation which constitute Creamy Layer of the Society" <http://ncbc.nic.in/html/creamyayer.html> (accessed 9 April 2011).

This should serve to ensure that those who are already well off do not benefit any further at the expense of someone who needs the opportunity more.

Ultimately an affirmative action policy should facilitate transformation and not hinder any prospects of progress. As a policy that makes surface reallocations, certain adjustments need to be made in order to bring about its transformative potential, for instance, by having it operate in conjunction with poverty relief schemes and coupling it with skills development programmes. A co-operative effort is required to trace the true causes of inequality in South Africa. Once done, it should aim to eliminate the causes of inequality without producing additional social ruptures. A transformative affirmative action policy, is what South Africa needs.

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