‘THE RACE-BASED JURISPRUDENCE OF THE CONSTITUTIONAL COURT’ – SOME IDEAS ABOUT A REPLY ON A FIRST READING

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*On the fullness of equality*

Martin Brassey starts with Peter Weston’s idea that equality is an empty concept. I have always found it is difficult to understand how an idea that people should be treated or regarded in some way as the same – thus inspiring multiple struggles over centuries – is a ‘empty’ idea, morally or otherwise. On the contrary it seems to be too full of meaning, and the challenge is to identify which of the many competing and contested principles, that might populate equality, we should choose to guide us in it application.

Equality, like freedom or dignity, can mean quite different things to different people, both as an aspirational idea and as legal doctrine. When we choose to give equality a substantive meaning that embraces redistributive and positive measures, as the South African Constitution does, then we are also faced with task of how to adjudicate those measures within the discipline of the Constitution and law.

I agree with Brassey that the CC has not provided detailed clarity and guidance on this issue, but rather than looking for help elsewhere – whether in delict, US jurisprudence or international law – I suggest that the answer lies in the principled development of the foundation laid by the Court in *Minister of Finance v Van Heerden*.

*Constitutional visions and competing values.*

There is no doubt that the kind of society that the Constitution envisages in general, and the idea of equality in particular, is contested in our society. How we decide that informs our political and legal interpretations of equality and affirmative action. These might range from a US inspired idea of formal equality, strict scrutiny of race-based differentiation and a colour-blind society, through more liberal egalitarian idea of distributive justice and redress of those inequalities brought about by membership of disadvantaged groups, to a more radical idea of equality that places greater emphasis on transformative and redistributive outcomes. To my mind the Constitutional Court’s equality jurisprudence generally clusters in the middle. Their jurisprudence on affirmative action (after *Van Heerden*) is a kind of outlier, that seems to be dogged by (racial?) division and an inability to agree on a principled way through difficult cases. Indeed, Brassey is right to flag the jurisprudence on race, and to seek a deeper understanding of it. My instinct that it lies in a contestation of values – and a frustration of each understanding the other - that we should seek to understand more fully.

From my perspective, we cannot develop a clear approach to affirmative action until we have a clear sense of the nature of inequality in our society, its embeddedness in the past and the ongoing and intergenerational social and economic effects of centuries of racialized (and gendered) dispossession and subordination. Indeed, the ongoing and urgent need for redistribution, over and above affirmative action, speaks to the need to get the jurisprudence right.

*The salience of race*

The difficulty of using apartheid categories to build a non-racial society has often been alluded to in academic writing. Of course, we want to deconstruct the social categories of race we have inherited from apartheid and colonialism, and dismantle their social and economic hierarchies. Doing so is no simple task, but race-based measures seem to be necessary, including the use of racial targets based on demographics. They should not be inflexible (and I agree that the Court has veered dangerously close to making them so), but they are necessary. My complaint is that Employment Equity Plans seems to be only constituted by numbers, with little attention paid to deeper issues of workplace transformation. In this sense, the demographic idea of affirmative action is a very thin one, not at all consonant with a thicker value of substantive equality. It might be necessary, but it is by no means sufficient.

The problem is not so much one of ‘multiracial grids’ or ‘cadre-deployment’ (although these might be present), but rather a failure to imagine in more detail what a non-racial (not a post-racial or colourblind) society might look like, and how that might entail not only targeted racial and gender appointments (sometimes tailored by class), but also more fundamental changes to workplace rules and culture.

*The Van Heerden test – a basis for jurisprudence in which rationality is not the standard*

In the 2004 case of *Van Heerden*, Moseneke DCJ addressed the jurisprudence of affirmative action and positive measures under s 9(2) of the Constitution. Correctly, in my view, this judgement distinguished the defence of affirmative action from unfair discrimination, recognising the need for a degree of deference and for constitutionally approved redress not to be perceived as presumptively unfair, attracting an onus of proof on every occasion.

There has been considerable debate about the standard set in *Van Heerden* as the Court never really developed it in subsequent cases. I disagree that the standard is – or even should be – one of rationality. It lends itself far more to a balancing enquiry, an exercise in proportionality where the benefits and harms of a particular measure are weighed up in the light of multiple underlying values (including dignity and equality). Indeed, the introduction of criterion three – does the measure advance equality – begs a cost-benefit analysis of the impact across the ‘privileged’ and disadvantaged individuals and groups. Here it is not dissimilar to the enquiry into unfair discrimination, but with a thumb on the scale of the disadvantaged group benefitting from the affirmative action, rather than the complainant. As I have previously argued,[[1]](#footnote-1) a fulsome reading of *Van Heerden* suggests that section 9(2) entails a value-based balancing of purpose and effects, rather than a more limited endorsement of rationality of the state’s reasons, and their relationship to remedying disadvantage. This does not mean that the standard cannot also be a more deferent one. As Chris McConnaghie has noted, that depends on the intensity of the review.[[2]](#footnote-2) However, one need look no further than this case to further the development of affirmative action jurisprudence.

1. C Albertyn ‘Adjudicating Affirmative Action Within a Normative Framework of Substantive Equality and The Employment Equity Act – An Opportunity Missed?’ *South African Police Services V Solidarity Obo Barnard* (2015) 132 *South African Law Journal* 711-734. [↑](#footnote-ref-1)
2. C McConnachie ‘Affirmative Action and Intensity of Review: South African Police Service v Solidarity obo Barnard’ *Constitutional Court Review* 163. [↑](#footnote-ref-2)