**THE RACE-BASED JURISPRUDENCE OF THE CONSTITUTIONAL COURT**

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In this essay, the author, focusing on race, considers how the South African Constitutional Court has construed the Equality Clause in the South African constitution. Invoking the celebrated work of Professor Westen, he reminds us that the concept of equality, always an ‘empty vessel’ until supplied with the parameters of comparison, vests the court with a wide-ranging jurisdiction. He believes that the court has, in the main, been doctrinally sound in the exercise of its mandate to combat discrimination, but he regrets the failure to root the analysis more firmly within the received traditions of the common law. Turning to the court’s treatment of affirmative action, he finds little to applaud. The court has renounced the remedial mandate of the constitution in favour of a system of multi-racialism that, in effect, revives the ‘separate but equal’ doctrine. In abstract principle, he says, this is unobjectionable, but, seen within the context of our apartheid past, it holds out little hope for a proper reconciliation of the races.

The backdrop

In the opening scene of *King Lear*, perhaps Shakespeare’s bleakest play, the Dukes of Kent and Gloucester discuss the decision of the King, which is prompted by his declining years, to divest himself of his kingdom, while retaining the status and trappings of kingship. The lands and estates he considers so burdensome will, he anticipates, be distributed equally among his children, all of them female. Since the eldest two are married, their portions will in effect vest in their husbands, the Dukes of Albany and Cornwall. Kent says he is surprised by what is happening. He had thought the King preferred Albany to Cornwall and might have been expected to decide accordingly. While agreeing that Albany seems to be better liked, Gloucester says ‘in the division of the Kingdom, it appears not which of the dukes he values most.’ ‘Equalities are so weighed, that curiosity in neither can make the choice of either’s moiety,’ he explains, by which he means (in the words of a Shakespearean editor[[2]](#footnote-3)) that the ‘qualities and properties of the several divisions are so weighed and balanced against one another, that the exactest scrutiny could not determine in preferring one share to the other.’

Understandably, the two courtiers believe that, if such pains have been taken to divide the properties equally, each daughter will, without distinction or difference, succeed to one of the resulting three shares. Events prove otherwise. The King is bent on an apportionment that reflects the love that, in his estimation, each bears him. In a spirit that would commend itself to exponents of *audi alteram partem[[3]](#footnote-4)*,he calls on each daughter to tell him why that she loves him most. On the basis of what he hears, he will award his ‘largest bounty … where nature doth with merit challenge.’ Goneril and Regan are cunning enough to pander to his vanity, suggesting that he alone is the object of their love, but Cordelia, the youngest, says simply ‘I love your majesty according to my bond, no more nor less.’ In time, she tells him, she will be wed, and since her husband will ‘carry half my love with him’, she cannot emulate her sisters by professing to love him alone.

The King, enraged beyond measure, disowns her. Where once he loved her most, he says, he now rejects her totally. ‘Here I disclaim all my paternal care, propinquity and property of blood, and as a stranger to my heart and me, hold thee.’ She, this ‘sometime daughter’, will receive nothing; instead, the third portion, the one destined for her, will go to the other two sisters in equal shares. The stage is set for the tragedy, and what ensues is indeed tragic. Conflict and chaos ensue when the two daughters he has so lavishly treat him with contempt and base ingratitude. By the close, Lear is dead and so are the daughters. Not even the faithful Cordelia is spared.

For those who like to moralize, this tale provides ample scope. It can serve, I imagine, as basis for a treatise on the importance of filial piety, or the dire consequences of unbridled hypocrisy, or even the effect of property on power. My concern is, however, with none of these, but with the light the story can shed on the process of equal treatment. I wish to make a point, which should be obvious but is often forgotten, that deciding to treat people equally entails an exercise of discretion at every level. None of the choices is compelling, and seldom are they even obvious.

Consider the structure of his decision-making. Lear, wanting to be rid of the burdens of kingship, decides that he will keep the title but dispose forthwith of his lands and estates. The recipients, he decides, will be his children but, doting old man that he is, he subjects this criterion to the condition that each must demonstrate their love for him. The daughters who meet the standard will share in the property equally. Expecting to make a three-fold distribution, he has parcelled up the kingdom accordingly, but Cordelia fails the test so, consistent with his intention to divest himself completely, he split her share between the other two.

Structurally, what is he doing? First, he decides to distribute, and do so immediately; then he decides what to distribute - the property, but not his title; then he decides to whom to distribute - his daughters; then he decides the criteria - each, being his offspring, will succeed provided they prove their love for him; and finally, he decides that those who meet the criteria will be endowed in equal share. Why, what, when, whom and how are each components of the decision - that is, the choices - he must make.

The Empty Idea of Equality

A set of values and interests underpinned the decision. He might have chosen to let his death take care of the issue, but he wanted to ensure - vain hope - ‘that future strife may be prevented now.’ He declined to postpone the decision, an option open to him, since he was ‘intent to shake all cares and business from our age’. He made his whole kingdom the subject of his decision even though he might have retained some of it. He decided, believing this to be fair, to confer the estates on his daughters even though, obeying the principles of primogeniture, he might have made Goneril his sole beneficiary. Pursuing his conception of fairness, he decided that each should be equally benefited when Goneril, presumably the future queen, would surely have had a need for the greater part of them. Finally, he subjected the endowment to the condition, absurd as it was that he stipulated in order to satisfy his vanity.

Since values and interests drive the decision to treat the daughters equally, it is they, not equality that merit examination if we wish to evaluate the decision. They are the motor power of the decision, whereas equality, in this case of equality of treatment, is simply the outcome. The same is true when we wish to make evaluations outside the realm of decision-making. We need to know why we choose the comparators and in what respects we propose to compare them. The mere fact that we choose to compare X with Y can tell us nothing about why we make this decision, how we should make the comparison, and what we should do once we have made it.

Equality as a concept is, it follows, purely formal. Outside this domain it can serve no purpose and, if we are not careful, can turn out to be downright misleading.[[4]](#footnote-5)

* The concept cannot tell us *who* to compare with *whom[[5]](#footnote-6)* nor *what* to compare with *what*.[[6]](#footnote-7) ‘The word “equal” by itself is incomplete. It is like the word “same”. We need to specify the respects in which things are said to be the same or not …. [W]e can never say simply that two people are equal, or unequal, but must have in mind the respects in which they are equal or unequal.[[7]](#footnote-8)’
* The concept cannot tell us *how* they should be compared, still less *why* the comparison should be made. It is no good saying, with Aristotle, that like should be treated alike, since this begs the question - who is relevantly alike? ‘The principle that persons who are alike in the relevant respect must be treated alike, while persons who are unalike in the relevant respects should be treated unalike … fails completely to specify which respects are relevant.[[8]](#footnote-9)’
* Finally, the concept cannot tell us, at the level of remedy, whether a perceived state of inequality should be rectified and, if so, by how much and over what period.[[9]](#footnote-10) Prudential considerations frequently require us to do nothing or, when we intervene, to do so to provide a mere partial remedy. The reason is obvious: ‘Equality distorts incentives promoting achievement in the economic field’ (in any field, for that matter) and so equality and efficiency need to be placed in a balanced relation.[[10]](#footnote-11)

What does this mean? It means that equality is, in the words of the title of the celebrated article by Peter Westen, an ‘empty idea’:[[11]](#footnote-12) it is ‘empty of content’, ‘an empty form having no substantive content of its own.[[12]](#footnote-13)’ ‘Without moral standards,’ the writer says, ‘equality remains meaningless, a formula which can have nothing to say about how we should act.[[13]](#footnote-14)’ We must, as it were, populate the principle with parameters if we are to make it function at all.

There is no closed list of the parameters that we can use, so it is ‘a mistake to believe that the various kinds of equality can be enumerated as a multiple yet finite list.[[14]](#footnote-15)’ King Lear’s stipulation - the expression of love - might seem absurd to us, but it is a parameter nonetheless. There are, to be sure, parameters that are customarily employed when equality is in issue: people will argue that distributions should be made according to merit, or needs, or works, or effort, or wants,[[15]](#footnote-16) but these are simply variations that commend themselves to the proponent’s sense of right and wrong. S Lakoff sums the matter up well by saying: ‘On the one hand, there are as many substantive versions of equality as there are substantive notions of right and entitlement by which persons can be said to be “alike” or “unalike”; on the other hand, there is only one formal idea of equality - that “likes should be treated alike.[[16]](#footnote-17)”’

It is these criteria, Westen maintains, that are the proper subject of our enquiry, not equality itself.[[17]](#footnote-18) If we are to be conscientious, we need to look behind the veil of equality and ask why we want, say, Ms A to receive the same amount of money as Mr B, or why members of Group C to have the same privileges as members of Group D. These reasons are bound up in our conceptions of morality, in our understanding of how things work, and in the emotions such as fear and envy that we all feel. *They* are what should be unravelled and calls on equality are unhelpful; nay, worse than unhelpful, they are potentially dangerous, since they have the inbuilt capacity to generate confusion. ‘The distortion comes in two ways. First, because equality appears as a separate and independent norm, equality erroneously implies that it entails unique remedies and standards all of its own. Second, because the proposition that like should be treated alike is unquestionably true, it gives the aura of revealed truth to whatever substantive values it happens to incorporate by reference.[[18]](#footnote-19)’

Since it is by means of the criteria we adopt that we give content to equality,[[19]](#footnote-20) we can, says Westen, simplify our discourse by concentrating on them alone. Boldly he states: ‘Equality will cease to mystify - and cease to skew moral and political discourse - when people come to realize that it is an empty form having no substantive content of its own. That will occur as soon as people realize that every moral and legal argument can be framed in the form of an argument for equality. People will then answer arguments for equality by making counterarguments for equality. Or simpler still, they will see that they can do without equality altogether.[[20]](#footnote-21)’ In saying this, he does not discountenance the role that principles of equality can play in setting standards. We commonly make comparisons by reference to a given criterion - wealth, say - and say that the one should, by rights, match the standard of the other. Lear did as much when he decreed that, all other things being equal, one daughter should receive as much as another. What Westen is saying is that decisions of this nature can be evaluated only by examining the criteria that underpin them and asking why it is right that one person should match the standard impliedly set by the other.

We are so used to thinking, to arguing, and to judging in terms of the equality principle that we struggle to accept the force of the ideas. Too true, says Westen: ‘The principle of equality - that likes should be treated alike - has been a fixture of Western thought for thousands of years.’ But, he continues, this is precisely because it is empty of content. ‘For the principle to have meaning,’ he stresses, it must incorporate some external values that determine which persons and treatments are alike, but once these external values are found, the principle of equality is superfluous.[[21]](#footnote-22)’

These are unsettling ideas. In themselves, they can appear repellent and, in their application, they can seem elusive. But, disquieting as they might be, they must be confronted and absorbed if we are to understand the interstices of equality-based arguments and the consequences they can have.

These are the very ideas with which I wish to engage, not in general or philosophical terms, but within the confines of jurisprudential law. I want to contend, on the basis of Westen’ s thesis, that decision-makers - lawmakers, bureaucrats, judges and lawyers - in construing the principles of equality injected into the law, can pour into this ‘empty vessel’[[22]](#footnote-23) what values they choose. They can decide who should be compared with whom,[[23]](#footnote-24) in what respects, over what period, and to what end. The enactments with which they must deal do, to be sure, create some boundaries and so do conceptions of what is prudent and socially acceptable;[[24]](#footnote-25) but within these bounds,[[25]](#footnote-26) the people performing the interpretive process have a free hand to say and do what they deem best.

In itself, of course, the fact that decision-makers enjoy a discretion is scarcely novel, but this is not the point. What is the point is that here, unlike elsewhere, the decisions are made by reference to a lodestar, equality, is barren of substantive content.[[26]](#footnote-27)

Using this as a platform, I want to examine how law and lawyers deal with the problem. My focus will be on race, not because other criteria deserve no consideration, but because race is the criterion that, in considering equality, our South African society regards as most telling. I seek to establish two propositions: first, that, while blacks and whites are equally protected by law against racial discrimination in theory, whites enjoy considerably less protection in practice; secondly, that the courts, permitted to endorse race-based affirmative action to redress past discrimination, are in fact sanctioning racial streaming in the belief that this produces a suitably engineered society that is ‘demographically representative’[[27]](#footnote-28) This, I shall suggest by way of conclusion, is the inevitable result of sanctioning policies that, eschewing individuated assessments, make comparisons between racial groups their fulcrum.

In making these points, I shall consider not only our law but also, somewhat fleetingly, the law of the United States. Since the century and a half since the abolition of slavery, the US courts have been struggling to decide how blacks and whites should treat each other, and the struggle continues. In the last fifty years or so, the debate has been extended to cover Hispanic immigrants, who fare less well than whites, and their Asian counterparts, who fare better. In the process, the American courts have had to consider, within the context of constitutional provisions as open-ended as ours, what the protection against discrimination entails and how affirmative action can permissibly be implemented. We can learn much from their struggle. Suggesting that we cannot is to suggest that our problems are unique, a stance with which South Africans became familiar during the apartheid years. This exceptionalism had nothing to commend it then[[28]](#footnote-29), and no more does it now.[[29]](#footnote-30)

Finally, I conclude by considering whether we truly want, or indeed deserve, a society streamed by race - a multiracial system in effect. Some countries have chosen precisely such a system, and it seems to work well enough. Singapore provides the classic instance: its model is equality of treatment for each of the racial groups (Chinese, Indians, and Malays) and, as a result, the fate of members of the respective groups is determined within their identity stream. To such a system, one of ‘separate but equal’, there can be no objection in principle, but in practice the result is exclusionary.[[30]](#footnote-31) In the United States it remained legally permissible until rejected as demeaning in the celebrated case of *Brown v Board of Education*.[[31]](#footnote-32) In South Africa, we surely need no reminding, it was the central tenet of Separate Development, the conceptual gloss that the dominant white government gave to crude, racially discriminatory, policy of apartheid under the leadership of Premier Hendrik Verwoerd. Is this, I ask as I close this essay, what we really want to resurrect in our land?

The Constitutional ban on unfair discrimination

In 1994, the year in which South Africa became a true democracy, South Africa abandoned the Westminster model in which parliament reigns supreme and opted for governance subject a written, justiciable, constitution. In 1996 this enactment, always intended to be interim, was succeeded by a final constitution framed on much the same lines. Incorporated in each was a Bill of Rights, largely liberal in nature, that contains as one of panoply of protections a clause entrenching the right of people to be treated equally.[[32]](#footnote-33) The clause in the Interim Constitution, section 8, was substantially the same as the current one, section 9, so there is every reason to treat the judicial exegesis of each as applicable to the other.[[33]](#footnote-34)

Clause 9 commences by stating that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’ In the ensuing subsection, it provides that; ‘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.’

Turning to discrimination, the clause prohibits unfair discrimination 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.’ It expressly deems discrimination on one or more of the listed grounds to be unfair unless it is established that the discrimination is fair.

Section 9(1) provides, first, for equality before the law and, secondly, for the right to equal protection and benefit of the law. Stated in these terms, the provision might be thought to be purely declamatory, but in fact it has exigible content and so has an actionable effect. A case can be based on it. If someone is denied equality ‘before the law’, the claim will be one of unequal treatment by a court of law. A denial of ‘equal protection and benefit of the law’, on the other hand, potentially generates a claim based on the proposition that ‘no one is above or beneath the law and … all persons are subject to law impartially applied.[[34]](#footnote-35)

*Harksen* endorses the fairness test

The test a court will apply in determining the claim is whether the enactment is rational. In *Harksen v Lane[[35]](#footnote-36),* a case in which Goldstone J carefully examined the contours of the equality clause, the learned Judge stressed as much. Under subs (1), said the judge, an enactment that differentiates between people or categories of people will be condemned if it shows no ‘rational connection between the differentiation … and the legitimate governmental purpose it is designed to further or achieve.[[36]](#footnote-37)’ But, he hastened to explain, the converse is not necessarily true: an enactment, though rational, can yet be impugned under subs (3) on the grounds that it constitutes unfair discrimination[[37]](#footnote-38). ‘The determination as to whether differentiation amounts to unfair discrimination … require a two-stage analysis. Firstly, the question arises whether the differentiation amounts to “discrimination” and, if it does, whether secondly, it amounts to “unfair discrimination.” It is as well, the judge cautions us, to keep these two stages separate[[38]](#footnote-39).

Invoking *Prinsloo v Van der Linde[[39]](#footnote-40)*, Justice Goldstone explained that discrimination arises in circumstances in which there is unequal treatment of people based on attributes and characteristics attaching to them.[[40]](#footnote-41) The word operates, in consequence, to limit the scope of the protection and so must be distinguished from mere differentiation. Every country must, in order to ensure effective governance, make a range of distinctions and classifications that treat people differently or have a differential impact on them. ‘If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. … The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law.[[41]](#footnote-42)’ Since this result would be intolerable, the limit on what is constitutionally reviewable under the rubric of equality is a vital constraint.

In principle, therefore, enactments that differentiate between person or classes of person are in themselves unobjectionable, but they become discriminatory if they have have the potential to affect the comparative well-being of persons or groups within the state in a way that, for present purposes, we can describe as visceral. The impact must, the judge continues, be deleterious. ‘Given the history of this country, “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.[[42]](#footnote-43)’ This requirement is deemed to be satisfied if the distinction is made by reference to one of the factors, of which race is but one of more than a dozen,[[43]](#footnote-44) specifically listed in the section. Otherwise its existence depends on ‘whether, objectively, the ground [of differentiation] is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparatively serious manner[[44]](#footnote-45).’

An enactment that is discriminatory will not, by reason of that fact alone, be struck down. Unfairness is required too.[[45]](#footnote-46) Species of discrimination that fall under one of the specified heads are made presumptively unfair by subs (5), but the presumption can be rebutted on the facts. The reverse is true of un-designated forms of discrimination, which are presumed to be fair unless the opposite is proved. The test of unfairness focuses primarily on the impact of the discrimination on those in the position of the complainant.[[46]](#footnote-47) Of relevance will be the fact that are vulnerable or disadvantaged members of society; so too the fact that the enactment is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all’;[[47]](#footnote-48) and so too the extent to which the discrimination has obtruded upon the dignity of people in the complainant’s position.[[48]](#footnote-49) If the enactment fails to pass this test, it will be condemned unless it can be justified under the limitations clause. This is true whether the discrimination is direct or indirect.[[49]](#footnote-50) It is equally true whether there is an underlying intention to discriminate or not.[[50]](#footnote-51)

Purporting to endorse this reasoning, O’Regan J did some, no doubt unintentional, violence to it in her concurring judgment by making nothing of the normative component embedded in the notion of discrimination. In her view, ‘two enquiries are necessary. The first requires us to consider whether there is a rational connection between the legislative or executive purpose and the differentiation which is challenged. If there is no such rational connection, then the provision or conduct will be in breach of section 8. If there is, a second enquiry is necessary to decide whether the differentiation is [unfair within the purview of the section][[51]](#footnote-52).’ This is fine as far as it goes, but sight must not be lost of the fact that differentiation is not discrimination unless it has the requisite ‘pejorative’ element. It is only once this requirement is satisfied that an investigation into fairness is triggered.

No one who has even the slightest knowledge of SA history can be surprised at the inclusion of such a regulatory framework in our law. ‘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. The achievement of such a society in the context of our deeply in egalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[[52]](#footnote-53)’

In *Rustenburg Platinum Mine v SAEWU obo Bester & others*[[53]](#footnote-54) the Constitutional Court entertained a case in which, in the language by which it characterized the issue, it had to decide ‘whether referring to a fellow employee as a “swart man” (black man) within the context of the case was derogatory. The man who uttered the words, a senior training officer with a long and clean service record, was white and the person to whom he addressed the words was black. The words were embodied in a heated demand that the co-employee should not park alongside him in the parking lot. Both cars were large four by fours and the speaker was finding it difficult to enter and leave his parking place.

On their face, the words are neutral but the employer, contending that they were derogatory in the context, brought proceedings against him that resulted in his dismissal. What the context revealed was that the name of the co-worker was unknown to the speaker, who would otherwise have referred to him by name. In evidence the speaker denied that he had used the words in question and conceded that, had he done so, he would have made himself guilty of using derogatory language that warranted his dismissal. Once the court rejected his denial as false, a wholly tenable conclusion in the circumstances, the outcome of the case was predictable.

The case would be of little interest to persons outside the contestants themselves were it not for the approach taken by Theron J, with whom all the other judges concurred. The judge criticized the Labour Appeal Court for proceeding on the basis of a supposition that the words were neutral. This was said to reflect insensitivity to ‘the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past - of what is neutral, normal and acceptable - might be used as the starting point in the objective enquiry without recognising that the root of this view skews such an enquiry.[[54]](#footnote-55)’ The Labour Appeal Court had, said the judge, ‘sanitised the context’.[[55]](#footnote-56)

This dictum and much of the balance of the judgment must have been comprehensible to the rest of the court or they would have withheld their concurrence. For those outside the clerisy, however, it is nothing short of bewildering. In the law of delict, upon which (as I have said) we can usefully draw in cases of discriminatory conduct, speech claimed to constitute an *injuria* must be evaluated objectively. If it is actionable, it is because it is *per se* derogatory or because it constitutes an innuendo, that is, an utterance that, while apparently neutral, obtains a derogatory colour from the context. If this is what the judge intended by her analysis, well and good.

On this construction, we might be left wondering why the judge had expatiated on the topic at such length and drawn on our wretched past so fulsomely, but no further harm would otherwise ensue. The problem is that she seemed to want to say much more. In South Africa, as elsewhere, there is a school of thought that suggests that whites alone can be racist since blacks, being the perennial victims of racism, cannot be its perpetrators. It is hard to believe that the judge intended so fatuous a conclusion but the language of her judgment reveals a tendency in this direction. If this is correct, the judgment is startling, even shocking, in its import.

A conclusion of this nature would, there is no denying, reflect the current social reality in which whites walk on eggs whenever race obtrudes and blacks become ever more stridently racist.[[56]](#footnote-57) It is unnecessary to substantiate this proposition by providing instances since no one who has even the slightest knowledge of our racial milieu will deny it. What matters, for present purposes, is the way the language of this judgment, opaque though it may be, seems to support the conclusion. The offence of racial discrimination is committed whatever the race of the offender, black or white. It may be legitimate to conclude that, by reason of our racist past, blacks feel a discriminatory hurt more keenly and deserve, in consequence, a higher measure of compensation, but this is a different matter entirely.

The Constitutional Sanction for Remedial Action

So far we have been concerned with acts of unfair discrimination, that is, conduct that unfairly trench upon the ‘fundamental dignity of persons as human beings or to affect them adversely in a comparatively serious manner.’ The acts are typically treated as negative in effect or, to say the same thing in different words, the consequences in question are typically considered to be negative. This analysis is unobjectionable so long as we understand that the negative impact may be implicit in an act seemingly positive on its face: for instance, the promotion of a white person is positive when seen in isolation but a proper evaluation of the facts might disclose an impairment of the dignity of a black contender for the job if race were to be the operative factor. It is, I stress, the consequences with which we are concerned, not the right itself. A right can be framed negatively or positively without changing its content. I can say that I have a right not to have my dignity impaired and characterize the right as negative, but I can equally contend that I have a right to dignity and characterize this right as positive.[[57]](#footnote-58)

Provision for positive intervention is made in s 9(2). It states as follows: ‘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.’

In s 8 of the interim constitution, the equivalent provision (s 3(*a*)),[[58]](#footnote-59) takes the form of a savings clause - the section is not to be read as ‘precluding’ measures taken for the specified purpose. The new section reads better, but the change is not purely ornamental. The underlying object is to emphasize that the measures in question constitute no exception to the tenet of equality but are an elaboration of it. They are designed to entrench the constitutional legitimacy of substantive equality and so disavow a construction, which was tenable under s 8, that the provision denotes only formal equality.

Strikingly, the provision, which for convenience we can describe as an affirmative action one, says nothing about the nature, content and scope of the measures that can legitimately be taken. The nature of the identified mischief - past discrimination - creates a context, however, from which we can discern the contours of the remedy. As the old saying goes, *ubi ius, ibi remedium* (where there is a right, so there is a remedy). Justice Mokgoro was right, therefore in saying that there need not be ‘a rigid link between the nature of the disadvantage suffered … and measures taken to alleviate that disadvantage’ [but] ‘there should be *some* correlation betweenthe two.[[59]](#footnote-60)’

The nature of the remedy is replete with the potential for contention and division. ‘Certain issues,’ says Don Munro in the opening sentences of his article, ‘in modern American society are inherently divisive, creating seemingly irreconcilable stances. Affirmative action, like abortion or gay rights, presents an especially difficult array of legal and social problems, largely because of the intensity of feeling on all sides.[[60]](#footnote-61)’ The same might as readily be said of South Africa. In a domain so pregnant with self-interest, reconciling the contending stances is probably impossible.

In the academic debate, however, it does help to have an understanding of the competing philosophies at work.[[61]](#footnote-62) Munro’s article provides a useful summary of them, not least because it frames the issues in generalized terms that take us beyond the potential parochialism of our own debates. ‘The competing paradigms are generally known as equal opportunity, or “equal treatment”, and “equal achievement”. Equal opportunity is based on the tenet that race and colour should be absolutely irrelevant in … decision-making. The ideal of color blindness is inherently incompatible with affirmative action. Equal achievement theory proceeds from a wholly different concept of justice, with the focus on the results rather than the conditions of equality. It seeks to reapportion [benefits] such that the economic position of [the disadvantaged] becomes roughly equal to that of [the advantaged][[62]](#footnote-63).’

In a footnote to this passage, he explains that the equal achievement paradigm itself divides, this time into three. The first sub-theory identified by him is ‘the remedial theory, which holds that society must first compensate for the legacies of [past discrimination] before a true “colour-blind” ideal can be achieved. In the words of Justice Harry Blackmun, “[i]n order to treat persons equally, we must treat them differently ….”’[[63]](#footnote-64) The second sub-theory, invoking the inherent value of diversity, depends upon the belief that society has real and definite interests in encouraging full and equal participation of all [disadvantaged] groups, if one because of the huge costs of continued disparities. Under the third sub-theory, which rests upon the importance of individual autonomy, the implementation of affirmative action should be the preserve of private actors and, to provide the scope for this process, even discrimination should be left unregulated.[[64]](#footnote-65)

In the United States, the first of these sub-theories holds no sway: the Supreme Court has resolutely set its face against the notion that the law provides a society-wide corrective for past discrimination.[[65]](#footnote-66) The second enjoys some currency there. Universities, for instance, that are otherwise bound by canons of non-racialism can legitimately use race as a factor in selecting students for admission provided their object in doing so is to enhance classroom diversity.[[66]](#footnote-67) Divergence in race is thought to symbolize divergence in viewpoint and a plurality of viewpoints is regarded, unsurprisingly, as beneficial to the academy.

In our country, by contrast, the rehabilitative nature of affirmative action is, by the section, made controlling. So true is this that the Constitutional Court felt the need to expressly disavow the nomenclature of affirmative action, which undeniably summons up the diversity theory, in favour of the expression ‘regstellende aksie’.[[67]](#footnote-68) This term, in the opinion of Moseneke J (writing for the majority of the court, ’is perhaps juridically more consonant with the remedial and restitutionary component of our equality jurisprudence.[[68]](#footnote-69)’ Behind this phrase resides the notion that that the intervention should place those detrimentally affected by discrimination on the plane they would have reached had it not been for past discriminatory conduct. This entails, in the language of equality analysis, that the criterion by which the assessment is to be made is past unfair discrimination; that the subjects of the comparison comprise the victims of the discrimination as they are when judged against how they would have been absent the discrimination; and finally, that the equalizing remedy is one that ‘roughly’ places them in the putative or (if you prefer the expression) idealized position they would have occupied but for the discrimination.

The test is a demanding one, but not uncommonly so. The law of delict operates within much the same framework. A delictual claim lies if there is an (1) act or omission (2) which is wrongful[[69]](#footnote-70) in nature (3) that is culpable, being either intentional or negligent (4) which causes harm (5) for which the remedy is to make the victim whole, by way of an interdict or damages, to the extent that this is practicable. The equality analysis with we are concerned would, under the restitutionary model, utilize the same taxonomy. There would have to be act or omission, which might be specific (a refusal to engage or promote an employee, for instance) or, more generally, some policy or practice (such as a hiring policy or workplace rules)[[70]](#footnote-71). Element (2), unlawfulness, entails a consideration of whether the conduct, by differentiating, is sufficiently visceral to satisfy the requirement of wrongfulness.[[71]](#footnote-72) The consideration of unfairness, at least arguably, constitutes the counterpart of culpability that comprises element (3). Element (4) needs no analysis - whether harm was inflicted is a question of fact. The make-whole remedy - element (5) - would be responsive to the circumstances of the case: compensation might be awarded but there is no reason in principle why the victim should not be placed in the position that would have been occupied but for the discriminatory conduct.[[72]](#footnote-73)

In delict the plaintiff typically bears the onus of proof on each element of the case. Once the invasion of patrimony or personality is established, however, the act is *prima facie* wrongful and the perpetrator, to escape liability, must give it the colour of justification.[[73]](#footnote-74) This consequence is realized by saying that he or she now bears the onus of negating the inference of wrongfulness and culpability that the invasion generates.[[74]](#footnote-75) Once we see this parallel, we can find nothing surprising in the fact that the section prescribes, by subs (5), a reversal of onus. If an act of discrimination is perpetrated, it is by no means untoward to expect the perpetrator to explain away its ostensible unlawfulness.

This reasoning, it needs hardly be said, anchors our equality jurisprudence within a framework that was crafted by Roman law and received by the Roman Dutch law. The value of this should be obvious, and it is decidedly not tradition for tradition’s sake, but the fact that sages, judicial and otherwise, have cudgelled their brains to produce, over the centuries, a jurisprudence governing injurious conduct that is rigorous and balanced. Competing interests are reconciled within a paradigm that facilitates remedial litigation without unduly circumscribing initiative and development. The result is that the infliction of harm is not *per se* actionable. So it is that traders can cause their competitors harm by out-competing them and newspapers can cause crooks harm by exposing their corruption. By the same token, motorists can travel from place to place knowing that, provided they are careful, they will incur no legal liability should they be involved in a collision. The law, fashioned and still honoured by time, seeks to strike a balance that, while always providing suitable protection for victims, yet enables freedom and enterprise to flourish. Placing our equality jurisprudence on the same scales by, in effect, making unfair discrimination just another specious of actionable harm gives it a legitimacy that is important and a boundedness that is no less so.

Of course, this analysis is competent only if it conforms to the dictates of the Equality Clause. It is the clause that has primacy, not the principles of the common law, and jurists, steeped in the conventions of their profession, must recognize and resist the temptation to force upon an enactment a construction congenial to their preconceptions. Enactments are not to be placed in straitjackets that impede the attainment of their objects and this is especially so of an enactment as consequential as the Constitution. If, however, our legal traditions, assuming that they are in no sense offensive, can be invoked with doing violence to the language of the enactment, it makes consummate sense to do so[[75]](#footnote-76).

Nothing in the Equality Clause stands in the way of this approach. The Clause, it should be clear by now, has two components: one comprises a prohibition - there shall be no unfair discrimination; the other comprises a right - people are entitled to equality and, if they have been the denied this right by unfair discrimination, measures to repair the harm are legitimate, indeed desirable. Restorative measures need not be race-based; a strong case can, for instance, be made for race-blind measures that target poverty in the knowledge that victims of discrimination will profit commensurately. When they employ race as their fulcrum, however, they potentially clash with the prohibition against unfair discrimination and so must be justified. This can be done by showing either that, being mere differentiation, they do constitute discrimination or, more probably, by showing that, being fair, they cannot be condemned as unfair discrimination. Discrimination, whose consideration occurs under the rubric of wrongfulness, depends on the employment of the criterion of race in a way that conforms to prevailing societal norms. Fairness, which I have hesitantly located under the rubric of fault, is inevitably normative as well, but is predominantly concerned with culpability. Give or take a little, the Equality Clause aligns comfortably with our conventional understanding of delictual impairment and, provided we remember that our concern is to analogize, not to prescribe, it is conceptually helpful to draw the parallel.

So apt is the analogy that some academic writers conclude that principles of equality are not implicated by remedial anti-discrimination. Why, the thinking goes, the need to have recourse to conceptions of equality - the harm, now identified and made actionable, must be remedied in the same sort of way as any other form of injurious conduct. The reasoning is over-simplistic, however: the harm that anti-discrimination provisions entail is potentially actionable because it is comparative in nature: the claim lies not because A has been treated injuriously but because the injury inflicted is worse than B’s (the postulated comparator). In the same vein, the make-whole remedy is not to cure the ill-treatment *per se* but to make A’s position the equal of B’s, whether that is good, bad or indifferent. At both levels, therefore, principles of equality are implicated - equality analysis is, at both levels of analysis, nested within the delictual matrix.

This insight is useful in elaborating on the notion that equality is an ‘empty idea’. The proposition is not that equality, in itself an empty vessel, can have no role to play:[[76]](#footnote-77) it is that it can play a role only when the parameters are framed within which it can receive its content. To decide whether A should be made the equal of B, we have to identify A as injured and B as the comparator by reference to which the injury must be assessed. On top of this, we need to determine whether the injury was inflicted indeed by B and, in the process, exclude the possibility that the injury was inflicted by a third party or is self-inflicted. Finally, we must invoke societal norms to determine why we believe a remedy is justified and called for.

*Van Heerden* embraces the rationality test

The exercise is, I repeat, far from simple. The facts of the *Van Heerden case* show just how hard it can be. In the course of negotiations that ushered in our democracy, it was decided that a special fund should be created to enhance and ring-fence the pension entitlements of old-order members of the parliament in a fund known as the CPF. Some time after the election of the new order Parliament, provision was made by statute for a new fund that gave a temporary preference to members elected for the first time to the new parliament. The basis of the claim was that the difference constituted discrimination since the beneficiaries of the preference were disproportionately black.

The essence of the claim was that the new scheme ‘improperly disfavours him and other category … members who are in receipt of pensions from the CPF in comparison with new parliamentarians who … do not receive pension benefits from the CPF.[[77]](#footnote-78)’ The impropriety was said to consist in an intent to prefer members ‘based on intersecting grounds of race and political affiliation.[[78]](#footnote-79)’ The relief claimed was an order entitling the CPF members to the same benefits under the new fund as those given the newcomers to the new parliament.[[79]](#footnote-80) It was no part of the case, it should be noted, and that the CPF members were in absolute terms - that is, absent the comparison - being cheated of their entitlements and so entitled, on this ground, to more.[[80]](#footnote-81)

By the terms of the claim, the empty vessel that equality entails was given the parameters to fill it. The claimant, who was a member of the CPF, was the protagonist in the claim, the members of the new fund were the comparators, and the disparity in benefits was contended to be the locus of the harm. Before the claim could succeed, however, the court had to be satisfied, first, that the differentiation was sufficiently visceral and deleterious to constitute discrimination and, secondly, that it was legitimate. The majority rejected the claim on both bases. On the first, it held that ‘there is no evidence to suggest any indignity;’ on the contrary, the claim ‘appears to be propelled by a desire to earn more in circumstances where his pensions benefit is well ahead of that of his newer colleagues in parliament.[[81]](#footnote-82)’ On the second, the issue of legitimacy, it held that, upon a proper application of the rationality test it favoured over fairness, ‘a clear connection between the membership differentiation the [new] scheme makes and the relative need of each class for increased pension benefits.[[82]](#footnote-83)’

Within the legal framework enunciated, the conclusion seems unexceptionable. Under the rationality test, the court was require to treat parliament as enjoy a discretionary prerogative and to defer to the exercise of the power provided it was not, as I put it earlier, ‘off the wall’. Moreover, it seems hard to quarrel with the conclusion that no visceral component, in the nature of an invasion of dignity, was implicated by the scheme. The factual conclusion seems to be a proper evocation of the law as formulated by the majority. The new fund embodied no explicit distinction on the basis of race, was not intended to do so, and, if it had a racially disparate impact, the result was collateral and coincidental.

Some of the reasoning in the judgment presents concerns, however. Paramount among them is the rejection of fairness as the operative criterion on which the normative evaluation is to be based. Enough has so far been said about this, and we can leave it aside for the present. Less troubling, but troubling even so, is the lengthy disquisition on past discrimination, which seems conceptually irrelevant given the limited scope within which the conclusion is ultimately arrived at. If, to put the matter bluntly, race had nothing to do with the structure of the fund, why deal with it at all, especially at such length? Engaging in such gratuitous lines of reasoning can only lead to the kind of woolly and confused thinking embodied in the following dictum: ‘The scheme was designed to distribute pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. In that sense the scheme promotes the achievement of equality.[[83]](#footnote-84)’ If this was truly the object, the judgment would have had to explore the extent to which the new members had, prior to their election, received comparable benefits elsewhere, and no real effort was made to do this. Just as gratuitous is the dictum to the effect that the new fund ‘serves the purpose of advancing persons disadvantaged by unfair discrimination.[[84]](#footnote-85)’ The new fund did no such thing, but made new members, whether privileged or disadvantaged, the beneficiaries of its terms. On top of this, it invites an examination of the extent to which entry into politics might not entail a sacrifice, as a matter of public service, of benefits previously enjoyed. Finally, the pronouncement sets in train a plethora of hard questions (such as, why should parliamentarians disadvantaged by past discrimination be singled out for special benefits of this sort?) based on new couplets of comparison demanding extraneous examination and evaluation.

In issue in the case was the constitutionality of a statutory fund that gave enhanced pension benefits to parliamentarians elected post-transition and so mostly black.[[85]](#footnote-86) The case was framed in equality, the basis of the claim being that the fund produced an adverse racial impact. The High Court ‘favoured the approach that in [their] effect, the measures under attack were not mere differentiation but discriminatory and that they must be convincingly justified because they are premised on grounds listed in section 9(3) ….”[[86]](#footnote-87) Moseneke J, writing for the overwhelming majority of the judges, said rejected this approach out of hand.

In an effort to substantiate his stance, the learned Justice stated as follows: ‘Remedial measures are not derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2).’ This reasoning is unconvincing. The issue is not whether remedial measures are a constituent part of equality or a derogation from it; it is how best to reconcile the race-based affirmative action measures with race-based discrimination. A policeman who has shot a fleeing robber in an effort to effect an arrest can escape the obligation to justify the harm by summoning up the importance of law and order. By a parity of reasoning, a decision-maker cannot escape the taint of racial discrimination by evoking the importance of equality. It is the structure of the analysis that dictates the outcome - when a criterion is employed that is found to be discriminatory, a justification is called for that, once shown to satisfy the test of fairness, is redemptive.

From the existence of the reverse onus, the learned judge opined, inferences could be drawn that revealed the lawgiver’s intention. How, he wondered, could restitutionary measures pass muster under s 9(2) and yet be presumed to be unfairly discriminatory? Manifestly, they could not: it was simply impossible to ‘accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly.’[[87]](#footnote-88) The fallacy in this reasoning, of course, is that it begs the question. Whether a measure, even one aimed at redress, can be regarded as constitutionally legitimate if it discriminates unfairly was precisely the issue that had to be unpacked and it cannot be wished away by a mere *a priori* assertion. The issue is one of substance. It cannot be resolved by reference to the reverse onus, which is a procedural question concerned with the dynamics of dispute resolution in a system based on the adversarial model.

A construction of the section is just conceivable that rejects a reversal of the onus on the issue of fairness and yet treats fairness as the operative test in cases even of affirmative action. Whether, having reasoned as he did, this conclusion was open to the judge is doubtful, however, and the judgment makes no suggestion that it might be tenable. Certainly the judge had no appetite for such a conclusion. His belief, never articulated but always patent, was that the test of unfairness was too exacting and that something less should be employed. Ordinary discrimination cases should, in his mind, continue to be determined by reference to fairness, but affirmative action cases should be less strenuously scrutinized.

This result was attainable, the judge decided, by a reading of the section as bifurcated and not as an integral whole. The text, structured as it is, provided him with a solution he found appealing. Ordinary discrimination cases would be housed under subs (3), be dealt with by reference to fairness, and be subject to the operation of the reverse onus. Cases involving redress for past discrimination would be housed under subs (2) and be tested by the application of a lesser standard. To hold otherwise would mean that subs (2) was ‘a mere interpretative aid or … surplusage,’ a result that was, in the judge’s view, obviously untenable. The proper approach to the section was, he thought,[[88]](#footnote-89) to treat subss (2) and (3) as mutually independent and give each a self-standing and substantive role to play. So harmonious an outcome could be realized by treating the former as controlling ordinary discrimination and the latter as regulating and facilitating affirmative action.

In *Harksen* the court made an authoritative pronouncement on the way ordinary discrimination cases should be determined. An act of differentiation would be unconstitutional if, first, it was visceral enough to be labelled discrimination; secondly, if its effects were detrimental to others so as to constitute discrimination; and thirdly, if the detrimental result was, in all the circumstances, unfair. In litigation on the matter, a demonstration of discrimination cast the onus on the perpetrator to displace the inference of unfairness. What *Van Heerden* held is that this approach is inapplicable to affirmative action cases. ‘If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9[[89]](#footnote-90)(3).’ The test under s 9(2) was not to be fairness, but something laxer. ‘When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.[[90]](#footnote-91)’

The language in which the majority’s test is framed may be oblique but its object is plain. The motive behind the measure is to provide the watershed between one form of assessment and the other. If the object is to redress past discrimination, then the measure will be legitimate provided it can be said to rationally achieve the aim.[[91]](#footnote-92) Otherwise it must satisfy the standard, a stricter one, of fairness. Since scrutiny by reference to rationality postulates no more than a tenable relationship between means and ends, measures intended to promote the interests of people disadvantaged by past discrimination will be impugnable only if they are, as the saying goes, ‘off the wall’.[[92]](#footnote-93) In the words of the judge, such measures ‘must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9[[93]](#footnote-94)(2).’

Since this is the same deferential standard that governs legislative acts generally, the construction of the section conjured up by the court has the effect of disabling the explicit anti-discrimination provisions of the Equality Clause whenever the existence of the requisite motive is discerned. It is hard to accept this approach as correct. Ngcobo J, in his dissenting judgement, did not think it was. He treated the *Harksen* test as controlling not just in cases of discrimination but also in the context of affirmative action.[[94]](#footnote-95) The same is so of Sachs J.[[95]](#footnote-96) Our courts might be wise to reject a standard of strict scrutiny in cases in which restitutionary measures are under examination, but it is hard to understand why they should be exempt from an evaluation for fairness and reasonableness. The canon of fairness contemplates a proper balancing of interests whenever a race-based measure is employed. In favour of such a measure will be its equalizing propensity (assuming there is one; against will be its potential impracticability, its cost in time, effort and money, and its adverse effect on settled expectations and legitimate vested interests. The rationality test contemplates no comparable analysis.[[96]](#footnote-97)

In the mind of the Justice Moseneke, this was just as well. Winding up his reasoning on this issue, the judge said that ‘such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.[[97]](#footnote-98)’ In his view, deference is the court’s proper response in the face of a challenge to an equalizing measure. The courts, in his view, must give decision-makers wide scope for the implementation of such measures. There is no place for the ‘tightly circumscribed affirmative action’ that would otherwise pertain.[[98]](#footnote-99)

To see what the effect of this pronouncement is, we can usefully turn to the facts of the cases. They show that in the course of negotiations that ushered in our democracy, the representatives of the contending factions, seeking to meet the concerns of vested interests, decided that a special fund should be created to enhance and ring-fence the pension entitlements of old-order members of the parliament in a fund known as the CPF. Some time after the election of the new order Parliament, provision was made by statute for a new fund that gave a temporary preference to members elected for the first time to the new parliament. The basis of the claim was that the difference constituted discrimination since the beneficiaries of the preference were disproportionately black.

The essence of the claim was that the new scheme ‘improperly disfavours him and other category … members who are in receipt of pensions from the CPF in comparison with new parliamentarians who … do not receive pension benefits from the CPF.[[99]](#footnote-100)’ The impropriety was said to consist in an intent to prefer members ‘based on intersecting grounds of race and political affiliation.’[[100]](#footnote-101) The relief claimed was an order entitling the CPF members to the same benefits under the new fund as those given the newcomers to the new parliament.[[101]](#footnote-102) It was no part of the case, it should be noted, and that the CPF members were in absolute terms - that is, absent the comparison - being cheated of their entitlements and so entitled, on this ground, to more.[[102]](#footnote-103)

By the terms of the claim, the empty vessel that equality entails was given the parameters to fill it. The claimant, who was a member of the CPF, was the protagonist in the claim, the members of the new fund were the comparators, and the disparity in benefits was contended to be the locus of the harm. Before the claim could succeed, however, the court had to be satisfied, first, that the differentiation was sufficiently visceral and deleterious to constitute discrimination and, secondly, that it was legitimate. The majority rejected the claim on both bases. On the first, it held that ‘there is no evidence to suggest any indignity;’ on the contrary, the claim ‘appears to be propelled by a desire to earn more in circumstances where his pensions benefit is well ahead of that of his newer colleagues in parliament.[[103]](#footnote-104)’ On the second, the issue of legitimacy, it held that, upon a proper application of the rationality test it favoured over fairness, ‘a clear connection between the membership differentiation the [new] scheme makes and the relative need of each class for increased pension benefits.[[104]](#footnote-105)

Within the legal framework enunciated, the conclusion seems unexceptionable. Under the rationality test, the court was require to treat parliament as enjoy a discretionary prerogative and to defer to the exercise of the power provided it was not, as I put it earlier, ‘off the wall’. Moreover, it seems hard to quarrel with the conclusion that no visceral component, in the nature of an invasion of dignity, was implicated by the scheme. The factual conclusion seems to be a proper evocation of the law as formulated by the majority. The new fund embodied no explicit distinction on the basis of race, was not intended to do so, and, if it had a racially disparate impact, the result was collateral and coincidental.

Some of the reasoning in the judgment presents concerns, however. Paramount among them is the rejection of fairness as the operative criterion on which the normative evaluation is to be based. Enough has so far been said about this, and we can leave it aside for the present. Less troubling, but troubling even so, is the lengthy disquisition on past discrimination, which seems conceptually irrelevant given the limited scope within which the conclusion is ultimately arrived at. If, to put the matter bluntly, race had nothing to do with the structure of the fund, why deal with it at all, especially at such length? Engaging in such gratuitous lines of reasoning can only lead to the kind of woolly and confused thinking embodied in the following dictum: ‘The scheme was designed to distribute pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. In that sense the scheme promotes the achievement of equality.[[105]](#footnote-106)’ If this was truly the object, the judgment would have had to explore the extent to which the new members had, prior to their election, received comparable benefits elsewhere, and no real effort was made to do this. Just as gratuitous is the dictum to the effect that the new fund ‘serves the purpose of advancing persons disadvantaged by unfair discrimination.[[106]](#footnote-107)’ The new fund did no such thing, but made new members, whether privileged or disadvantaged, the beneficiaries of its terms. On top of this, it invites an examination of the extent to which entry into politics might not entail a sacrifice, as a matter of public service, of benefits previously enjoyed. Finally, the pronouncement sets in train a plethora of hard questions (such as, why should parliamentarians disadvantaged by past discrimination be singled out for special benefits of this sort?) based on new couplets of comparison demanding complex deliberations of an ultimately extraneous nature.

The test crafted by Moseneke J, it should by now be absolutely clear, is concerned with the remedy the effects of past unfair discrimination. In the absence of such discrimination, it has no part to play. Under the second sentence of s 9(2), the one with which we have predominantly been concerned, the court is expected to look backwards into the past, discover whether unfair discrimination in fact occurred and whether in fact it produced deleterious consequences, and craft a remedy suitably tailored to repair the detriment. If, in the process, it discovers that the claimants suffered no discrimination - because, say, they are white or, less fancifully, because they are expatriates[[107]](#footnote-108) - then the second sentence of subs (2) is unavailing.

Is there scope for claiming preferential treatment circumstances falling outside this paradigm?[[108]](#footnote-109) In *Van Heerden* there are teasing suggestions that there might indeed be. Try this for size: ‘what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.[[109]](#footnote-110)’ Or try this: our Constitution ‘imposes a positive duty on all organs of State to protect and promote the achievement of equality — a duty which binds the judiciary too.[[110]](#footnote-111)’ If you seek a summary, try this: ‘a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.[[111]](#footnote-112)’

*Barnard* upholds multiracialism

That these dicta were not stray remarks but straws in the wind becomes clear upon a proper understanding of the judgment in *South African Police Service v Solidarity obo Barnard*.[[112]](#footnote-113) In the case, it appeared that the application for promotion by Captain Barnard, a white, female police officer, was twice recommended by a multiracial committee as the best candidate on merit but each time found herself knocked back on the grounds that, on a grid that divides personnel by race and gender, people with her attributes - that is, white women - were over-represented in the grade when seen as a proportion to their numbers in the population as a whole.[[113]](#footnote-114) On each occasion the post was left unfilled so Barnard continued, as theretofore, to performing the role in an acting capacity[[114]](#footnote-115).

For reasons that are currently unimportant, the legitimacy of the enabling plan, which was framed under the Employment Equity Act, was not pertinently contested. Barnard’s counsel contended in the course of argument that this was of no consequence once it was appreciated that a decision unlawful in effect cannot be treated as lawful by reason merely of the fact that it is made in execution of a plan, and this is so however prescriptive the plan may be.[[115]](#footnote-116) This argument was accepted by the judgment of the majority, and so the way was cleared for a proper consideration of the issues.

The argument mounted on behalf of Captain Barnard, reduced to its essence, was that the use of such a grid to stream applicants by race-cum-gender can axiomatically never constitute a measure whose object is to rectify past discrimination. The reason becomes plain once it was understood that, under such a scheme, a white male and so, by definition, a person advantaged by past discrimination will be preferred, whatever his relative merits, if every other race-cum-gender group is over-represented in the grade in question. Within the framework so usefully outlined by Don Munro, we now inhabit, not the first category (which focus on redress), but the second (which makes diversity its aim). In form and content it is a species of naked social engineering[[116]](#footnote-117): it identifies the divisions in our society and, absorbing and endorsing them, it entrenches them in a structure that engineers their continuance and ensures their perpetuation. Since it views society through the prism of race, the system is properly termed multi-racialism:[[117]](#footnote-118) the expression is a happy one since it denotes the division of people into race groups and contemplates that, within the silos so created, they will, for the foreseeable future, be separately dealt with and disposed of. It is the antithesis of the system, properly termed non-racialism, in which, when race plays a part, it is only as a marker for the harm that has been inflicted by racial discrimination in the past and now cries out for redress.

In form, substance and object, two systems are irreconcilable and incompatible. A society cannot, at one and the same time, strive for non-racialism and yet countenance multiracialism. Since judgments[[118]](#footnote-119) in the lead up to *Barnard* wereemphatic in their endorsement of non-racialism and non-sexism, there was reason to believe that the court would reject the plan, constructed as it was on principles that made race and sex determinative, as unconstitutional and, having done so, would condemn the way she was treated pursuant to it. In the language and rhetoric of the majority judgement, to be sure, the belief was realized. ‘Our constitutional democracy is founded on explicit values,’ said Justice Moseneke. ‘Chief of these, for present purposes, is human dignity and *the achievement of equality in a non-racial, non-sexist society* under the rule of law.’ In the same spirit, he took pains to explain that: ‘Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, *if we are truly to achieve a non-racial, non-sexist and socially inclusive society[[119]](#footnote-120)*.’ But these sentiments, fine as they are, received no application to the facts of the case. The judge declined to condemn the treatment of Capt Barnard under the multi-racial plan.

The judge reached this conclusion by much the same path as he had trod in *Van Heerden.* Though he was now less dogmatic,[[120]](#footnote-121) he continued to see the issue as resoluble by reference to the principles of rationality.[[121]](#footnote-122) ‘As a bare minimum,’ he said, ‘the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational.[[122]](#footnote-123)’ An application of this test, the majority seemed to imply, would leave a race-cum-gender grid untrammelled.

In their minority judgment, Cameron, Frontman and Majiedt JJ seemed to take a different view. They held that there is ‘a tension between the equality entitlement of the individual and the equality of society as a whole.[[123]](#footnote-124)’ Resolving the clash required judicious decision-making. A balance had to be struck that, they implied, goes beyond the mechanical application of a formula. Fairness should be the touchstone.[[124]](#footnote-125) ‘Unlike mere rationality, it is sufficiently encompassing to allow courts to assess … “fair treatment in employment” [and] in addition, fairness is a foundational constitutional value.[[125]](#footnote-126)’ Responding to Justice van der Westhuizen’s misgivings on the issue,[[126]](#footnote-127) they accepted recognized that fairness ‘is an open-ended norm’, but they said ‘so are norms of reasonableness, proportionality, wrongfulness and negligence in delict, and public policy and good faith in contract.[[127]](#footnote-128)’ For his part, Van der Westhuizen J produced a minority judgment, followed much the same line. He subjected the constitutional right of equality to searching jurisprudential analysis, he stressed that the interests of the group cannot be determinative since measures to promote equality can trench upon individual dignity. A balance, he emphasized, had to be struck between the two constitutional imperatives in order to resolve the tension immanent between them.[[128]](#footnote-129)

Under the Act the balance is struck by permitting the use of targets (which are flexible)[[129]](#footnote-130) but not quotas (which are not).[[130]](#footnote-131) Flexibility is required not as an end in itself, but in order to strike appropriate balances between the interests of the individual in comparison to the group and to eliminate the kind of absurdities that can result from a mechanical application of a grid. Developing the point, the three judges took an example of such an absurdity from the current plan. ‘The Plan’s ideal target for Indian women is 0.4 employees, or fewer, at every salary level. An overly rigid approach to the Plan would require that the National Commission never approve the appointment of an Indian woman. That would not only be absurd, it would be a bitter irony because Indian women have also suffered past discrimination.[[131]](#footnote-132)

Reading these minority judgements in the round, it seems permissible to conclude that the judges deprecated the use of grids and the multiracialism they embody. Justice Jafta, expressing his view in a minority judgment of his own, had no such qualms. Without saying as much, he placed himself firmly in the camp of multiracialism. ‘By not appointing Ms Barnard and reserving the post for black officers, the National Commissioner sought to achieve representivity and equity in the Police Service. This accords with the Employment Equity Plan and is consistent with the purposes of the Act. Therefore, the National Commissioner’s decision cannot constitute unfair discrimination nor can it be taken to be unfair.[[132]](#footnote-133)

The *Prisons Case* Applauds Multi-Racialism

*Solidarity & others v Department of Correctional Services & others*[[133]](#footnote-134)(the ‘*Prisons* case’) was a similar kind of case. The action was brought by eleven prison warders in order to obtain the promotion they had been refused because, given their colour and gender, they were demographically ‘over-represented’ in the categories of posts to which they sought elevation. In contrast to *Barnard,* they happened to be ‘coloured’ in the main and by no means were all of them male.

As in *Barnard*, the contention was that the Plan was not designed to redress past discrimination but embodied a form of social engineering that was impermissible under the Constitution. In *Barnard* the contention found no favour with Justice Moseneke, who held that the Commissioner ‘exercised his discretion not to appoint Ms Barnard, even though she had obtained the highest score, because her appointment would have worsened the representivity in [the target category] and the post was not critical for service delivery. … I cannot find anything that makes his exercise of discretion unlawful.[[134]](#footnote-135)’ Building on this statement, Zondo J, writing for the majority, embraced the concept of representivity, and thus multiracialism, with both hands. The relevant part of the judgment, lengthy though it is, must be quoted unabridged if its import is to be fully appreciated.

‘[40] … Black candidates, whether they are African people, Coloured people or Indian people are also subject to the Barnard principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails … that the workplace should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people.’

‘[41] It would be unacceptable, for example, for a designated employer to have a workforce of five hundred employees fifty of whom occupy senior management positions but only five of those senior management positions are held by African people when twenty are held by White people, fifteen by Coloured people and ten by Indian people despite the fact that in the population of South Africa, African people are by far the majority.’

Plainly, it is numbers and numbers alone that matter in the judge’s view. Once the race groups are delineated, their numerical presence in the workforce in proportion to the broader population is what counts. On this line of reasoning there is no room for a consideration of levels of past discrimination, so it comes as a surprise to see him embark upon an analysis that directly undercuts this premise.[[135]](#footnote-136) ‘Nobody can justifiably dispute that, although under apartheid and racial discriminatory laws and practices all Black people suffered hardships, the greatest hardships were suffered by African people.’ In his view, this justifies the conclusion that ‘any corrective measure, such as an employment equity plan or affirmative action programme, cannot succeed in reversing the imbalances of the past if it is based on the notion that Black people would be equitably represented in a workforce or in a particular occupational level if there are enough Coloured people or Indian people even if there are no African people or there are only a few African people.’

Reading this passage with a keen eye, the average person might be forgiven for concluding that the grid is indeed designed, not as a form of race and gender norming, but as a mechanism, clumsy though it might be, to remedy past discrimination. Why else would the judge be concerned with the degrees of discrimination severally suffered by members of the four races? In fact, however, the dictum is revealed as nothing but a digression, inconsequential in effect, upon resumption by the judge of his multi-racial analysis. ‘The [Employment Equity] Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve the constitutional objective that every workforce should be broadly representative of the people of South Africa. The result is that groups that fall under “Black” must be equitably represented within all occupational levels of the workforce of the designated employer. It will not be enough to have one group or groups only and to exclude another group or groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups.[[136]](#footnote-137)’ Lest we misunderstand his drift, he underscores his point thus: the employer ‘is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented at that occupational level.’

Justice Nugent, with whose judgment Cameron J concurred, felt considerably less sanguine about the Plan. To him it seemed coldly calculating. ‘There is no sign in the Plan now before us of the just balancing required by [earlier CC cases] nor is there any recognition of the care and vigilance expressed in *Barnard*. Nor is there any attempt to harmonise the constitutional tension that concerned the concurring judges, nor of the balancing urged by Van der Westhuizen J. In contrast to the thoughtful, empathetic and textured plan one might expect …what we have before us is only cold and impersonal arithmetic.[[137]](#footnote-138)’ Gradgrind[[138]](#footnote-139) might be proud of such a system, but we should not be. ‘Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers in an arid ratio having no normative content.[[139]](#footnote-140)’

Under the Plan, the pool of people selected to provide the comparator by race and gender was national. No allowance was made for the fact that the races are not evenly distributed throughout the country. As a result, the slots for coloured people living in the Cape, who make up half of the province’s population, totalled less than ten per cent of the gross. The Department, somewhat faintly, sought to justify this structure by arguing, first, that coloureds in the region were free to relocate and seek work elsewhere and, secondly, that their complaint was misplaced since the apartheid state, by its ‘Coloured Preference’ policy for the region, had favoured them over black Africans. Neither of the arguments gained traction with the court, which unanimously held that, in constructing the grid, the regional and not just national demographics must be brought into account. The Plan was condemned as unlawful.

In deciding on the appropriate relief, the court faced something of a conundrum. Was it clear that, if the Plan had been lawful, the claimants would have obtained the promotion that they sought? If not, should their claims not be rejected as unproved, leaving them, as the Labour Court had done, without substantive relief? Strict speaking, this issue is resoluble only by evaluating the merits of the claimant in comparison to the other job applicants candidates in a process that took proper account of considerations of race and gender equality. Needless to say, this is a task no court can relish and few courts will lightly undertake.[[140]](#footnote-141)

In the years leading up to this case, the lower courts[[141]](#footnote-142) skirted the problem by holding that race-cum-gender references must be left out of account unless mandated by an over-arching plan. Whether this was the right way to treat the matter was a question for which the *Prisons case* might have been expected to provide an answer, but the court left the issue largely unexplored. It simply held, in line with the decision of the Labour Appeal Court, that the coloured warders recommended for advancement should be receive promotion or, in cases in which the post had been filled, its equivalent in monetary compensation. ‘Since the Department’s understanding that Coloured people and women were over-represented in the relevant occupational levels had no lawful basis, the Department has failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the Department’s decisions in refusing to appoint the Coloured and female [warders] constituted acts of unfair discrimination [and] unfair labour practices.[[142]](#footnote-143)’

Was this reasoning not equally applicable to the white warder whose claim was under consideration? No, said the majority:[[143]](#footnote-144) the plan, by failing to take regional imbalances into account, operated unlawfully against coloureds but the same could not be said of whites. This claimant was ‘a White person and white people are already overrepresented in the relevant occupational level to which he sought appointment.[[144]](#footnote-145)

The Insolvency Case privileges multiracialism over merit

The remorseless logic of multiracialism reached its apex in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others[[145]](#footnote-146)* (the ‘*Insolvency Case*’).

The factual matrix takes a form that by now will be familiar. Under prevailing insolvency legislation, the Master of the Court is entrusted with the power to appoint provisional liquidators to take charge of the estate in the period, which can be considerable, that elapses before a final liquidator is appointed. Over the years the Master developed a system under which creditors, whose interests are the only ones at stake, would file ‘requisitions’ proposing candidates for the appointment of the liquidator they preferred. Needless to say, the system rewarded those liquidators who, in the eyes of the creditors, could be expected to wind the estate up most effectively.

For over ten years, the Master has elected to supplement the appointees with a black person who, by learning the ropes, might promote the cause of transformation. Established liquidators, subscribing to the object, were content with the system even though they a significant portion of their fee would now go to a person they regarded as supernumerary. Creditors, for their part, were unconcerned since only a single fee remained payable.

The scheme proved over time to be less than completely successful, and the Chief Master, encouraged by the Department, decided it needed overhaul. What he crafted and promulgated was a proposal that stretched multiracialism to its limits. What he envisaged was a system in which appointments would be made strictly in proportion to the national demographics of race and gender. In terms of the scheme, insolvency practitioners had in terms of a grid whose application would be mechanical and strict. While exceptions would be entertained in especially demanding cases, appointments would ordinarily be made consecutively in the ratio A4: B3: C2: D1, where -

* ‘"A" represents African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994; "B" represents African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994; "C" represents White females who became South African citizens before 27 April 1994; "D" represents African, Coloured, Indian and Chinese females and males, and White females, who have become South African citizens on or after 27 April 1994 and White males who are South African citizens’
* and the numbers 4: 3: 2: 1 represent the number of insolvency practitioners that must be appointed in that sequence in respect of each such category.’

Pivotal to the attack on the policy was the argument that the policy misconceives the object of the enabling statutes. The system they put in place, under which execution is levied on the estate of a defaulting debtor, is designed for the benefit of the unpaid creditors and them alone.[[146]](#footnote-147) Its object is not to provide work for liquidators and line their pockets. A policy by which liquidators are appointed must pursue this aim if it is not to be condemned as *ultra vires*, arbitrary and irrational. This required the wishes of the creditors to be treated as paramount, since no one could know better than they who best would serve their interests. Considerations of transformation might obtrude, to be sure, but this was only because, by amendments to the statute, provision had been made for them. Permitting them to overwhelm the wishes of creditor could never be right, however, and the policy, by doing precisely this, committed a grievous error.

In the opinion of Justice Jafta, who penned the decision of the majority, the wishes of creditors were irrelevant. It sufficed that the Master’s list was confined to people who were, in the opinion of that functionary, ‘suitably qualified’. The interplay of market forces, which could be expected to sort out the able sheep from the incompetent goats, had no role to perform.[[147]](#footnote-148) The plans in *Barnard* and the *Prisons case s*truck something of a balance between equality and proficiency: within the silos, candidates who satisfied the requirements were evaluated on merit and the best one was expected to succeed. The same is manifestly not true under this scheme. Mere enrolment on the list suffices to ensure that Buggins will be given the assignment when his turn comes up. The court had no sympathy for the views of the Supreme Court of Appeal, which held that it is irrational to make an appointment without reference to ‘factors such as the nature of the individual estate, and the industry specific knowledge, expertise or seniority of the practitioner concerned.[[148]](#footnote-149)’ (At para [50].)

Justice Jafta opens his reasoning with a clarion call of the sort that customarily adorns judgements in this field. The policy with which the court was concerned was, in his view, a restitutionary measure[[149]](#footnote-150). That such a view is misconceived should by now be obvious: the policy was not designed to redress past injustice but to operate as a system of race-based social engineering. It creates a benefit for victims of discrimination only for so long as they would, but for it, receive less of the work. Should the scales tilt in the opposite direction, the process must, to be consistent, go into reverse and the beneficiaries of past discrimination will now profit. This is not a measure of redress.

As it happens, the challenge succeeded, but on the basis that the plan was incoherently formulated, not on the basis of its architecture. For so long as the case remains a precedent, we should not lightly expect a measure to be impugned because it gives primacy to race over merit and the collective over the individual. The hope that the court might embark upon a process in which interests are judiciously balanced seems forlorn.

The Matrix of Societal Values

At the start of this essay, I set out to show that equality is an empty vessel that, to be efficacious as a test or determinant needs to be filled. A decision has to be made on who should be compared with whom, in what respects, and over what period. On top of this, a decision must be made to establish what remedy, if any, is appropriate. These are value-laden choices, and the reader of this essay will, if conscientious, have had the opportunity of musing over how the parameters have been framed by the decisions I have explored.[[150]](#footnote-151)

In our law, as in many other jurisdictions, it is the Constitution that embodies the foundational values and the courts that erect an edifice, equally impregnated by values, upon them. At both levels the values are the product of no *deus ex machina*, but reflect an understanding of what society believes and wants, at least aspirationally. By its very nature, a Constitution such as ours is framed in general terms and so the judges of the court, in construing it, enjoy a discretion that is extremely wide. When they give expression to their views they reflect, not just their preconceptions, but also their understanding of the societal mores and standards I have outlined. There is nothing special about this: in microcosm the judicial process was ever thus; within the constitutional setting, it is pronouncedly so.

The social beliefs underpinning these mores are, I perceive, deeply rooted and spawn ideologies that, powerful in themselves, become especially potent when they appear to serve the interests of the majority, a result that obviously pertains in South Africa though not, equally obviously, in the United States. Resisting them must perforce be hard and our Constitutional Court has shown neither the ability nor the inclination to make such a stand. The very contrary is true: the members, white as well as black, compete to outdo each other in intensity of rhetoric and dogmatism of stance.

First in the lists is the notion that our society naturally divides by race and that the division can competently provide a basis by which our people should be dealt with. The borderlines may be furry and imprecise, but race is nevertheless seen as determinable by skin colour and skin colour, for its part, is seen as a suitable marker for culture, creed and class. At the highest level the division is into two - white and black (a termed used generically and, because it is ambiguous, here described as non-whites), the latter being used generically. When apposite, the black group is conceived as subdividing into three - black African, Indian (aka Asian), and coloured. As with every process of categorization, problems of application inevitably arise: Does the one-drop rule make someone a coloured? Should the product of a match between one black and one white person be classified as neither black nor white, but coloured? Into which category does an oriental person fall? And so on through the plenitude of debates that race-based classification naturally entails.[[151]](#footnote-152) Whatever their impact on the individuals concerned, these are issues that, in group-based thinking, are at the penumbra and the, for the purposes of framing policy, it is the core that counts. Smart-alecks might argue that we cannot classify without a structure, such as the old Population Registration Act, within which to make the classification. The answer people make to them is that we can readily categorize by studying the colour of a person’s skin and such physical attributes as hair, nose and lips. In cases of doubt, the problem can be solved by considering factors such as the community in which they live, the way society sees them, and, when all else fails, the classification they choose for themselves. Race, taken in the round, is a marker that our society is self-evidently willing to embrace despite the eclipse of apartheid. That our Constitutional Court shares this view should be obvious from the survey of the cases I have surveyed.

The second societal standpoint is that is desirable, at least for the foreseeable future, to make these race based distinctions if we are to realize our social policy objectives. Liberals doubt this, for they fear the perpetuation of race-based division, discrimination and strife. But the prevailing consensus is against them. It is reflected in a broad range of attitudes and materials and, if we doubt this, we need only look at Art 2(2) of the UN’s International Convention for the Elimination of Racial Discrimination: ‘States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.’ The Constitutional Court accepts this principle, sometimes with reluctance but always without qualification. The American Supreme Court takes a stand against it, but

The third societal standpoint is that, in the formulation and promotion of these objectives, we must recognize that people whom I have called, for want of a better term, non-whites, when compared as a group to whites, enjoy a lower standard of social and economic welfare when compared as a group to whites and so are concomitantly unequal. Economic welfare in particular is treated as important, but social welfare is not far behind. As a proposition, this is indisputable, but the issue is, what to do about it? Liberals doubt whether group-based analysis is helpful. They believe that, at least where this is practicable, the analysis should be individualized. The prevailing ethic is against them: the Constitutional Court emphatically believes otherwise, and the US Supreme Court equivocates on the point.

The fourth standpoint, treated as axiomatic by most black Africans but much more controversial among the other races, is that the disparity so identified is solely the result of colonialism, apartheid and other race-based discrimination over past years.[[152]](#footnote-153) The extent to which this is true is by no means an easy question to answer. Issues of causation can be complicated by the presence of multiple causes and implicate the question of whether, as a matter of judicial policy, the nexus between cause and effect is sufficiently proximate to warrant the grant of relief. When, as here, one group (white people) is said to be causatively responsible for injury to a second group (non-whites), the complexity of the analysis is multiplied many times over.

Needless to say, the issue bears an intense amount of emotional freight. Whites, as individuals, typically resist the notion that they were guilty of discrimination. Such a charge generally elicits responses such as ‘I never voted for the Nats’ or ‘look how well I treated my staff’. Non-whites, for their part, generally reject the notion that they, as a group, must be located in a historical context in which they made their own choices and are responsible for their own fate. Analysts who approach the issue in an effort to be dispassionate normally see the outcome as a complex mix of discrimination and self-actualization.[[153]](#footnote-154) Constitutional Court judges are not generally among them.[[154]](#footnote-155) If they recognize the existence of the issue, and surely they must, they prefer not to confront it, but choose instead to assume that discrimination as solely responsible for the disparity.[[155]](#footnote-156)

Suppositions such as this may be rhetorically useful, but they are ultimately tendentious.[[156]](#footnote-157) Serious work in the field shows, first, that disadvantages, for want of a better word, can be caused by a plurality of factors and, secondly, that people comprising racial groups can sometimes perform more effectively when oppressed. This is not simply because, to parrot Helen Zille,[[157]](#footnote-158) colonialism came with benefits as well as drawbacks; it is also because oppression may steel the resolve and hone the skills of the oppressed. There is, no doubt, some correlation between oppression and disadvantage, but it is by no means linear.[[158]](#footnote-159)

The last societal assumption is that, in giving preferences to non-whites because of their colour, we help to redress the consequences of past discrimination. On its face, the issue is debatable: there is at least one school of thought that suggests preferential treatment of this nature is enfeebling, debasing and humiliating. This is not a point I wish to engage with her. My concern is with the intrinsic validity of the supposition itself. If a multi-racial outcome is truly the aim of our leaders, the judges of the Constitutional Court not least, then redress is not their concern, assimilation is. What they seek is to integrate non-whites into the country’s economic and social life so that the benefits are divvied up more broadly and potential unrest is concomitantly quelled. The process, which has its roots in considerations of diversity and not redress, is all but universally applauded as a means of ‘creating a black middle-class’. As such, it has its merits, but it comes at a cost. Preferring people on the basis of considerations other than merit inevitably exacerbates graft and nepotism. ‘Cadre deployment’, the official policy of the ruling party, obtains a legitimacy, however spurious, when it can so handily be re-characterized as affirmative action.[[159]](#footnote-160)

If there is substance in these propositions, no one can be particularly surprised at the way our highest court has handled the cases that come before it. Disappointed perhaps, but not surprised. The Supreme Court of Appeal, whose bench has comprised lawyers steeped in the historical traditions of our law, has tended to reveal a more liberal frame of reference, but the bench of the Constitutional Court, in everything it says, has a more radical, transformative vision.[[160]](#footnote-161) In the light of this, it can, at least tenably, be forgiven if it espouses, in the name of redress, a system of unalloyed multi-racialism.

*Rasool* expresses our multiracial roots

Forgiven, yes, but they should not, I think, be excused. Multi-racialism has its roots deep in our society and has been enduringly pernicious. It received its judicial imprimatur in pre-apartheid times in the case of *Minister of Posts & Telegraphs v Rasool.*[[161]](#footnote-162)Under scrutiny was a bye-law that segregated the facilities of the post office between ‘Europeans’ and ‘Non-Europeans’. In the case it was accepted, for the purposes of argument, that the facilities themselves were co-equal, but the claimant, an Indian, objected to the measure on the basis that it was inherently demeaning. The argument was rejected by a majority of the appeal court, whose views are captured in the judgement of De Villiers JA. ‘In my opinion … a discrimination which is not accompanied by inequality of rights, duties, privileges or treatment, is not per se unreasonable merely because it is made on grounds of race or colour ….’[[162]](#footnote-163) Gardiner AJA dissented. Commencing with a useful discussion of the distinction between differentiation and discrimination, he went on to say: ‘I cannot shut my eyes to the fact that the instruction is actuated by the circumstances that a large number of Europeans object to being brought into contact in public offices with non-Europeans, and that they regard the latter as being of a lower order of civilization.’ In the light of this fact, ‘any fresh classification on colour lines can … be interpreted only as a fresh instance of relegation of Asiatics and natives to a lower order … Such treatment is an impairment of the *dignitas* of the person affected[[163]](#footnote-164) ….’ This followed from the fact that ‘the Asiatic is treated by our Legislation as being below the white man, [and] the native is treated as … being of yet a lower order.[[164]](#footnote-165)’

In South Africa - I speak generally - whites are yet to be treated by black Africans as ‘of yet a lower order’. The same is true of coloureds and Asians. But the propensity to mete out such treatment, especially by those who belong to a race group in an overwhelming majority, is immanent in our make-up and, in recent times, is repeatedly being actualized.[[165]](#footnote-166) So much should be clear from my examination of the legal and social forces that currently inform our anti-discrimination milieu. Our Constitutional Court judges should be alive to these dangers and, if they consider them trivial, should tell us why. The fact that, by endorsing multi-racialism, they prepare the ground on which such perils can grow unchecked is very troubling.

The UN ushers in a proper approach

What should our court be doing?

Above I have suggested the jurisprudence of the United States of America is helpful. It cannot, I have stressed, be treated as persuasive and still less can it be conceived as binding. The same is not true of all international instruments and precedent. South Africa, as a member state of the United Nations, is part of the broader international community and has much to learn from its instruments and jurisprudence, especially those it has ratified.[[166]](#footnote-167) Our Constitution says as much: it states that, when interpreting the Bill of Rights, a court must consider international law, and, when construing statutes, must heed the country’s international law obligations.

The United Nations Charter, which codifies the major principles of international relations, exacts a pledge from member states to promote ‘respect for, and universal observance of, human rights and fundamental freedoms’. It reaffirms faith in human rights, in the dignity and worth of human beings and in the equal rights of men and women. Its aim is to promote formal equality by prohibiting discrimination but substantive equality of outcome through affirmative action is not envisaged. The UN’s Universal Declaration of Human Rights picks up the theme. Pledging to promote universal respect for and observance of human rights as ‘fundamental freedoms’, it sets out three main principles of human rights, namely freedom, equality and dignity. These rights are regarded as ‘inalienable’ and must be respected without distinction of any kind.

These principles have been developed in international instruments that emphasize the principles of dignity and equality and contain non-discrimination clauses. At their forefront is the International Convention on the Elimination of Race Discrimination (’ICERD’), which entered into force in 1969. In clause 4 it pertinently states that ‘[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.’ The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination.

In deciding what this entails, recourse can be had to the guidelines framed by UNESCO in order to evaluate affirmative action policies. As a point of departure, they accept that differentiation on the basis of sex, race, colour, language, and religion, political or other opinion, membership of a racial minority, or birth or other status is illegitimate. Measures based on such criteria can, however, become legitimate if their object is to redress past systemic discrimination practised over many years on the self-same grounds and provided they do not disadvantage any person arbitrarily. The proviso is important. Affirmative action programmes, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed. Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.

Crucial to ICERD’s conception of affirmative action, however, is the proviso to clause 4. It states that affirmative action *‘measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved[[167]](#footnote-168).’*  This proviso is being traduced by every branch of government in our country. In promoting multiracialism and black advancement irrespective of past discrimination the state is, in the words of the proviso, pursuing policies that lead to the maintenance of separate rights for different racial groups and that potentially will continue after the objectives for which they were taken have been achieved.

Where to from here?

How might we best proceed from here? Were the road wholly open, we could do worse than consult the work of Lawrie Ackerman, a judge elevated to the Constitutional Court at its inception. With characteristic eloquence and lucidity, he states:[[168]](#footnote-169)

‘… [N]o country where serious and systemic discrimination has occurred can – for administrative and other financial reasons – be expected to devise and administer a remedial system that has, in all cases, to consider the awarding of a remedy on a case-by-case, individual-by individual basis. The logistics and costs might make this impossible. No legislation or comprehensive administrative measure can always operate with the surgeon’s scalpel, given the vast number of cases involved. It is, in appropriate circumstances, compelled to use a broader sword, *but where an individualised remedy is reasonably possible it should be employed*. The greatest challenge facing the remedial mandate of s 9(2) is finding the appropriate balance in this regard. In trying to determine what this is, a number of features should be borne in mind. The overarching goal is not limited to establishing, progressively, a society in which the consequences of past discrimination are eliminated, but a society in which the dignity of all is equally respected. Remedies are not justified which would turn the white “category of persons” into an underclass.’

An individualized remedy is no doubt harder to administer than a multi-racial grid, but it is not that difficult. Don Munro is as helpful here as elsewhere[[169]](#footnote-170). Writing, of course, of the United States, he begins his argument on this score by saying:

‘A number of respected commentators, both liberal and conservative, have begun to espouse the virtues of a class-based approach to affirmative action. For a variety of reasons, a system based on economic disadvantage can be seen as a worthwhile successor to race-based preferences. Conservatives see the idea as a way of moving toward a color-blind society whereas liberals perceive benefits in building a consensus on civil rights and in distributing increased aid to the poor and working classes.’

A system based on the upliftment of the poor is by no means impracticable,[[170]](#footnote-171) he contends. ‘The central idea of the economic disadvantage preference is simply to award a “plus” factor … on the basis of prior individual or familial economic status, rather than race ….’[[171]](#footnote-172) Since poverty and race are highly correlated, the integration of black people into society might as readily be achieved in this manner and the disadvantages of an overt race-based structure - its capacity to create rancour among whites and triumphalism among blacks - are mitigated. The fact that race-based remedial action is permissible under our Equality Clause does not mean that it must be employed as a tool of convenience. It should be utilized, as Judge Ackerman says, only when an individualized approach is impracticable though, where appropriate, race-based information and statistics can be used as one metric, among others, by which to evaluate the scheme.[[172]](#footnote-173) Such an approach would do justice to the notion that, while racial quotas are taboo, equivalently framed targets are not.

There are those who say that, while an individuated system may be practicable, monitoring its outcomes would be uncertain and costly. Munro meets the objection in the following terms: ‘the well-established success of the non-racial educational scholarship model [suggests otherwise]. Certainly class-based programs would be no more expensive to design and operate than most traditional race-based programs … All in all, economic disadvantage preference plans would be a cost-effective positive-sum replacement for existing racial preference programs.[[173]](#footnote-174)’

If these are disadvantages, as some contend, they are truly secondary. They pale into insignificance when they are set against the fact that such a system, of course, does nothing to parade the supposed virtue of ‘bringing blacks into the system’. Multi-racialism, by contrast, serves this purpose admirably. This is precisely why multi-racialism is racist and precisely why we should denounce it as unconstitutional. They constitute quotas pure and simple and

‘a racial quota derogates from the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.’[[174]](#footnote-175)

To some, the propositions I make and the distinctions I draw might seem to be immaterial. Henry James, a writer only surpassed by Proust in his preoccupation for minutiae, was once likened to an ‘elephant rolling on a pin’. What I say may deserve the same critique and, in consequence, be consigned to the dustbin of irrelevance. What I envisage, however, is an irrelevance much more substantial in nature, and it is one that the passage of time will reveal. Clem Sunter, futurologist *par excellence*, is reported as saying that based on current trends; whites will by 2030 comprise less than 2% of the South African population. So small is this number that equality analysis between white and black will become all but barren. What will succeed it is anyone’s guess - tribal comparisons, perhaps. If so, the empty vessel of equality will require filling anew and then the words of *King Lear* will cease to be merely instructive, and become prophetic:

‘So we’ll live, and pray, and tell old tales …

Talk of court news; and we’ll talk with them too, -

Who loses and who wins; who’s in, who’s out,

And take upon [us] the mystery of things;

As if we were God’s spies.’[[175]](#footnote-176)

1. BA (UCT) LLB (Wits) H Dip Tax Law; Visiting Professor of Law, University of the Witwatersrand; Senior Counsel. I need to disclose an interest and so a potential bias: I acted for Solidarity in both the cases to which it is a party, though not in each of the courts in question. I also appeared in the *Insolvency Practitioners* case and prepared the heads of argument in *Bester*.

   My essay deals with ‘the difficult, if not emotive, questions of equality, race and equity ….’ S*outh African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123; [2014] 11 BLLR 1025; 2014 (10) BCLR 1195, (2014) 35 ILJ 2981 (CC) at para 1S; see too at para [72]. I have tried to keep this piece simple and, throughout, to minimize the potentially disabling consequences of my own emotions. I accept that I have a privilege that I should be willing, as the saying goes, to ‘check’ and that, as a result, circumspection is called for. Conducing to caution is the fact that people who write from my vantage point are perceived to be critical of affirmative action and so ‘risk being called racist.’ See the comment on point by Van der Westhuizen J in *Barnard* at para [127]. [↑](#footnote-ref-2)
2. William Warburton, Bishop of Gloucester... I take the explanation from 1583 fn *b* of the compendious *The Globe Illustrated Shakespeare* (1979), edited by H Staunton. [↑](#footnote-ref-3)
3. The Latin tag expresses the notion that interested parties should be heard before a decision is taken. [↑](#footnote-ref-4)
4. In *Palmer v Thompson* 403 US 217 (1971*),* the municipality under scrutiny decided to close its swimming pools rather than integrate them. By doing so, it treated both blacks and whites equally and, as result, the US Supreme Court declined to strike down the decision. If the substance of the decision had been examined, however, it should have been set aside as tainted by discriminatory motives. The interests of equality were served - people were equalized downwards - but the decision was impugnable none the less. See the discussion in William E O’Brian Jr ‘Equality in Law and Philosophy’ (2010) http://wrap.warwick.ac.uk/view/author\_id/6524.html 7. [↑](#footnote-ref-5)
5. Writing of a time in which Apartheid held sway, the US writer Jennifer L Hochhschild *What’s Fair* (1981) in effect makes this point when she says: ‘South Africa can claim to follow the principle of strict equality - blacks are treated equally among themselves and whites are treated equally among themselves.’ ‘As the example suggest,’ she continues, ‘this condition may permit the principle of equality to yield dramatically unequal results, but this paradox is a problem of boundaries, not of definition.’ See at 51. [↑](#footnote-ref-6)
6. ‘”Equality” and equal are incomplete predicates that necessarily generate one question: equal in what respect …. Equality essentially consists of a tripartite relationship between two (or several) objects or persons and one (or several) qualities.’ See first page of *Stanford Encyclopaedia of Philosophy* sub nom ‘Equality’, a truly excellent survey of the field in general, available on the internet at https://plato.stanford.edu/entries/equality/. ’When we are assessing a state of affairs to see whether it meets the appropriate standard of justice, we need to know what it is about people we should measure. Is it their standard of living; their happiness; their health; their wealth or something else again?’ J Wolff ‘Equality: The recent History of an Idea’ https://www.scribd.com/document/279312919/Jonathan-Wolff-Equality-The-Recent-History-of-an-Idea 2. [↑](#footnote-ref-7)
7. Thomas Sowell in *Westen* *infra* 583 fan 160. [↑](#footnote-ref-8)
8. J Wilson *Equality* (1966) 121 cited in *Westen* 560n72. [↑](#footnote-ref-9)
9. ‘Should we seek to equalize the goods in question over complete individual lifetimes, or should we seek to ensure that various life segments are as equally well off as possible?’ *Stanford Encyclopaedia* supra under ‘Simple Equality and Objections to Equality in General’. [↑](#footnote-ref-10)
10. *Stanford Encyclopaedia* supra under ‘Simple Equality and Objections to Equality in General’. [↑](#footnote-ref-11)
11. As so often, this is a metaphor that conceals as much as it reveals. Beneath the surface are two ideas: first, that equality is meaningless until parameters are generated, invariably by recourse to normative standards, to give it content; secondly, that it remains empty even once the parameters have been selected, since recourse to the underlying values axiomatically makes the canon of equality otiose. What I am concerned with is the first, not the second conception; my interest is in the indeterminacy of equality as a concept. In passing, however, I do make some comments about the second in examining the implications of the conception of substantive equality. [↑](#footnote-ref-12)
12. P Westen ‘The Empty Idea of Equality’ (1982) 95 *Harv LR* 537 at 537 and 596. [↑](#footnote-ref-13)
13. *Westen* *supra* at 547. [↑](#footnote-ref-14)
14. *Westen* 540n8. [↑](#footnote-ref-15)
15. Jennifer L Hochhschild *What’s Fair* (1981) usefullyidentifies the criteria typically invoked in support of distributive justice and places them on a continuum from ‘equality to differentiation’: See 51-51. The continuum proceeds from Strict Equality (e.g. *per capita)*, through Need, Investments (how much in time effort or money has been invested), Results, and arrives finally at Ascription (i.e. family, status etc.). Her book takes a random sample of 28 working adults and solicits their views on how rewards and benefits should best be allocated. Her research reveals: ‘Support for equality is weak in discussions of property rights, but grows stronger as the resource to be distributed shifts to social policies, pure political rights and authority ….’ (At 190). This is, I venture to suggest, unsurprising.

    This analysis is conceptually helpful, I find. Less so is the distinction said to exist between formal and substantive equality. It is one that doubtless has some descriptive utility and rhetorical force, but it provides no philosophical model in which to locate a proper understanding of the concept of equality and the manner of its operation. It is a chimera.

    Albertyn and Goldblatt, academics at the forefront of our equality jurisprudence, make the opposite case in their chapter ‘Equality’ in S Woolman and other ‘The Constitutional Law of South Africa’ ??? esp at ???-???. They never quite define the distinction, but embrace it to advance a number of essentially socio-political contentions. They say that formal equality ‘presumes that all persons are equal … and cannot tolerate differences,’ but, if we discount the deprecatory language, we are left to ask why this should be so bad. The common law, seeking to treat people equally, generally commits itself to a system of punishment and reward that treats each person as counting for one for one and only for one. That this is indeed its metewand is a matter that the conscientious lawyer might be expected to applaud. The principle is underpinned by a belief, morally sound to the core, that the rich and powerful should receive no better treatment than the poor and week. The fact that, in practice, this laudable aim goes unrealized is a consequence not of the principle itself, but the fallibility or venality of those who apply it.

    Pursuing the theme, the authors say that ‘formal equality cannot tolerate differences … and also ignores the actual social and economic differences between individuals and groups.’ This is simply false. Embedded in the common law is the recognition that its tenets are subservient to the prescripts of the lawgiver (the legislature or similar institution). If, as often happens, an enactment mandates a system by which people are divergently treated, the common law gives primacy to the provision and expects the courts to act consequentially. It is by these means that, in the eyes of the common law, the material and social interests of vulnerable people are promoted, and rightly so when the society is a democracy. If judges fail to do what the lawgiver mandates, it is not because of the common law’s ‘reliance on “neutrality”’ but, again, because they have fallen down on the job.

    Making a stab at a concession, they say: ‘The value of substantive equality does not provide a definitive answer to the question “equality of what?”’ Yet they feel that the notion can be used to erect a platform on which can be built ‘a social democratic vision that entails both equality of opportunity and equality of outcomes.’ To complain that the two sorts of equality can be mutually conflicting would be to carp – they plainly mean that the operation of each will depend on the circumstances. What is not a quibble, however, is the criticism of their mode of reasoning. It is the constitutional text upon which the law must draw its conclusions; it is wrong to stick a label on the text and make it the determinant of the outcome.

    The problem every court must face is that the constitutional text is porous and requires, for its implementation, a proper judicial understanding of its intent and purpose. The sagacious judge will understand that the process of construing the text entails the juxtaposition of equality against the imperatives of freedom in a properly ordered society. [↑](#footnote-ref-16)
16. *Westen* 540n8 [↑](#footnote-ref-17)
17. Cf Joseph Raz *The Morality of Freedom* (1986) 240: ‘what makes us care about various inequalities us not the inequality but the concern identified by the underlying principle. It is the hunger of the hungry, the need of the needy. The suffering of the ill and so on.’ [↑](#footnote-ref-18)
18. *Westen* 592-3. [↑](#footnote-ref-19)
19. ‘The starting point of equality analysis is almost always a comparison between affected classes,’ said Moseneke J in *Minister of Finance v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121, 2004 (11) BCLR 1125, [2004] 12 BLLR 1181 (CC) at para [39]. Well, yes and no. The process of comparison is integral to the process of equality analysis, but classes are by no means necessarily, of even typically, the protagonists of the comparison. Much more typical, in daily life at any rate, is a comparison between individuals. [↑](#footnote-ref-20)
20. *Westen* 596. [↑](#footnote-ref-21)
21. *Westen* 537 (abstract).

    Efforts are enduringly made to inject the principle of equality with substantive content. Kenneth L Karst, for example, says it is ‘the denial of equal status, the treatment of someone as an inferior that causes stigmatic harm [so] the idea of equality is not merely derivative but the essence of the substantive claim’. See ‘Why Equality Matters’ (1983) *Georgia LR* 245 at 248-9. He concedes that we can, speaking in the abstract, talk of a ‘right not to be stigmatized;’; but, he says, ‘this is just another name for the right to be “treated as an equal”. (At 249). The mistake he mistakes is to conflate the standard set by the comparator (the person meting out the treatment) with the principle that each should be equally treated. The fallacy in his reasoning is exposed once we appreciate that the principle of equality is satisfied by equalizing down no less than equalizing up. The prohibition against stigmatization would obviously not be satisfied if everyone could stigmatize everyone else.

    Similar objections can be raised in response to Ronald Dworkin’s notion, which he treats as a *grundnorm,* that ‘everyone has a right to equal concern and respect.’ Henk Botha “Equality, Plurality and Structural Power’ (2009) 25 *SALJ* 1 at 3 locates it within the ‘Kantian notion that every human being should be treated as an end in herself rather than as means to an end.’ A pleasing notion. In practice, however it can be far from easy to understand what the concept entails and, more pertinently, whether this is truly a standard of equality. ‘RM Dworkin regards political morality as resting on one fundamental right of everyone to equal concern and respect. This seems to mean that everyone has a right to concern and respect and that there is nothing else which may count in justifying political decisions. It is nothing but a closure principle to a political theory putting forward a right to concern and respect, and not a right to equality, as the foundation of all political morality.’ J Raz *The Morality of Freedom* (1986) 220. Goldstone J in *Harksen* at para [49],borrowing from a Canadian Supreme Court judgment that uses dignity as shorthand for ‘equal concern and respect,’ stated: ‘”Dignity is a notoriously elusive concept [and] needs precision and elaboration.’

    As Westen points out, Dworkin’s thesis has mutated over the years as he has implicitly come to appreciate its vagueness and ambiguity. ‘In his earlier writing, Dworkin appears to view the ‘right to equal concern and respect” as a comparative right; that is, a right to “concern and respect” *if and only if* such concern and respect is granted to others. … More recently, however, he speaks of the right to “equal concern and respect” as a non-comparative right of each person to be treated in “the way the good or truly wise person would wish to be treated.” … Most commentators assume that Dworkin means to be expounding a non-comparative rule of treatment.’ P Westen *Speaking of Equality* (1990) 73n22.

    I belabour this point not just for its conceptual value, but also because Dworkin’s ideas have been very influential in intellectual circles. Our Constitutional Court is much taken by them. For just one of many such instances, see *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* [2005] ZACC 20, 2006 (3) BCLR 355 (CC);, 2006 (1) SA 524 (CC) at para [60]. It informs the judicial refrain that a ‘commitment to human dignity’ is at the heart of the Constitution. See, for instance, the dictum of O’Regan J in *Harksen v Lane & others* [1997] ZACC 12, 1997 (11) BCLR 1489, 1998 (1) SA 300 (CC) at para [91.

    SA labour law, it should be noted, has a concept known as the ‘parity principle’. It says that if two employees commit the same offence, they should receive the same sanction since ‘like cases should be treated alike.’ The effect of the principle, whose adoption is by no means unequivocal, is that if one employee is allowed to go scot free, so should the other. In such a case, the principle equality *does* have substantive content, but, as Christopher Peters points out, ‘although equality is no longer empty, it is misguided: it tells us to do the wrong thing for a bad reason.’ Peters says that there behind the parity argument are consequentialist concerns and they, not equality, truly determine the decision - in the present context, it they would entail, presumably, a wish to avoid industrial conflict. . William E O’Brian Jr ‘Equality in Law and Philosophy’ (2010) http://wrap.warwick.ac.uk/view/author\_id/6524.html 6 discussing Christopher Peters ‘Foolish Consistency: On Equality, Integrity and Justice in *Stare Decisis*’ (1996) 105 *Yale LJ* 2031*.*

    I relegate these issues, interesting as they are, to this overlong footnote because they are ultimately collateral to the point I am making in the text. [↑](#footnote-ref-22)
22. Westen’s expression: see supra at 547. [↑](#footnote-ref-23)
23. ‘A norm of equality,’ it must be remembered, ‘is inherently comparative: it says what a person has, or how he is treated, should depend ultimately on what others have or how they are treated.’ *Wolff* supra 8. [↑](#footnote-ref-24)
24. In the course of examining the history of racial discrimination in the United States of America, D Marvin Jones says: ‘Equality is a deeply sedimented concept with not one objective meaning but successive levels of meaning built up over time. Each of those historic understandings is itself a unity of opposites, of often contradictory interpretations constructed by interpretive communities in conflict - former slaves and former slave owners, norther Republicans and southern Democrats, employers and minorities who worked for them - each viewing the moral universe through a different lens.’ ‘No Time for Trumpets: Title VII, Equality, and the *Fin de Siecle’* (1994) 92 *Mich LR* 2311 at2319. [↑](#footnote-ref-25)
25. ‘Even a cursory summary of international experience indicates that there are no universal accepted bright lines for determining whether or not an equality or non-discrimination right has been breached. The varying emphases given in different countries depend on a combination of the texts to be interpreted, modes of doctrinal articulation, historical backgrounds and evolving standards.’ In consequence, ‘a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, might create more problems than it solved.’ Per Ackermann, Oregon and Sachs JJ in P*rinsloo v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) at paras [18] and [19]. [↑](#footnote-ref-26)
26. That the lawgiver invokes such indeterminate concepts is, at least arguably, no accident: ‘[M]uch of political life … places enormous importance on the use of a number of broad and vague expressions that are more symbolic than substantive…. To the extent that this language is tolerated or even encouraged …, we can be said to have fostered an intentional rather than inevitable indeterminacy as a way of increasing the authority of our leaders to decide themselves how they will deal with the future as it arises.’ F Schauer ’Authority and Indeterminacy’ in *Authority Revisted* (1987) quoted in Westen’s book *Speaking of Equality* 270n49. [↑](#footnote-ref-27)
27. The ‘transformation of the workplace entails that the workforce of the employer should be broadly representative of the people of South Africa.’ *Solidarity & others v Department of Correctional Services & others* [2106] ZACC 18, (2106) 37 *ILJ* 1995, 2016 (5) SA 594, 2016 (10) BCLR 1349 (CC) at para [40]. [↑](#footnote-ref-28)
28. In making these remarks, I make no effort to suggest that foreign jurisprudence should be treated as controlling. Such a contention would be absurd. What I am saying is that it can be instructive and should be consulted in this spirit. When, within the present context, Constitutional Court judges take the opposite view, the do the process of judicial reasoning a disservice. See , for instance, the judgment of Moseneke J in M*inister of Finance and Other v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121, 2004 (11) BCLR 1125, [2004] 12 BLLR 1181 (CC) at para [29] (dismissing US anti-discrimination law as ‘limited and formal’’). See too the judgment of Sachs J in the same case at para [142] (’Formal equality is based on a status quo-oriented approach which is particularly suited to countries where a greater degree of actual equality or substantive equality has already been achieved.’) Then see the dicta of Mokgoro J. To much the same effect at para [142]. [↑](#footnote-ref-29)
29. The proper place of comparative law was explained by Chaskalson P in S *v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para [39]: “In dealing with comparative law we must bear in mind that we are required to construe the South African [interim] Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own [interim] Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”

    Kriegler J showed a willingness to take instruction from the jurisprudence of the United States Supreme Court in *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708, 1997 (4) SA 1 (CC) at para [85]. [↑](#footnote-ref-30)
30. The doctrine, characterized as ‘odious’, was condemned in Bakke on the grounds that that it produces a status that is ‘always separate but seldom equal’. *University of California Regents v Bakke* 438 US 265 (1978) 326-7. The charge has the same resonance in our past. [↑](#footnote-ref-31)
31. *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954), [↑](#footnote-ref-32)
32. Constitution of the Republic of South Africa Act 1088 of 1996.

    Section 9, the operative clause, reads as follows:

    ‘1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

    2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

    3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

    4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

    5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’ [↑](#footnote-ref-33)
33. Section 8 read as follows:

    ‘(1) Every person shall have the right to equality before the law and to equal protection of the law.

    (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

    (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

    (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

    (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.’ [↑](#footnote-ref-34)
34. *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [27] per Langa DP. [↑](#footnote-ref-35)
35. [1997] ZACC 12, 1997 (11) BCLR 1489, 1998 (1) SA 300 (CC). [↑](#footnote-ref-36)
36. At para [42] read with para [44]. See too Prinsloo *v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at paras [25]. ‘In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.” This passage was cited with approval in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [27] [↑](#footnote-ref-37)
37. *Harksen* at para [44]. [↑](#footnote-ref-38)
38. At para [45]. [↑](#footnote-ref-39)
39. *Prinsloo v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at paras [24] - [26]. [↑](#footnote-ref-40)
40. *Harksen* at para [46].

    The formulation, it should be noted, is framed in absolute terms and rightly so. The subject of the conduct has an interest - dignity - that the conduct diminishes. If the person is the only one so affected, then he or she is comparatively less well off, but this consequence is not what matters. It is the act of deprivation itself. There may be no comparators whatever, yet the dignity of the victim would be no less affronted.

    This provides a classic illustration of the point that Westen makes. Every claim on equality enjoys its substance only because there lies, beneath it, an interest considered worthy of protection or promotion. Claims on equality are, therefore, empty unless the interest is exposed and evaluated.

    We cannot escape this conclusion by making a before-and-after analysis, that is, by treating the subject of the conduct before the discriminatory act as the comparator. A choice is still being made between two personae: the one before the act, the other after it. A second choice is being made by the very process of bringing the conduct into account. Finally, of course, a normative choice is made when we decide that it would be right and proper to make the victim whole.

    The fact that we have to make such decisions shows just how empty a vessel equality truly is. Yet the concept is rhetorically beguiling, as I have tried to show. Westen has written a whole book on the topic - P Westen *Speaking of Equality* (1990) . [↑](#footnote-ref-41)
41. *Prinsloo v Van der Linde & another* supra at para [17]. [↑](#footnote-ref-42)
42. At para [46] citing *Prinsloo v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at para [31]. [↑](#footnote-ref-43)
43. Fourteen then, sixteen now: ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’ [↑](#footnote-ref-44)
44. Supra *a*t para [52](*b*)(i). [↑](#footnote-ref-45)
45. Fairness, like public policy, is an unruly horse, but courts are increasingly expected to work with it. It demands a consideration of all the relevant circumstances in order to strike an appropriate balance between competing interests. See *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1997) 18 *ILJ* 439, 1997 (4) SA 51 (SCA) at para [6], where, within the context of the unfair labour practice jurisdiction, Scott JA put the point thus: ‘The ultimate determinant is fairness, by which is meant fairness to both the employer and the employee. In deciding the question of fairness the Court must necessarily apply a moral or value judgment.’

    The test is broad enough to encompass both ethical and pecuniary considerations. An employee will be injured by a dismissal but the act of dismissing will not be unfair if the employer had prudential reasons for dismissing. [↑](#footnote-ref-46)
46. At para [52](*b*)(ii). [↑](#footnote-ref-47)
47. At para [50](*b*) [↑](#footnote-ref-48)
48. At para 50(*c*). O’Regan J made substantially the same observation at para [89]. ‘Factors relevant to the [determination of unfairness] would include the identity of the individual, and his or her membership of a group previously advantaged by or vulnerable to discrimination, as well as the nature of the interests affected by the discrimination.’ See too para [93]. Sachs J stressed that it is important to locate the enactment within its factual matrix and ‘pay special regard to patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself’ (at para [123]. [↑](#footnote-ref-49)
49. *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [31]. Langa DP made the point thus: ‘The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of [the equality] section....’ [↑](#footnote-ref-50)
50. *City Council of Pretoria v Walker* supra at para [43]. But this ‘This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits “unfair” discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness’ (at para [44]). [↑](#footnote-ref-51)
51. At para [85]. Building on this point, O’Regan J explained 9at para [112]: ‘The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similalry, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. [↑](#footnote-ref-52)
52. P*resident of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708; 1997 (4) SA 1 (CC) at para 41. [↑](#footnote-ref-53)
53. [2018] ZACC 13 [↑](#footnote-ref-54)
54. At para [48]. [↑](#footnote-ref-55)
55. Ibid. [↑](#footnote-ref-56)
56. Ours, needless to say, is not the only country in which this is occurring. It is a scourge in the United States as well. See the depressing recital of incidents in D D’Souza The End of Racism (1995) [↑](#footnote-ref-57)
57. The distinction is purely one of semantics. [↑](#footnote-ref-58)
58. The applicable section reads: ‘(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. [↑](#footnote-ref-59)
59. *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708, 1997 (4) SA 1 (CC) at para [94]. [↑](#footnote-ref-60)
60. ‘The Continuing Evolution of Affirmative Action under Title VII: New Directions after the Civil Rights Act ‘ (1995) 81 *Virg LR* 565 at 565. I single out the article for consideration because it is, in my view, especially useful, thoughtful and rigorous in this area. The literature on point is overwhelming. Leave aside the articles - the books on equality alone were, by the early nineties, rolling on to the bookshelves at the rate of some fifty a year. See Westen *Speaking of Equality* {1990) 285. [↑](#footnote-ref-61)
61. Before proceeding, it is as well to appreciate that affirmative action, even in practice, has protean manifestations. See Christopher McCrudden ‘A Comparative Taxonomy of “Positive Action” and “Affirmative Action” Policies’, Research paper 12-04, Queens U Belfast, at http://ssrn.com/abstract=2089374. [↑](#footnote-ref-62)
62. Supra at 580. [↑](#footnote-ref-63)
63. Supra at 580n57. [↑](#footnote-ref-64)
64. The best known proponent of this theory is Richard Epstein *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992): see esp at 396 and 412-21. [↑](#footnote-ref-65)
65. Institutional measures to rectify demonstrable cases of discrimination are permissible provided they are suitably tailored to achieve the goal. Programs designed to promote cultural diversity by the application of race-based standards can also be legitimate provided quotas are eschewed. The evaluation cannot foreclose on an evaluation of all relevant factors.

    Speaking generally, the approach taken that race-based distinctions are competent only if they are precisely tailored to serve a compelling government interest. The measures in question will be strictly scrutinized to ensure that this standard is met. The individual, not the group, constitutes the object of protection or, less obviously, promotion and the ‘mere recitation of a “benign” or legitimate purpose for a racial classification is entitled to little or no weight’ (*Richmond v JA Croson Co* 488 US 469 (1989) at 500. “Outright racial balancing … is patently unconstitutional.’ See *Fisher*, below, at ???. The basic tenet is as follows: ‘The Constitution abhors classifications based on race, not only because those classifications can harm favoured races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.’ *Grutter v Bollinger* 539 US 306 (2003) at 353.

    The case that laid the table was *University of California Regents v Bakke* 438 US 265 (1978); the one that put the food one it, forty years later, was *Fisher v University of Texas at Austin* ??? (2015) [↑](#footnote-ref-66)
66. Enrolling ‘a diverse student body “promotes cross-racial understanding, helps to break down stereotypes, and enables students to better understand persons of different races.”’ Per Kennedy J in *Fisher v University of Texas at Austin* ??? (2015) ??? [↑](#footnote-ref-67)
67. ‘Remedial or corrective action’. [↑](#footnote-ref-68)
68. *Minister of Finance v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121, 2004 (11) BCLR 1125, [2004] 12 BLLR 1181 (CC) at para [29]. [↑](#footnote-ref-69)
69. Sometimes termed ‘unlawful’. In the context the two words mean the same. [↑](#footnote-ref-70)
70. Nothing more than convenience dictates the examples I invoke. The same analysis can be conducted whatever the sphere of conduct. [↑](#footnote-ref-71)
71. Stipulating that only blacks need apply to play the part of Othello, manifestly a species of differentiation, would probably not be wrongful and so would not constitute discrimination. Neither, I imagine, would the hiring blacks to sell goods door to door in a black township. [↑](#footnote-ref-72)
72. In *Solidarity and Others v Department of Correctional Services and Others* [2016] ZACC 18, (2016) 37 *ILJ* 1995, 2016 (5) SA 594, [2016] 10 BLLR 959, 2016 (10) BCLR 1349 (CC) the department was ordered to promote employees against whom it had discriminated where the posts were still open and otherwise pay them as though they had been promoted. See at para [95].

    Crafting a remedy when a group is the subject of discrimination can be complex, but this is certainly not beyond the wit of the courts. The Constitution Court has shown a welcome adroitness within this field. [↑](#footnote-ref-73)
73. See *Mabaso* *v Felix* 1981 (3) SA 865 (A).

    The debate about whether the onus is substantive (a true onus) or merely procedural (an evidential burden), much enjoyed by academics, were made academic in the pejorative sense by this case. The onus is substantive. Those who wish to pursue them will find the topic exhaustively considered in P Boberg *The Law of Delict* (1984) 791-99.

    The debate about whether the justificatory defence negates wrongfulness or culpability, pursued with the same brilliance by Boberg, seem equally academic to me. Since the conduct is typically deliberate, the perpetrator who can justify it naturally escapes the opprobrium of both culpability and wrongfulness. So I am comfortable in locating the analysis on the basis that I have - namely, that discrimination implicates wrongfulness and unfairness implicates fault. If I am wrong, it makes no different to the thrust of my analysis, which is concerned to treat the issue broadly, not to dwell upon its *minutiae*. [↑](#footnote-ref-74)
74. Common examples are to be found in the doctrine of self-defence and in the plea that the injury was inflicted in the proper exercise of authority. [↑](#footnote-ref-75)
75. The principles of statutory construction, taken generally, support this argument. See, for instance, *Seluka v Suskin & Salkow* 1912 TPD 258 at 265, which expresses a principle that is trite: ‘It … is a canon of construction that an Act must not be presumed to alter the common law, but directly it is clear from the language of the statute that the very object of the Act is to alter or modify the common law, then full effect must be given to this object.’

    Section 39(3) can be cited on this score as well. It states as follows: ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

    In invoking these materials, I am obviously arguing by analogy. The point I am making, it should be obvious, is that the taxonomy of the common law principles governing actionable harm is instructive and so can guide our understanding of the new harm of unfair discrimination. The Equality Clause and the common law are in no need of the kind of reconciliation contemplated by the interpretive canon I have referred to. [↑](#footnote-ref-76)
76. In an attack on Westen’s thesis, Erwin Chemerinsky makes this very point. Westen’s argument only establishes that the concept of equality is *insufficient* to resolve moral and legal controversies. If it says that it is unnecessary, this is only because of a conceptual rejection of a foundational moral ethic such as the duty to care for each other. See ‘In Defense of Equality: A Reply to Professor Westen’ (1983) 81 *Mich LR 575.* [↑](#footnote-ref-77)
77. *Van Heerden* supra at para [12]. [↑](#footnote-ref-78)
78. *Van Heerden* supra at para [12]. [↑](#footnote-ref-79)
79. The claim was, therefore, one for equalization upwards. Unsurprisingly, most claims founded on the equality doctrine are of this sort. The claimant typically says ‘I want more so I have the same as the comparator’, not ‘I want the comparator to have less so as to have the same as me.’ [↑](#footnote-ref-80)
80. The pensions payable to CPF members were ‘generous and several times more generous than they would, on their pensionable annual salaries, have been entitled to under comparable public sector pension funds.’ *Van Heerden* supra at para [53] [↑](#footnote-ref-81)
81. *Van Heerden* supra at para [52]. [↑](#footnote-ref-82)
82. *Van Heerden* supra at para [52]. [↑](#footnote-ref-83)
83. *Van Heerden* supra at para [52]. [↑](#footnote-ref-84)
84. *Van Heerden* supra at para [52]. [↑](#footnote-ref-85)
85. The intent was to give a preferential fringe benefit to parliamentarians who, because of the structures of apartheid, had been unwilling or unable to secure election before then. Its effect, though, was to produce an impact that, in the main, preferred blacks to whites. Somewhat ambitiously, reliance was placed on this manifestation of disparate impact to contend that the provisions constituted unfair race based discrimination. [↑](#footnote-ref-86)
86. At para [32] [↑](#footnote-ref-87)
87. See too the judgement of Sachs J in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [112]. [↑](#footnote-ref-88)
88. Contrast the decision of Sachs J at the following paragraphs: ‘ ‘[136] … I do not however regard sections 9(2) and 9(3) as being competitive, or even as representing alternative approaches to achieving equality. I see them as cumulative, interrelated and indivisible. ,,, [140] … where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.’ [↑](#footnote-ref-89)
89. At para [36} [↑](#footnote-ref-90)
90. At para [37}. The judge’s reasoning, while capturing the point, denigrates it by describing it in a trivial way. The object of the second sentence in subs (2) is obvious: it is to make it clear that measures designed to redress discrimination and so promote equality are not to be condemned simply because they are based on race. It is a savings clause no different from its counterpart in the interim constitution. There is, to be sure, a change in language and textual framing, but this is simply to emphasize that, in the mind of the lawgiver, restitutionary measures are a facet of equality, not a deviation from it. In the words of the learned Justice (at para [30]): ‘Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not “reverse discrimination” or “positive discrimination”…. They are integral to the reach of our equality protection.’

    Sachs J in his minority judgement in *Van Heerden* made exactly this point when he said: ‘Section 9(2) was clearly inserted to put the matter beyond doubt. The need for such an express and firm constitutional pronouncement becomes understandable in the light of the enormous public controversies and divisions of judicial opinion on the subject in other countries.’ [↑](#footnote-ref-91)
91. It is settled that the canon postulated by the test is rationality. See A M Louw ‘The Employment Equity Act, 1998 (and other Myths about the Pursuit of “Equality”, “Equity” and “Dignity” in Post-Apartheid South Africa’ 2015 (18) *PELJ 594 at 600.* [↑](#footnote-ref-92)
92. See JL Pretorius ‘Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action’ (2013) ??? *SALJ* 31 at 40: ‘Although rationality review requires a minimum of justification in respect of the legitimacy of the purposes pursued and of ends-means coherence, it relieves the state of the duty to justify actions in two significant respects. Requiring a rational relationship between means and ends is a far less exacting standard than demanding that means should be proportional to ends … Rationality review does not express the same responsiveness to situations where the infringements of rights are unnecessarily intrusive. To the extent that a rights-limiting act can be rational, even if disproportional or unfair, a mere rationality standard of justification demands no explanation for the disproportional or unfair invasion of rights.’ [↑](#footnote-ref-93)
93. At para [41]. The passage points up an irony. Protagonists of race-based affirmative action proclaim that the measures are appropriate because they are reciprocal to the harm. In effect, they are saying that since race made the basis of discrimination, it must be invoked as the basis for redress. In this passage the learned judge highlights the notion that the measures of redress are a response to past ‘unfair discrimination’ yet he favours a construction of the section that rejects unfairness as the criterion for measures intended to effectuate the redress. [↑](#footnote-ref-94)
94. See at para [110]: ‘The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision.’ [↑](#footnote-ref-95)
95. See the following paragraphs: ‘ ‘[136] … I do not however regard sections 9(2) and 9(3) as being competitive, or even as representing alternative approaches to achieving equality. I see them as cumulative, interrelated and indivisible. [140] … where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.’ The learned Justice pointed out, however, (at para [152]) that: Courts must be reluctant to interfere with … measures [to destroy the caste-like character of our society].’ See at para [152]).’ [↑](#footnote-ref-96)
96. Generally, see J L Pretorius ‘Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: *Solidarity obo Barnard v South African Police Services*’ (2013) 130 *SALJ* 31. [↑](#footnote-ref-97)
97. At para [33]. [↑](#footnote-ref-98)
98. At para [2]. [↑](#footnote-ref-99)
99. *Van Heerden* supra at para [12]. [↑](#footnote-ref-100)
100. *Van Heerden* supra at para [12]. [↑](#footnote-ref-101)
101. The claim was, therefore, one for equalization upwards. Unsurprisingly, most claims founded on the equality doctrine are of this sort. The claimant typically says ‘I want more so I have the same as the comparator’, not ‘I want the comparator to have less so as to have the same as me.’ [↑](#footnote-ref-102)
102. The pensions payable to CPF members were ‘generous and several times more generous than they would, on their pensionable annual salaries, have been entitled to under comparable public sector pension funds.’ *Van Heerden* supra at para [53] [↑](#footnote-ref-103)
103. *Van Heerden* supra at para [52]. [↑](#footnote-ref-104)
104. *Van Heerden* supra at para [52]. [↑](#footnote-ref-105)
105. *Van Heerden* supra at para [52]. [↑](#footnote-ref-106)
106. *Van Heerden* supra at para [52]. [↑](#footnote-ref-107)
107. I take these as illustrative. I make no judgment about whether such people have a tenable claim on affirmative action. [↑](#footnote-ref-108)
108. To put the matter another way, does the Equality Clause mandate affirmative action to realize the goals of distributive justice, or does it countenance only corrective justice. Generally, see AJ Morris ‘The Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice’ (1995) *Oxford J of Legal Studies* 199. Closer to home, O Dupper ‘In Defence of Affirmative Action’ (2004) 121 SALJ 187 pursues the theme admirably. [↑](#footnote-ref-109)
109. At para {31]. [↑](#footnote-ref-110)
110. At para [[24]. [↑](#footnote-ref-111)
111. At para [26]. [↑](#footnote-ref-112)
112. [2014] ZACC 23; 2014 (6) SA 123, [2014] 11 BLLR 1025, 2014 (10) BCLR 1195, (2014) 35 *ILJ* 2981 (CC). [↑](#footnote-ref-113)
113. Grids setting race-cum-gender standards by which the staff complement is to be managed are now commonplace in both the private and the public sector. See *Louw* supra at 655.

     They generally follow a single pattern. The staff complement of the employer is distributed in each grade by gender (male and female) and race (white, coloured. Indian or African). The eight subsets in a grade (four races multiplied by two genders) are then compiled into a grid. Each number is then reduced to a percentage of the total staff component within a grade and this is then compared to the equivalent demography, by race and gender, of the population of the country as a whole (or, sometimes, the economically active subset of it.) By these means the employer can establish whether a particular category of person within a grade is ‘over-represented’ or ‘under-represented’ and accept or reject applications for recruitment or employment accordingly. If the post cannot be filled because the only suitable candidate is ‘over-represented’, the post will be left vacant unless the employer overrides the grid in order to secure special skills or to satisfy some other exiguous condition. [↑](#footnote-ref-114)
114. After the case, she sought and obtained employment with Solidarity, her trade union. What doesn’t emerge from the case, but is worth noting, is that her father was himself a police officer and had brought her up to believe that serving in the Force was an honour of the highest sort. [↑](#footnote-ref-115)
115. At para [38] Moseneke J put the matter thus: ‘The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.’

     The conclusion is unexceptionable, but this is an odd way of framing it. The true issue is whether the faithful implementation of a plan not challenged as unlawful can be condemned as unlawful.

     Jafta J thought not. He believed that, unless the plan was set aside, it must be taken to be lawful and so must its implementation. The problem with this reasoning is that it depends on the characterization of this case as one to be decided in administrative law. It was not. SAPS may be a state institution but, in the guise of employer, its conduct must be assessed by the standards that govern every other employer. The issue is fascinating in its own right, but fall way beyond the scope of this article. [↑](#footnote-ref-116)
116. By which I mean nothing pejorative. I am simply concerned to ensure that the system is understood for what it is. [↑](#footnote-ref-117)
117. ‘[T]he term “multi-racialism” implies that there are such basic insuperable differences between the various national groups here that the best course is to keep them permanently distinctive in a kind of democratic apartheid. That … is racialism multiplied, which probably is what the term truly connotes. We aim, politically, at government of the Africans by the Africans, for the Africans, with everybody who owes his only loyalty to Afrika and who is prepared to accept the democratic rule of an African majority being regarded as an African. We guarantee no minority rights, because we think in terms of individuals, not groups.’ The words are Robert Sobukwe’s. Speech at the Inaugural Convention of the Africanists (April 1969) http://www.sahistory.org.za/archive/robert-sobukwe-inaugural-speech-april-1959. Sobukwe was elected the first President of the Pan African Congress at this convention. [↑](#footnote-ref-118)
118. See, for instance, the following excerpt from the majority judgement in *Van Heerden* (at para [26]): ‘a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.’ [↑](#footnote-ref-119)
119. At paras [28] and [32] respectively. [↑](#footnote-ref-120)
120. A measure of equivocation is to be found in the phrase ‘at a bare minimum and in tail of the paragraph, where he says: : ‘Although these are the minimum requirements, it is not necessary to define the standard finally.’ See at para [39]. [↑](#footnote-ref-121)
121. Whatever the equivocation, his judgment is seen as postulating rationality as sufficient as well as necessary. See the judgment of Cameron, Froneman and Majiedt JJ at [94]. ‘The main judgment … concludes that the implementation of remedial measures should be rationally related to the terms and objects of the measure.’ See too at para [66]: The EEA Plan, says Moseneke J, ‘obliged the national Commissioner to take steps to achieve the targets, provided he acted rationally ….’ [↑](#footnote-ref-122)
122. At para [39]. [↑](#footnote-ref-123)
123. At para [77]. [↑](#footnote-ref-124)
124. In considering the effect of the Employment Equity Act, these judges were fully entitled to conclude that fairness was the lodestar whenever a measure or its implementation happened to be challenged. There is, in principle, nothing preventing a construction of the statute that, in comparison to the Equality Clause, places greater constraints on the scope of legitimate racial preferences. To believe, however, that they were equally unfettered in the construction of the Equality Clause itself, as they seemed to do, constituted a breach of the rules of judicial precedent. In *Van Heerden* the court made its pronouncement on the issue, saying that rationality, not fairness, is the touchstone. It is by no means clear that what was said there should not be of equal application here. [↑](#footnote-ref-125)
125. See at para [98]. [↑](#footnote-ref-126)
126. Expressed at para [159]. [↑](#footnote-ref-127)
127. At para [100]. [↑](#footnote-ref-128)
128. On the facts, however, he felt that Barnard interests should bow before those of the collective. [↑](#footnote-ref-129)
129. At para [42]. Cf the summary of the standpoint by the three judges at para [94]. [↑](#footnote-ref-130)
130. A quota system ‘insulates each category of applicants with certain desired qualifications from competition with all other applicants’. *University of California Regents v Bakke* 438 US 265 (1978) 265 at 315. [↑](#footnote-ref-131)
131. See at para [119]. [↑](#footnote-ref-132)
132. (At [227]). Endorsing the decision of the Labour Appeal Court, he held that, ‘because ‘the essence of restitutionary measures is to guarantee the right to equality”, their implementation cannot be subject to an individual’s right to equality.’ At para [231]). The statement is a surprisingly blunt endorsement of the importance of multiracialism. [↑](#footnote-ref-133)
133. [2016] ZACC 18, (2016) 37 *ILJ* 1995, 2016 (5) SA 594, [2016] 10 BLLR 959, 2016 (10) BCLR 1349 (CC). [↑](#footnote-ref-134)
134. At para [62] [↑](#footnote-ref-135)
135. at para [46]. [↑](#footnote-ref-136)
136. At para [49]. [↑](#footnote-ref-137)
137. At para [102]. [↑](#footnote-ref-138)
138. The reference is aptly described in Wikipedia. ‘Mr Thomas Gradgrind is the notorious school board Superintendent in Dickens's novel *Hard Times* [whose] name is now used generically to refer to someone who is hard and only concerned with cold facts and numbers.’ [↑](#footnote-ref-139)
139. At para [133].

     In *Barnard*, Zondo J explained, the Constitutional Court held that ‘a quota is rigid whereas a … target is flexible’ (at para [51]). In the present case, the Employment Equity Plan permitted ‘deviations’ in cases in which, in the eyes of the Commissioner, the Department’s needed the candidates special skills or would otherwise profit from the appointment. In the opinion of the majority, this system of deviations provided the Plan with the requisite flexibility.

     Justice Zondo made no effort to examine the rationale for outlawing quotas – that is, that a system concerned with demographics must not be allowed to override the claims, based on dignity, of the individual. The current system of exemptions, concerned purely with the employer’s interests as it was, could never serve such a purpose. Nugent AJ was right to conclude, therefore, that ‘the Plan could not be more rigid’ (at para [114]). ‘What stood in [the warders’] path … were quotas with no discretion to take account of other factors, like individual experience, application and verve, and this Court said in *Barnard* that rigid quotas ‘amount to job reservation ….’ At para [118]. [↑](#footnote-ref-140)
140. Traditional principles of law approach the matter on the basis that discretionary decisions, if found to be irregular, should generally be sent back to the repository of power (the employer in this case) for consideration afresh. The court will only substitute its decision if this would be appropriate in the exercise of its own discretion on matters of remedy. The courts, doing their best on the materials before them, will substitute if the fresh decision is a foregone conclusion or bias is at play or it would be otherwise convenient to do so. See, for instance, G*auteng Gambling Board v Silver Star Development Ltd & others* 2005 (4) SA 67 (SCA). [↑](#footnote-ref-141)
141. Including the Supreme Court of Appeal - see *Gordon v Department of Health: Kwazulu-Nata*l [2008] ZASCA 99, 2008 (6) SA 522, [2009] 1 All SA 39, 2009 (1) BCLR 44, [2008] 11 BLLR 1023, (2008) 29 *ILJ* 2535 ((SCA) at para [28]. ‘To justify the failure to appoint a candidate who complied with stipulated requirements it had to be shown that that action was not unfair. The evidence at our disposal is clear that the respondent did not have an affirmative action plan or policy in terms of which it appointed Mr Mkongwa. The evidence is also clear that the selection panel found the appellant to be the most suitable candidate and recommended that he be appointed. It is also common cause that the appellant complied with all the requirements for the post in terms of [the operative statute]. In the light of all these facts it was clearly unfair not to appoint him. The Labour Court was therefore incorrect to conclude that it was not a requirement for the respondent to have had a plan or programme first before appointing [the claimant].’ [↑](#footnote-ref-142)
142. At para [82]. [↑](#footnote-ref-143)
143. At para [93]. [↑](#footnote-ref-144)
144. At para [93]. This seems to put the best gloss on this part of the decision. In effect the court is treating the plan as partly lawful and party unlawful. At a stretch, the doctrine of severance just permits such an approach. [↑](#footnote-ref-145)
145. [2018] ZACC 20 (CC). [↑](#footnote-ref-146)
146. So much is absolutely clear from an understanding of the process, a proper examination of the enactments, and an appreciation of the judicial dicta on point. [↑](#footnote-ref-147)
147. Someone reading this summary, seeing it as absurd, might be forgiven for treating it as traducing the argument. It does not. This is precisely the effect of the following passages:

     ‘[35] First, the expressly stated objectives of the policy are “to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination”. The attainment of some of these objectives, especially fairness, would advance the interests of creditors. The policy seeks to achieve fairness to creditors by requiring that the alphabetical list contains only appropriately qualified insolvency practitioners and, where a complex matter arises, and the appointed practitioner is inappropriate to manage the estate, the Master may then also appoint a suitable senior practitioner. In addition, the policy requires that every practitioner appointed must timeously lodge a bond of security with the Master and it disqualifies a practitioner who has a conflict of interest from appointment in respect of the estate where a conflict arises. This illustrates the synergy between the overall objective of the Insolvency Act and section 158(2) which sets out the purposes for the policy the Minister is mandated to make.

     [36] Second, when the Master appoints provisional trustees under section 18 of the Insolvency Act, the objective is to protect the interests of creditors. While the process of appointment must accord with the policy determined by the Minister, the overarching purpose is to preserve the assets of the insolvent estate for the benefit of creditors. Before the first meeting of creditors, the Master steps into their shoes and is authorised to give directions to the provisional trustee, which could be given by creditors at a meeting.[23] In addition, a provisional trustee may not sell the assets of the estate without authorisation by the Master. Therefore, the scheme of appointment created by the Insolvency Act and the policy made by the Minister are in line with the overarching purpose of the Insolvency Act.’

     Justice Madlanga, with whose minority judgement Justices Froneman and Kollapen concurred, made the same point every bit as trenchantly. ‘On what is before us it is uncontested that appointments are on the basis that all practitioners who make it to Masters’ lists are suitably qualified to practise as insolvency attorneys. The very fact that each practitioner on the list is suitably qualified does cater for the interests of creditors.’ Those who doubt whether the performance of the role is quite so mechanical will find that the decisions of the Supreme Court of Appeal from which this appeal lay. Especially instructive is the judgment of Wallis JA, who became well versed in such work when in practice at the bar. See *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* ([2016] ZASCA 196, [2017] 1 All SA 331, 2017 (3) SA 95 (SCA).. [↑](#footnote-ref-148)
148. Ibid at para [50]. [↑](#footnote-ref-149)
149. Unexceptionably, he described restitutionary measures and the need that underpins them in the following terms (at para [1]): ‘Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures.’ [↑](#footnote-ref-150)
150. I have succumbed to the temptation to provide the analysis in the text, but only occasionally. The effort is significant and its fruits are marginal. What matters is to understand that the exercise is inescapable and, when it is made, values are at the very core of it. [↑](#footnote-ref-151)
151. When the analysis becomes physiological, problems of course abound. ‘It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states: some holding that any visible admixture of black blood stamps the person belonging to the colored race …; others, that it depends on the preponderance of blood …; and still others, that the preponderance of white blood must only be in the proportion of three-fourths ….’ Justice Brown *in Plessy v Ferguson* supra. [↑](#footnote-ref-152)
152. See, for instance, the dictum of Langa DP in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [46]: ‘Many privileges were dispensed by the [apartheid] government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres …’ [↑](#footnote-ref-153)
153. Langa DP shows a willingness to contemplate this complexity when he says in C*ity Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [47]: ‘I am acutely aware that generalizations are invidious and that there are undoubtedly some members of the white community who are poor and some from the black community who are wealthy.’ He properly puts his conclusions on the footing that past discrimination was designed to benefit the white community, and he expresses the view that it had this effect. What he sagaciously refrains from saying is that such discrimination is *solely* responsible for the disparity. [↑](#footnote-ref-154)
154. On occasion, they can be found to make the point without, it seems, really intending to do so. In considering a complaint by a white person based on the fact that service charges for historically ‘white’ areas were disproportionately high, Sachs J said in *Walker* supra at para [105}: ‘The mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not … enough to constitute indirect discrimination on the grounds of race.’ [↑](#footnote-ref-155)
155. As Powell J pointed out in *Wygant b Jackson Board of Education*  476 US 267 (US) at 277 (see too at 289), there are ‘numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups.’ In similar effect is the dictum in *Bakke* of Justices Brennan, White, Marshall and Blackmun, who pile such assumptions one on another: ‘If it was reasonable to conclude – as we hold that it was – that the failure of minorities to qualify for admission at [the University] under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, [Bakke, the white candidate] would have failed to qualify for admission even in the absence of [the University’s] special admissions program.’ *University of California Regents v Bakke* 438 US 265 (1978) 265.

     Domestically, see, for instance, the judgment of Sachs J in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [105]: ‘In the present case, there is overwhelming evidence to show that the complainant has in fact benefited from accumulated discrimination and that he continues to enjoy structured advantage of a massive kind.’ The see the dictum of the same judge at para [110]: ‘the complainant identifies himself … on the basis of belonging to a racial group which, as is commonly known, benefited directly in the past from programmes that were systematically law-enforced and overtly racist. Indeed, he continues to enjoy manifest *de facto* advantage as a result of such programmes.’

     The supposition is most boldly enunciated in the minority judgment of Madlanga J in *Insolvency Practitioners* at para [63]: *‘I*t does not require rocket science to realise that at the dawn of our constitutional democracy virtually all meaningful fields of human activity would be dominated by white people. That was because white people were disproportionately better qualified … as a result of black people being blatantly and unashamedly denied equal opportunities …. Therefore the reason white people were - and continue to be - disproportionately better qualified and more experienced is a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid.’

     That this is pure rhetoric can be demonstrated by returning to 1652. When Van Riebeeck and his men set foot on the Cape shore, their material welfare, however indifferent it might have been, was decidedly better than that of the local Khoi-San. This was manifestly not the consequence of discrimination.

     On its own terms, the reasoning is flawed. The Justice forgets that over the previous twenty years black people were, as a matter of policy, included in every significant team of liquidators. If this was not time enough for a skills base to develop, the Justice should have told us. [↑](#footnote-ref-156)
156. Thomas Sowell, brilliant US economist, arguably says everything there is to say on this topic in an array of books. See, for instance, *Wealth, Poverty and Politics* (2016). That he is black rules out the cry that he is no better than a racist. The conscientious rigour of his work does the same. [↑](#footnote-ref-157)
157. Erstwhile leader and a continuing presence in the official opposition, the Democratic Alliance. She flighted a tweet in which she said that colonialism was not all bad. Her opponents twisted the statement into one suggesting that colonialism was all good. Her supporters said *sotto voce* that she should have kept quiet; but silencing is itself a form of repression in this field, as I have pointed out in a previous publication. See “The Employment Equity Act: Bad for Employment, Bad for Equity’ (1997) 18 *ILJ* 1359. [↑](#footnote-ref-158)
158. ‘There is no *prima facie* reason to suppose that members of different racial and ethnic [groups] would be equally likely to want to go into [a specific profession] and, on the contrary, many reasons to expect that they would not. To the extent that ethnic and racial groups form at least partially self-contained communities (and they do0, members of one community will value different sorts of character traits, encourage the acquisition of different skills, and have different ideas about what sorts of jobs carry the most prestige.’ AM Louw supra citing ’Proportional Representation of Women and Minorities’ in SM Cahn *The Affirmative Action Debate* (2013) 136. See too *Richmond v JA Croson Co* 488 US 469 (1989) at 507 [↑](#footnote-ref-159)
159. See the comprehensive, eloquent, and very disturbing word by Anthea Jeffery *BEE: Helping or Hurting?* (2104) [↑](#footnote-ref-160)
160. In *Barnard* Moseneke J stressed the fact that ‘our Constitution has ‘a transformative mission [and] hopes to have us reimagining power relations within society’ (at para [29]. [↑](#footnote-ref-161)
161. 1934 AD 167. [↑](#footnote-ref-162)
162. At 182. [↑](#footnote-ref-163)
163. At 190-91. The dialectic reflects underlying social attitudes and structures of power in a way that eerily tracks the seminal decision of the US Supreme Court in *Plessy v Ferguson* 163 US 537 *(1896).* [↑](#footnote-ref-164)
164. At 191. [↑](#footnote-ref-165)
165. Ill-will and hostility towards whites in general and Afrikaners in particular, is by no means reserved for the ignorant and vengeful. Judgments of the Constitutional Court itself are beginning to exhibit such sentiments. In *City of Tshwane Metropolitan Municipality v Afriforum & another* [2016] ZACC 19, 2016 (9) BCLR 1133, 2016 (6) SA 279 (CC) Afriforum, an Afrikaans-based activist organization, sought to enforce an undertaking that the public would be properly consulted before a change of Pretoria street names would be effectuated. This might seem innocuous enough - the doctrine of legitimate expectation, upon the principles of which such cases are founded - is no longer a novelty in our law. But the court viewed it otherwise. he majority judgment, written by Mogoeng Mogoeng CJ, dismissed the claim in the most strident of terms, while Jafta J, writing a virulent concurring judgement, went so far as to suggest that the traditions emanating from whites enjoy no constitutional recognition because they are ‘rooted in the racist past’. In his eyes, so it seems, every cultural tradition to which whites might cling is riddled with racism and so undeserving of protection. [↑](#footnote-ref-166)
166. Their impact within this domain is well rehearsed in the UNESC ‘Prevention of discrimination: the concept and practice of affirmative action’ Final Report submitted by Mr Marc Bossuyt, special rapporteur in accordance with Sub-Commission Resolution 1998/5 17 June 2002 (‘UNESC Final Report’): see especially at paras [81] to [100] and 112. [↑](#footnote-ref-167)
167. Emphasis suppled. [↑](#footnote-ref-168)
168. L Ackermann *Human Dignity* 358, emphasis supplied. [↑](#footnote-ref-169)
169. Supra at 602. [↑](#footnote-ref-170)
170. Impracticability, in that instance termed ‘administrative inconvenience’, was a factor that weighed heavily with the court in *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708, 1997 (4) SA 1 (CC): see, for just one of the applicable dicta, the reasoning of Mokgoro J at para [106]. [↑](#footnote-ref-171)
171. At 602, [↑](#footnote-ref-172)
172. Speaking of the United States, Bowen is quoted with approval in Bakke for the following proposition: ‘While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experiences among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished – and against what odds.’ *University of California Regents v Bakke* 438 US 265 (1978) at 317n51. [↑](#footnote-ref-173)
173. At 609. [↑](#footnote-ref-174)
174. *Richmond v JA Croson Co* 488 US 469 (1989) at 527. [↑](#footnote-ref-175)
175. Act V Sc III. [↑](#footnote-ref-176)