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The More Things Change … [1] Multiracialism in Contemporary South Africa

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ABSTRACT: The system of multiracialism, by which the races in South Africa were streamed and administered separately, still prevails and, though proscribed by an avowedly non-racial Constitution, is applauded by our highest court. Nothing prevents us from embracing the constitutionally-mandated goal, and remedial action should invoke race only when necessity dictates.

KEYWORDS: race, multiracialism, non-racialism, apartheid, separate development, equality, ICERD, section 9, affirmative action, remedial action, quota

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[1] '*Plus ça change, plus c'est la même chose.*' (The more things change, the more they remain the same.)

I INTRODUCTION

South Africa is by law pronounced and proclaimed to be a non-racial state. The Constitution, the basic law of the country, solemnly states as much: in s 1, which is termed the founding clause, it expressly says that non-racialism is one of the central values of the single sovereign, democratic, state created by the instrument.

South Africans, taken generally, applaud this fact. For fifty years, they suffered under a system in which people were divided and ruled by race, and they now want no part of it. They renounce, indeed roundly denounce, the naked racism of apartheid and the sophisticated variant it spawned, separate development. No longer, they say, will we be divided up and governed on the basis of race. We have ceased to be black, coloured, Indian or white and have become individuals who are entitled to be treated as such. By our Constitution, we have committed ourselves to a non-racial future; this is what we believe in, what we have fought for, and what we have achieved. In the spirit of Ladysmith Black Mambazo, our country's glorious *acapella* group, we believe we can now raise our voices and sing out: 'Different colours mean nothing to me; different languages mean nothing to me; different names mean nothing to me.'[2]

Or can we? In the name of equality, under the rubric of affirmative action, the state continues to treat people by reference to race and, using the self-same system of racial categorization by which apartheid operated, deals with them accordingly. The policy, which is widely implemented, is nowhere more rigorously applied than in the field of employment, and the public service, especially but by no means exclusively. In the interests of 'demographic representivity', job applicants are uniformly characterised by colour and succeed, whatever their intrinsic merits, only if the vacancy is for a person taken to fall within the group in question. In form, this is not non-racialism; nor is it substantively so, since whites, who can scarcely be said to be the victims of past discrimination, benefit and suffer equally from the system. What it is, is multiracialism.

To boot, it is multiracialism of a special sort. It is multiracialism that shares precisely the same inspiration, the same philosophical justification and the same structure as the hated policy of separate development. We cannot, it seems, throw off our past: what plagued us once continues to haunt us still. Why this should be so raises a number of questions.

- Is there, we ask ourselves, something in the very notion of equality that forces us to employ multiracialism as our organizing model?
- Is there something in our legal tradition, our common law especially, that has this result?
- Are there imperatives of international law recognised by us as mandatory that demand compliance with the system?
- Finally, are there provisions in the Constitution – the Equality Clause not least – that override the aspirations in the founding clause so as to make multiracialism obligatory?

In this article I consider these questions and conclude that nothing forces us back into the clutches of multiracialism. Quite the contrary: the Constitution, in terms and in spirit, obliges us to embrace non-racialism and, by making race cardinal to our decision-making, we flout its basic tenets. In itself this is a bad thing, since the instrument, negotiated so earnestly between white and black, deserves our respect, even fealty. No less bad are the consequences, which I consider, somewhat fleetingly, before I finish the essay. There are a few countries in which

[2] Joseph Shabalala, producer, 'Kangivumango', a track to be found on the record album '*The Very Best of Ladysmith Black Mambazo – Rain, Rain, Beautiful Rain'* (2004), compilation by Ladysmith Black Mambazo..

multiracialism is implemented and, in one or two of them, the system has arguably produced good results, but South Africa is most certainly not among them. The policy of dividing people into races and 'developing' them separately has failed us in the past and it will not serve us in the future.

II IS MULTIRACIALISM, SOMEHOW, AN INHERENT FEATURE OF EQUALITY?

Most, if not all, judgments entail a comparison of one sort or another. Sometimes it will be between things. If we say that something is hard, we have in mind its corollary, a thing that is soft. Sometimes it will be between people: when we say that X is the eldest of the children, we bring to mind the siblings she has and recognise that they are younger than her. Sometimes we mix up the two, people and things. If we say that someone lives in poverty, we set a standard by reference, first, to the material things required to support life and, secondly, to the way other people – richer people – are living. The fact that the first is absolute and the second is relative makes no difference for present purposes. The standard, once set, still acts as a basis by which we make the comparison.

The comparison, it should be obvious, entails a choice. Once we have the subject of our decision-making, we select the person or thing with which we will make the comparison and the criterion by reference to which the comparison will be made. The comparator need not be real, and often is not. A notional thing or person can be postulated as the basis of comparison – lawyers, accustomed to use such fictions as the reasonable person, know this well enough – and sometimes the process of abstraction can be so extended that we all but forget that a comparison is being made. Such is the position when a standard, set by reference to how people might properly be expected to behave, becomes the comparator idealised as a principle. Bound up in the rule that murder is the intentional and unlawful killing of another human being, for example, is the idea that, when two killers are compared, one may be condemned when the other is not.

In the absence of constraint, moral, legal or social, the choice is entirely ours to make. We are continually reminded that it is wrong to compare apples with pears, but this is so only if our concern is with the essential 'appleness' of the thing. If our concern is to know whether each share the quality of being a fruit, then it is entirely proper to make the comparison, in the process identifying the subject of the analysis (the apple), the comparator (the pear) and the criterion by which to compare them (the quality of being a fruit). In the same way, we can compare one person, older and taller though she is, by reference to, say, the colour of their hair or the way they laugh.

In the domain of equality, the self-same comparison is, and must be, made. The subject of the evaluation must be chosen, so must the comparator, and so too the criterion by reference to which they will be evaluated. The only difference is that the assessment is narrower; instead of seeking points of identity or disparity, which may be large or small, we are now asking whether the subject and comparator are, by reference to the applicable criterion, the same or not. The sameness can, in principle, be of any quality: if we choose weight as the criterion, for instance, we can say that a lump of lead is equal to a sack of feathers if each weighs a kilogram; if we are concerned with their texture, however, we must conclude that they are unequal. In the same way, a child may be unequal to her siblings in height but be their equal in appetite or generosity.

The opening scenes of King Lear provide a striking illustration of how the methodology of equality works. The eponymous king, now in his dotage, decides to unburden himself of his estates. He has three daughters and they, he proposes, should each be the recipients of his largesse. A courtier expects him to prefer the daughter whose husband he likes better, but the King takes up the stance, initially anyway, that each should benefit equally. Before making the final decision, however, he requires them to describe the depth of each of their love for him. The elder two play along, but the youngest will have none of it. Speaking from her heart, she says simply 'I love your majesty according to my bond, no more nor less.'[3] In time, she tells him, she will be wed, and since her husband will 'carry half my love with him',[4] she cannot copy her sisters by pretending she will always love him alone. The King, enraged beyond measure, disowns her and grants the whole of his lands to the other two in equal shares. What ensues is terrible and, in the finest tradition of Shakespearean tragedy, none of the principal figures emerges alive.

In making the distribution, Lear proceeded – could not but proceed – in precisely the way we have foreshadowed. First he decided on the benefit to be conferred, then he selected the people whom he would benefit, and finally he resolved on the extent of the benefit. The people comprise his daughters as distinct from their husbands, his courtiers or the public at large: the benefit consists of his lands in their totality, not just a part of them; and the distributions are to be made equally provided the threshold requirement – the proper expression of filial piety – is satisfied. The basic comparison determines the set of potential beneficiaries by selecting in favour of the children and against everyone else; but within the set is a subset, determined by reference to the expression of love, that ultimately serves to favour the eldest two daughters over the youngest.

In the tale, we discover not just how decision-making works – the process or, if you like, the methodology. We also see that, unless some constraint dictates otherwise, the process is wholly open-ended. Who is to be compared to whom is a matter of discretion; so too is the criterion by reference to which the comparison will be made and the outcome of the comparison (will there be an equal distribution or one that is proportioned?)- is a matter of discretion. How the discretion is exercised is always a matter of who we choose to compare with whom, and what we elect to use as the criterion for comparison. The courtier expected that the husbands would be the subject of comparison, that the king's relative love and affection would be the criterion, and that the lands, which were the object of the decision, would be distributed proportionately. In fact, the daughters were compared on the basis of their expression of love for the kings and the distribution was made equally between two of them.

Until populated in this way, equality is and must always be an abstraction, a purely formal concept that can tell us nothing of substance. Peter Westen is right, therefore, when he describes the concept as an 'empty idea':[5] it deserves this description because it is 'empty of content', 'an empty form having no substantive content of its own.'[6] There is no such thing as 'substantive'

[3] *King Lear* Act I Sc 1.

[4] Ibid.

[5] 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.

[6] P Westen 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, 537 and 596.

equality until we have decided who should be equal to whom, in what respects, and to what degree. There is, as a result, no point in peering into the concept in the hope that it will, in and of itself, yield eternal verities about the way society should be structured.[7] 'Without moral standards,' Westen says, 'equality remains meaningless, a formula which can have nothing to say about how we should act.'[8] There is no closed list of the standards we can invoke and so no closed list of the parameters we can employ, so it is 'a mistake to believe that the various kinds of equality can be enumerated as a multiple yet finite list."[9] In the words of Lakoff, '[o]n 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".'[10]

There is, in principle, nothing that drives us to employ one set of standards rather than another. We make our choices by responding to our conceptions of right and wrong, good and bad, useful and useless, or whatever. Since we share such values to a greater or lesser degree, we are quick to take the parameters as given and invoke equality as though, in itself, it were instructive. We say people should be equally treated and when asked how, we say, according to merit, or needs, or works, or effort, or wants.[11] But these, to repeat, are simply the choices that commend themselves to the moral conceptions of the proponent; absent a system of values, they have no inherent justification, and most certainly cannot be validated by proclaiming the merits of equality. Without deciding who should be equal to whom and in what respects we can resolve nothing. We cannot say whether sisters should be equal to their brothers, women should be equal to men, or blacks should be equal to whites.[12]

The doctrine of equality, it follows, makes no demands that we divide people by reference to the colour of their skin. If we can and do make this division, we make a choice that is ours. By parity of reasoning, the doctrine makes no demands that, once people are so divided, the resulting groups should, in some respect or other, be equally treated. If we can and do decide that they should, the choice once more is ours. Nothing intrinsic to the concept of equality can ever determine the question; its answer must ever be sought in values that are extrinsic to it and employed to make it function. No doubt some considerations appear more compelling than others: for example, our conceptions of the proper connection between cause and effect might suggest, at least to people of a liberal persuasion, that race is an extraneous factor in determining distributive social and economic questions. These are, however, just expressions of our ideas and values, which may or may not be dominant at any one time, and in no way derogate from the general proposition that is now being advanced.

7 This is no idle point. There are writers who propound just such a notion: for just one of many examples, see C Albertyn & Beth Goldblatt 'Equality' in S Woolman & others *The Constitutional Law of South Africa* 35-5.

8 *Westen* (note 6 above) 547.

9 Ibid 540 n8.

10 Ibid.

11 Jennifer L Hochschild *What's Fair* (1981) usefully identifies 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 (eg per capita), through Need, Investments (how much in time effort or money has been invested) and Results to arrive, finally, at Ascription (ie 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).

12 The notion that equality, until populated, is a purely formal concept is one of the central themes of Amartya Sen's prodigious work: see, in particular, *The Idea of Justice* (2009) ch 14.

Once this is understood, we are obliged to accept that multiracialism is just one more choice. As a matter of social policy, its merits can be debated, but nothing rooted in the principle of equality compels us to accept it as axiomatic. If we plump for it, either in itself or in one or other of its manifestations such as separate development or demographic representation, we do so because we believe this is justified by deeper values we hold dear.

III DO OUR LEGAL TRADITIONS PROPEL US TOWARDS MULTIRACIALISM?

Under the common law, a person is free to act, or decline to act, unless the law prescribes otherwise. Freedom is the basic postulate of our law, and it is enjoyed by everyone to the extent that it is not abridged by law. Primary legislation enshrining race-based discrimination is not lightly presumed to create such an abridgment since it 'is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights.'[13] In dealing with subordinate legislation, the courts were wont to exercise greater powers of control. They regularly struck down regulations, ordinances and similar enactments if they deemed them to be unreasonable. Ordinarily, a rule would be unreasonable if it fell outside the range of rules that reasonable people might make, but within this context, the word was assigned a special, more limited, meaning. It was to denote something less than conventional unreasonableness but more than mere irrationality. Measures, by reference to this intermediate standard, would be struck down if they were 'partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.'[14] If the measure was unjust but not manifestly so, it would survive scrutiny; so too if it disclosed some degree of justification even though the justification was not compelling. Parliament, the representative of the people, could sanction measures that were misguided or mistaken,[15] but it could not be taken to legitimate the perverse or absurd. If a measure was 'off the wall', as the saying goes, then 'the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."'[16]

Using the same interpretative approach, the common law courts would presume, unless the contrary was clear, that the lawgiver intended to promote the public interest by means properly tailored for the purpose. Unless constrained to do otherwise, they would reject a construction which produces a result that is, by prevailing standards, seen as arbitrary, partial or unequal in its operation. They would 'not lightly construe a statute in such a way that its effect is to achieve apparently purposeless, illogical and unfair discrimination between persons who might fall within its ambit. [and, if] the language of the statute is reasonably capable of an interpretation which avoids that result, that is the interpretation which the court will give it rather than the one which would attribute to the legislature a whimsical predilection for purposeless and unfair

[13] *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 552.

[14] *Kruse v Johnson* [1898] 2 QB 91 at 99–100. The *dictum* is treated as equally applicable in our law, as a long line of cases testifies.

[15] A measure 'is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification, which some judges may think ought to be there'. *Kruse* (note 14 above) 100.

[16] Ibid at 99–100. The applicability of *Kruse* in our law has never been questioned; Broome JP rightly remarked in *R v Jopp* 1949 (4) SA 11 (N) 13 that the doctrine has been approvingly applied in a 'long line of cases'.

discrimination.'[17] Rationality was the touchstone and, in defence of liberty, they would, when they could, discountenance statutory constructions that were redolent of perverseness, injustice and, most pertinently for our purpose, unfairly discriminatory. [18]

Beyond a certain point, however, they were unable to proceed. Constrained by the doctrine of parliamentary sovereignty, they felt bound to implement statutes, however oppressive they might be, if they were unambiguous in the powers they conferred on officials or the burdens they imposed on subjects. This was a consequence of a conception of democracy that treated the will of Parliament, once properly discerned, as supreme and inviolable, recognizing the existence of no power of judicial review that might vest in the courts. But within those limits, they made themselves the protectors of the rights and liberties of the ordinary person as best they could. So, for instance, in *Metal & Allied Workers Union v Minister of Manpower*,[19] the court held that, in the absence of an express power to make a racially-conditioned decision, the Registrar of Trade Unions acted unlawfully in registering non-racial unions as capable of representing black workers alone.

What the common law reprobated, it must be stressed, was not the use of race per se, but its use in an arbitrary or uneven way. In *R v Carelse*[20]and *R v Abdurahman*,[21] the court intervened not because the regulatory measures employed the criterion of race to segregate the amenities in question – beaches in the first case, railway carriages in the second – but because the actual division operated to the palpable disadvantage of the races who were not white. Discrimination itself was not the perceived mischief, but discrimination producing an unfair outcome. The consequence of this approach was an in-principle acceptance of racial streaming – a process we should term, and rightly term, multiracialism – and its condemnation only when its impact proved in fact to be disparate. The case on point, more infamous than celebrated, is *Minister of Posts and Telegraphs v Rasool*,[22] in which our highest court was required to decide on the validity of a by-law that, without expressly being so authorised, segregated the facilities of the post office between 'Europeans' and 'Non-Europeans'. In argument, the objecting party, an Indian individual, accepted that the two streams were functionally equivalent but claimed that the measure was inherently demeaning. The argument was rejected by a majority of the appeal court, whose views are captured in the judgment 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'[23] 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

[17] *Lister v Incorporated Law Society, Natal* 1969 (1) SA 431 (N) 434.

[18] Of course, the common law judges were far from uniform in their application of these principles. It would be naïve to suggest that they might be. For and interesting insight into how they were wont to proceed in the years between the world wars, see WHB Dean 'Reason and Prejudice: The Courts and Licensing Bodies in the Transvaal' in E Kahn *Fiat Iustitia: Essays in Honour of Oliver Deneys Schreiner* (1983) 211. The author says: 'it is quite clear that, although reluctant to recognise explicit racism, the courts were not prepared to tolerate decisions based purely on … race'. (At 214.)

[19] 1983 (3) SA 238 (N).

[20] 1943 CPD 242.

[21] 1950 (3) SA 136 (A). See too *R v Lusu* 1953 (2) SA 484 (A).

[22] 1934 AD 167.

[23] Ibid at 182.

contact in public offices with non-Europeans, and that they regard the latter as being of a lower order of civilization' so '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'.[24] This followed ineluctably 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.'[25]

Would the outcome have been different had the judges been able to test the provision under a justiciable Bill of Rights? It is hard to say. The experience of the United States, which of course does have such a testing right, is equivocal. On the one hand, we have the late-nineteenth century decision of the US Supreme Court in *Plessy v Ferguson*[26] endorsing the doctrine of multiracialism; on the other hand, we have *Brown v Board of Education of Topeka*,[27] decided 50 years later, in which multiracialism was rejected and *Plessy* was explicitly overruled.

In *Plessy*, the court had to decide whether railway carriages could legitimately be segregated by race. The finding of the court was that a 'statute which implies a legal distinction between the white and coloured races – a distinction which is founded on the colour of the two races, and which must always exist so long as white men are distinguished from the other race by colour – has no tendency to destroy the legal equality of the two races.'[28] Since it had been accepted, for the purposes of argument, that the two sets of carriages were equally commodious, the court declined to intervene. Separation, provided it was equal, was unexceptionable. Segregation was legitimate.

Justice Harlan, the sole dissenting voice, roundly rejected this thinking, holding that 'State enactments regulating the enjoyment of civil rights upon the basis of race … under the pretense of recognizing equality of rights can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.'[29] 'The sure guaranty of the peace and security of each race,' he continued, 'is the clear, distinct, unconditional recognition … of every right that inheres in civil freedom, and of the equality before the law of all citizens … without regard to race.'[30] Even were this not so, he proceeded, the exercise of a power to segregate within the circumstances then prevailing would be bad in law. 'Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks, as to exclude coloured persons from coaches occupied by or assigned to white persons.'[31] The effect was to put 'the brand of servitude and degradation upon a large class of our fellow citizens, – our equals before the law.' 'The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.'[32]

The argument that multiracialism, neutral in theory, is nevertheless discriminatory in practice proved determinative in *Brown*. The issue, said the court in the case, was this: 'Does

[24] Ibid at 190-191. 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).*

[25] *Minister of Posts and Telegraphs v Rasool* (note 22 above) at 191.

[26] 163 US 537 (1896).

[27] 347 U.S. 483 (1954).

[28] 163 U.S. 537, 543.

[29] Ibid at 561.

[30] Ibid at 560.

[31] Ibid at 557.

[32] Ibid at 562.

the segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible' factors may be equal, deprive the children of the minority group of equal educational facilities?'[33] In *Plessy,* the majority had held it fallacious to assume that the enforced separation of the two races stamped the coloured race with the badge of inferiority and, should the contrary be thought true, this was 'solely because the coloured race chooses to put that construction upon it.'[34] In *Brown*, the court held that this view represented a failure in 'psychological knowledge' that had since been exposed by copious modern authority. The true position was that separate facilities are inherently unequal and, in consequence, the doctrine of 'separate but equal' has no place within the public domain.[35]

Cases such as these can be endlessly debated, but the debates are beyond this essay. For present purposes it is enough to observe that the common law, the fundamental source of our legal culture, is hostile to race-based programmes and tolerates them, if it tolerates them at all, only when the language of statutes makes a finding to the contrary untenable. We must conclude, then, that nothing in our legal traditions compels, or even encourages, our courts to embrace multiracialism. There are, to be sure, a few cases in which the courts endorsed race-based regulations in the absence of a statutory obligation to do so, but they are exceptional. *Abdurahman*,[36] the seminal case on the common law, placed the issue of racial discrimination squarely within the rubric of reasonableness and held that such partial or unequal treatment is not to be countenanced unless specifically mandated by the enabling statute. Baxter is entitled to conclude, therefore that our common law courts, having adopted the *dictum* in *Kruse*,[37] evinced 'an early abhorrence of discriminatory administrative action [by generally holding that] non-legislative discriminatory administrative action is unlawful if it is not clearly authorised by statute.'[38]

IV DOES INTERNATIONAL LAW MAKE MULTIRACIALISM A REQUIREMENT?

Section 39(1) of the Constitution stipulates that international law (which includes international treaties, conventions and customary norms) must be considered in the process of construing the Bill of Rights.

Of these sources, the most instructive is the International Convention on the Elimination of Race Discrimination ('ICERD'), which entered into force in 1969, and a brief consideration of it will suffice for our purposes. [39] 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 properly propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination.

[33] Ibid at 493.
[34] Ibid at 551.
[35] Ibid at 494.
[36] *R v Abdurahman* 1950 (3) SA 136 (A) 149B–C.
[37] Discussed above.
[38] L Baxter *Administrative Law* (1984) 526.
[39] Their impact within this domain is well rehearsed in the UNESCO '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 ('UNESCO Final Report'): see especially at paras 81–100 and 112.

Crucially, however, it stipulates that legislative '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.'[40] In its 2006 response to the report submitted by South Africa under ICERD, the Committee singled out the provision in order to express its concern that our country's affirmative action measures might indeed lead to the 'maintenance of unequal or separate rights for those groups after the objectives for which they were taken have been achieved.'[41]

Nothing in international law controverts ICERD – the Convention is exhaustive of the international position. The international position is clear: affirmative action, properly conceived, is legitimate and indeed mandated, but the division of people by race in order to subject them to segregated governance is not. International law, far from mandating multiracialism, positively reprehends it. Exponents of multiracialism, in whatever guise it is framed, will find naught for their comfort here.

V DOES THE CONSTITUTION SANCTION MULTIRACIALISM?

At the start of this essay, I pointed out, in general terms, that our Constitution espouses non-racialism. The provisions in question deserve a closer look. The Constitution opens by stating that the 'Republic of South Africa is one, sovereign, democratic state founded on … human dignity, the achievement of equality and the advancement of human rights and freedoms. Explicitly incorporated in this introductory clause, which is 'foundational' in its effect,[42] is a commitment to 'non-racialism and non-sexism'.[43] After a few preliminary sections, a Bill of Rights is included that is far-reaching in scope and content. Drawing its inspiration from principles of constitutional supremacy envisioned by the founding fathers of the USA, the Constitution makes the Bill of Rights a charter against which all law, primary and subordinate, can be tested for coherence and validity.

Included in the Bill is the Equality Clause, which is to be found in s 9. Tracking its predecessor, which was in s 8, the 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.

[40] Emphasis supplied.

[41] *Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination, South Africa*, UN Doc. CERD/C/ZAF/CO3 of 19 October 2006, para 10.

[42] See, for instance, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) para [73].

[43] Section 1.

Its construction is framed by the interpretative rules embodied in the Constitution itself, and the same is true of enactments promulgated pursuant to it. [44] They are three in number. The first is that the Bill of Rights must be construed in a manner that promotes the values underlying an open and democratic society based on human dignity, equality and freedom. The second is that parliamentary statutes and other enactments must be construed in a manner that promotes the spirit, purport and the objects of the Bill of Rights.[45] The third is that international law 'must' and foreign law 'may' be considered when construing the Bill of Rights.[46]

A The protection against arbitrariness: s 9(1)

Section 8 in the Interim Constitution[47] opened by stating that '[e]very person shall have the right to equality before the law and to equal protection of the law.' When s 9 replaced it, the right to 'equal benefit of the law' was added so that, under the present provision, 'everyone is equal before the law and has the right to equal protection and benefit of the law.'

On the face of it, these rights are far-reaching, so much so that an ordinary person – one untutored in the law – might be forgiven for concluding that, since equality under law is ultimately achieved only when everyone is treated the same, the law cannot permissibly

[44] The common law requires fealty to such directives, but the status of the Constitution as supreme law places the matter beyond doubt.

[45] Section 39(2) of the Constitution. Generally, see *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12, 2001 (1) SA 545 (CC) para 21, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15, 2004 (4) SA 490 (CC) paras 88–92, *South African Police Service v Public Servants Association* [2006] ZACC 18, 2007 (3) SA 521 (CC) para 20.

[46] Section 39(1)(b) and (c).

[47] Section 8 reads 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.' The clause in the Interim Constitution, s 8, was substantially the same as the current one, s 9, so there is every reason to treat the judicial exegesis of the first as applicable to the second. The Court has certainly followed this approach. See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18, 1999 (2) SA 1, 1999 (2) BCLR 139 (CC) and cf *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) para [15].

distinguish between its subjects and by so doing treat them differently.[48] However, a moment's reflection is all that is required to show that this cannot be the meaning of the section; if it were, the law would grind to a halt, since it typically operates, and must operate, by differentiating between subjects.[49] '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 s 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called on 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.'[50] Since this result would be intolerable, there must be a limit on what is constitutionally reviewable under the rubric of equality.

The limit resides, we can safely conclude, in the three phrases so far identified: 'equality before the law', 'equal protection of the law' and 'equal benefit of the law'? In our case law, unhappily, no serious effort has been made to explicate them and delineate their scope. Our judges have been happy to speak about them in lofty terms. In *Fraser v Children's Court, Pretoria North, & Others*, for instance, the majority proclaimed 'that the guarantee of equality lies at the very heart of the Constitution [and] permeates and defines the very ethos on which the Constitution is premised.'[51] They have, in the same spirit, been happy to resort to comforting generalities. In *City Council of Pretoria v Walker*,[52] 'the equal protection and benefit of the law' was said to mean that 'no one is above or beneath the law and … all persons are subject to law impartially applied'; and in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,[53] we learn that the equal benefit of the law means 'that both in

[48] This postulates, of course, equality between subject and comparator in every respect. From the discussion of Westen's work, it should be obvious that such a universal identity between the two is seldom, if ever, comprehended by equality analysis. Typically, the comparison is of only some qualities and the point of reference is not co-extensive. Without doing violation to the principle of equality, I can say that this bag of beans is equal to that bag of sand by weight or in size. It is by reason of this fact that it is possible for a judge to say: 'Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.' See *Minister of Home Affairs & Another v Fourie & Another* [2005] ZACC 19, 2006 (3) BCLR 355, 2006 (1) SA 524 (CC) para [60]. For *dicta* in the same vein, see the eloquent judgment of Sachs J in *National Coalition for Gay and Lesbian Equality &Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) para [132].

[49] 'It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently.' *Prinsloo v Van der Linde &Another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC)('*Prinsloo*') para 24.

[50] *Prinsloo* ibid at para 17.

[51] 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) para 20. The paragraph is cited with approval in *Bhe & Others v Khayelitsha Magistrate & Others* [2004] ZACC 17, 2005 (1) SA 580, 2005 (1) BCLR 1 (CC) para 49, which in turn invokes *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) paras 155-166]and262; *Shabalala &Others v Attorney-General of Transvaal, & Another* [1995] ZACC 12, 1996 (1) SA 725, 1995 (12) BCLR 1593 (CC) para [26], *Brink v Kitshoff NO* [1996] ZACC 9, 1996 (4) SA 197, 1996 (6) BCLR 752 (CC) para 33:*, Satchwell v President of the Republic of South Africa & Another* [2002] ZACC 18; 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 para 18.

[52] [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC).

[53] [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) para 59.

conferring benefits on persons and by imposing restraints on state and other action, the state had to do so in a way which results in the equal treatment of all persons.'[54] Yet, when the time came to give concrete effect to the clause, the Court treated it as superfluous by holding that it simply replicated the common law power of rationality review. The clause, it said, means no more than that a legal measure must have a legitimate purpose and make no distinctions between people that fail rationally to achieve the purpose.[55]

For present purposes, therefore, the opening paragraph of the Equality Clause has nothing to tell us.[56] Most certainly it cannot be read as mandating or legitimating multiracialism. When, as we do, we ask ourselves why the Court sanctions multiracialism, we will find no answer here. Such answer as emerges actually points the other way: non-racialism, not multiracialism, is the aim.

B The protection against unfair discrimination: s 9(3)

In *Harksen v Lane,*[57] the Court revisited *Prinsloo* and reaffirmed its central message. Under ss (1), it said, 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.[58]' However, the converse is not necessarily true: an enactment, though rational, can yet be impugned on the grounds that it constitutes unfair discrimination.[59] '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 Court cautions us, to keep these two stages separate.[60]

[54] Ibid at para 27.

[55] '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 has been said to promote the need for governmental action to relate to a defensible vision of the public good as well as to enhance the coherence and integrity of legislation. … Accordingly, before it can be said that mere differentiation infringes [subs (1)], it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe [subs (1)].' *Prinsloo* (note 49 above) at paras 25–26. Generally see M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 *South African Public Law* 312; A Price 'The Evolution of the Rule of Law' (2013) 130 *South African Law Journal* 649.

[56] So much is all but explicit in the following *dicta*. '[W]hile the existence of such a rational relationship is a necessary condition for the differentiation not to infringe [the Equality Clause], it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present. … It is to [these provisions] that that one must look in order to determine what this further element is.' *Prinsloo* (note 49 above*)* at paras 24 and 27. Unfairness in the course of discriminating is, it held, the further element.

[57] [1997] ZACC 12, 1997 (11) BCLR 1489, 1998 (1) SA 300 (CC) ('*Harksen*').

[58] Ibid at para 42 read with para 44. See too *Prinsloo* (note 49 above) at para 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) para 27.

[59] *Harksen* (note 57 above) at para 44.

[60] Ibid at para 45.

Developing the theme, the Court explained that discrimination arises in circumstances in which there is unequal treatment of people based on attributes and characteristics viscerally inhering in them.[61] The word 'discrimination' operates, in consequence, to limit the scope of the protection and so must be distinguished from mere differentiation. Enactments that differentiate between persons or classes of person are in themselves unobjectionable, but they become discriminatory if they have the potential to affect the comparative wellbeing 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.'[62] This requirement, said the Court, 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,[63] 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.'[64]

Section 9(3), in summary, provides a wholehearted endorsement of non-racialism. To say this is not to say that it outlaws all distinctions based on race. Some can be imagined that a court would treat as legitimate under the section: selecting a black person to play Othello, perhaps, or to sell goods door-to-door to a customers who, being black themselves, tend to prefer dealing with blacks. On top of this, the clause must be placed in the context of a section that plainly creates an exception – or, if you prefer, qualification – in favour of measures designed to redress past discrimination.[65] Making due allowance for such reservations, however, it seems fair to say that, if the foundational section (s 1) sets up non-racialism as a goal of our society, this is the clause that, by prohibiting discrimination of an unfair sort, creates the instrument by which the goal can be realised. Taken in the round, it is a broad negation of race as a proper basis of social governance and operates, in consequence, against the notion that multiracialism is a competent policy for the purpose.

C The recognition of restorative measures to promote equality: s 9(2)

The Equality Clause has two basic elements. One comprises the prohibition with which we have just been dealing, namely, that there shall be no unfair discrimination. It is negative in nature – it prohibits. The other comprises a right that is positive. It says that people are entitled to equality and, if they have been denied this right by past unfair discrimination, measures to repair the harm are legitimate, indeed desirable. The right is created by s 9(2), which states as follows: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote

[61] Ibid at para 46.

[62] Ibid at para 46 citing *Prinsloo* (note 49 above) at para 31.

[63] 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.'

[64] Ibid at para 52](b)(i).

[65] Sensibly, the Court gives effect to the distinction, a necessary one, by treating dignity as the fulcrum upon which s 9(3) pivots. Differentiation that impairs dignity is treated as proscribed under the section.

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.' [66]

The text of the clause, which is enigmatic, presents two problems. The word 'includes' in the phrase 'equality includes the full enjoyment' gives rise to the first. A provision framed in such language, the language of 'inclusion', plainly posits a generic set of rights within which the specific, designated, rights are included. The first, and perhaps more linguistically natural, construction of this language is to treat the sentence as an elaboration of the rights just delineated: read thus, the sentence is conceived as relating back to ss (1), and serves to locate the specified rights and freedoms among those referred to in the earlier provision. The second posits no obvious connection between the two clauses and, by making ss (2) self-standing, a set of rights and freedoms, independently sourced, of which 'the full and equal enjoyment of all rights and freedoms' are but some. Textually, the second construction makes better sense, not least because ss (1), referring only to rights and making no reference to freedoms, can provide no foundation, at least literally, for a construction sufficiently over-arching to embrace the 'freedoms' referred to in ss (2). Practically, however, it seems to make no sense. The expression 'the full and equal enjoyment of all rights and freedoms' is so broad as to appear exhaustive, and it is hard to imagine anything falling beyond its compass.

There is, I venture to suggest, no getting to the bottom of this question and I doubt whether much turns on it. It is the spirit of the provision, rather than the words it employs, that principally seems to matter. What we learn from it, basically, is that people are entitled to enjoy their rights and enjoy their freedoms whomsoever they may be. This may seem glib, but so be it. Such cavalier handling of the second problem in the section cannot so lightly be countenanced, however. It arises out of the juxtaposition in the sub-section of the two ideas separately embodied in the two discrete sentences. The first sentence speaks of equality in terms that are general and very wide. It says that equality must be taken to include the 'full and equal enjoyment of all rights and freedoms', but what it does not identify is the subject, the repository, of the rights and freedoms. Is it the individual or is it the collective? More pertinently, if it denotes the collective, does it comprehend collectives defined by race and disposed of accordingly? If so, it might, were it taken in isolation, provide some basis, however tenuous, on which to construct a system of multiracialism. Whites, coloureds, Indians and blacks, when so categorised, must each receive their 'full rights and freedoms' and this is attainable by recognizing the racial categories and separately endowing their members with the benefits in question.

As I say, this construction might be tenable if the sentence operated in isolation, but of course, it does not – it is connected to a subsequent section that, in terms, renounces discrimination. By coupling the two sentences together, the lawgiver must, on basic principles of construction, intend that each should be evocative of the meaning of the other. In specifically legitimizing measures designed to promote the interests of persons previously disadvantaged by unfair discrimination, the second sentence seems plainly intended to sharpen the focus and narrow the scope of the antecedent sentence. So much would be the effect of an application of

[66] In s 8 of the Interim Constitution, the equivalent provision (ss 3(a)), took 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 emphasise 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.

the *eiusdem generis* rule and it seems peculiarly apt in the context.[67] If this is correct, then the section, read as whole, must be taken to comprehend *only* measures that are restorative, that is, that are designed and tailored to remedy the consequences of past unfair discrimination.

This conclusion is in no way undermined by the inclusion in the clause of a reference to 'categories of persons' disadvantaged by past unfair discrimination. Underlying this wording, firstly, is a desire to ensure that a measure will survive scrutiny despite the fact that some who profit from it have not personally suffered unfair discrimination. Moreover, extending the scope of the clause to cover groups reflects an understanding of how hard it can be to decide the extent to which discrimination, as opposed to other causes, is responsible for a state of deprivation. Problems of causation such as this pervade the law and can only be resolved on a common sense basis.[68]

Section 9(2), we conclude, provides no support for multiracialism. It contemplates a world in which South Africans will enjoy equal rights and freedoms and, for this purpose, legitimates the systematic reversal of the consequences, to individuals and groups, of past discrimination, race-based discrimination for present purposes. Multiracialism, which looks to a socially constructed future, is wholly unconcerned with past discrimination. It defines people, both individuals and groups, by race and, whenever it discovers the existence of some differential, it devises some remedy that will eliminate the disparity. It is unconcerned with the source of the difference – whether it be self-created, innate or externally generated – and equally unconcerned with issues of fair-play, morality or comparable justification. Whites will be remediated if they are the underdogs in just the same way as blacks might be under the same circumstances. Placing a construction on s 9(2) that sanctions such a programme is wholly foreign to the text once one appreciates that the second half of the sub-section influences and shapes the way the first half is construed. Taken in isolation, the first sentence of s 9(2) might conceivably be read as countenancing the separate handling of the races, but when the two sentences are read together, no such interpretation is tenable.

Nothing, therefore, in s 9(2) can be read as legitimizing multiracialism. The same is true, we can accept, of the balance of the Equality Clause and indeed the Constitution at large. There are, to be sure, a few clauses in the document that require state institutions to be broadly representative of the people of South Africa,[69] Dealing with them in detail is beyond the scope of this article; here it is enough to say that efforts to build a justification for multiracialism on the basis of them are bound to prove futile. They are, I suggest, designed to do no more than prevent parochialism, by which I mean, an impulse to favour one's own group over others. Certainly they cannot be construed as legitimizing a structure of race-based streaming wholly anathema to the concept of non-racialism.

[67] The rule is but a guide. I say its application is apt not just because of the juxtaposition of the two sentences, which suggests that the two sentences are interrelated, but also because the repetition of the word 'equality' in the opening words of the second sentence cannot but be a reference back to the 'equality' that opens the first sentence.

[68] Revealing an understanding of this fact, Justice Mokgoro put the issue on the footing that there need not be 'a rigid link between the nature of the disadvantage suffered … and measures taken to alleviate that disadvantage' [but at least] 'there should be some correlation between the two.' *President of the Republic of South Africa & Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708, 1997 (4) SA 1 (CC) para 94.

[69] See Constitution, ss 174 and 195.

VI TOO BAD, THOUGH: THE COURT THINKS MULTIRACIALISM IS JUST FINE

In the face of these provisions and of the context in which they are set, the Court has given its imprimatur, expressly and unreservedly, to multiracialism. Let us have no doubt about what this means. Seduced by the siren-song of demographic representivity, the Court has held that the people of South Africa can justifiably be (1) separated into racial categories (2) comprising the matrix of white, coloured, Indian, and black created by the apartheid regime (3) and then be managed, controlled, favoured and disfavoured according to the category into which they fall (4) provided only that the groups are not disproportionately treated.

What paved the way for this result was *Van Heerden* and, though it was not directly concerned with multiracialism, it must be carefully considered for the latitude it created. *Barnard* tripped lightly down the path, to be followed by *Correctional Services* until *Insolvency Practitioners* signalled that the destination had been reached, and each of them deserve a corresponding level of scrutiny. The path, it will be seen, has been a slippery one.

A *Van Heerden*

In the course of negotiations that ushered in our democracy, it was decided that a special fund known as the Central Provident Fund ('CPF') should be created to enhance and ring-fence the pension entitlements of old-order members of the Parliament. 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 essence of the claim in the case, *Minister of Finance & Other v van Heerden*,[70] was that the new scheme 'improperly disfavours … members who are in receipt of pensions from the CPF in comparison with new parliamentarians who … do not receive pension benefits from the CPF.[71]' The impropriety was said to consist in an intent to prefer members 'based on intersecting grounds of race and political affiliation.[72]' The relief claimed was an order entitling the CPF members to the same benefits under the new fund as those given to the newcomers to the new Parliament.[73]

In the High Court, the measures were held to be discriminatory in their effect and to require proper justification before they could be treated as legitimate.[74] In the ensuing appeal, Moseneke J, writing for the overwhelming majority of the judges, rejected this approach as quite wrong. He began by proclaiming, uncontroversially, that –

> [r]emedial measures are not a 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).[75]

[70] (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ('*Van Heerden*').

[71] Ibid at para 12.

[72] Ibid.

[73] 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.'

[74] *Van Heerden* (note 70 above) at para 32.

[75] Ibid at para 32.

In dealing with the issue, the court below had relied on the reverse onus provision in the section (s 9(5)), but this was not designed with cases such as this in mind, in which the object of the enactment was ameliorative. Moseneke J stated as follows:

> 'It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme under s 9(2) is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly.'[76]

The reverse onus clause should not be made to govern the affirmative action provision. Were it to do so, the effect would be intolerable, since '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.'[77]

Ordinary discrimination cases – that is, cases in which no remedial object is being pursued – should, in his mind, continue to be assessed by reference to fairness, but measures whose ostensible object was restorative should be subject to less strenuous scrutiny. 'When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination.'[78]

If the motive was remedial, the person challenging the measure would have to discharge the onus of establishing that the means being employed for the purpose were irrational. The proper approach to such cases, said the Justice, was to posit three requirements:

> 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.[79]

[76] The reasoning is, to put it mildly, unpersuasive. A reverse onus clause operates purely within the domain of procedure: it simply determines who bears the burden of persuasion and, in consequence, serves only to identify who will lose if the evidence is unconvincing. In its conclusion the judgment is equally unpersuasive. In law, the legitimacy of the conduct of a repository of power is seldom made to depend on the presence or absence of proper motive. Acts are typically struck down even when the motive is benign and upheld even when malign. Issues of remedial justice for past discrimination are, by international law, exemplars of this principle. So much is clear from the comprehensive report of Rapporteur Bossuyt in the UNESCO Final Report (note 39 above). Over and over, he emphasises that motive should not provide a basis for the justification of a remedial measure. See at paras 107, 108 and especially at 113, where he says: 'The aim or goal is not decisive …. Affirmative action should not be interpreted as justifying any distinction based on any ground with respect to any right merely because the object of the distinction is to improve the situation of the disadvantaged individuals or groups. Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action.'

[77] The argument is, of course, conceptually untenable. The core function of the Court is to 'second-guess' the Legislature and the Executive by considering, in the course of litigation, whether their enactments comply with the imperatives of the Constitution. The issue is not *whether* to second-guess, but *in what manner* and *to what degree*. Second-guessing is, to be sure, impermissible if what is being second-guessed is the Constitution itself. This is, in effect, what the Court did here.

[78] *Van Heerden* (note 70 above) at para 33.

[79] Ibid at para 37.

If all three requirements were met, the measure would be unimpugnable.

The language in which the majority's test is framed may be oblique but its object is plain. The motive behind the measure provides the criterion that distinguishes one form of assessment from the other. Race-based measures are prohibited if they are unfairly discriminatory, but measures designed to favour people previously disadvantaged will survive scrutiny if they are 'reasonably capable of attaining the desired outcome'.[80] A measure will have the character of rationality if it satisfies the test by which provisions are evaluated for rationality under ss (1). '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.'[81] Moreover, said the Justice, 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.[82]

Reasoning thus, the Court achieved two things: it relaxed the test by which measures ostensibly intended as remedial would henceforth be evaluated and placed the onus of proof back on the party mounting the challenge. Unlike ordinary measures of a discriminatory nature, which would be struck down if unfair, those designed to be remedial would survive scrutiny provided rational means were employed to achieve their end. Proof of the requisite objective would, it seems, remain the duty of the 'sponsor' of the measure, but little if anything would be required beyond a showing that the measure's beneficiaries were people who had previously been the victims of discrimination. Once this onus was discharged, the challenger would be saddled with the burden of proving that the means employed in the measure bore no rational connection to the objective sought to be attained.[83]

By reasoning in this way, the Court placed remedial measures beyond the reach of anti-discriminatory provisions of the Constitution, and so put their evaluation on the same footing as ordinary enactments. Challenges might still be mounted on the conventional grounds of constitutional review, but no special protections against discrimination were to be derived from s 9. A measure intended to favour blacks, presumptively regarded as the victims of past discrimination, would survive scrutiny provided it promoted their interests in a rational way. It would, in effect, be beyond the purview of s 9. In contrast, a race-based measure revealing no such intention would be subject to scrutiny under the section and survive only if it met the standard of fairness posited by the concept of unfair discrimination.

By its very nature, a measure promoting multiracialism can have no such intention. Its object is to stream people by race and treat them commensurately within the streams so created. Its intention, taken on its face, cannot be intended to favour one race above another.[84] As a result, it should be subjected to scrutiny by reference to the stricter standard of fairness and be treated as constitutional only if, in accordance with the reverse onus requirement in sub-clause (5), the 'sponsor' of the scheme can show that it passes muster as fair. So much should be obvious, but would the courts treat it as such?

[80] Ibid at para 41.

[81] Ibid.

[82] Ibid at para 2.

[83] There is some debate over whether the Judge intended so parsimonious a test, but this is how I read the passage and there is nothing in the ambient jurisprudence to say that my interpretation is wrong.

[84] In its application it may have this effect, of course. It will do so when one race – black or white, it makes no difference – is under-represented in the class of persons under consideration.

In recent years they have given their answer to this question in three cases: *Barnard*, *Correctional Services*, and *Insolvency Practitioners*. They are considered below and, properly understood, they deliver an unequivocal answer. In summary, it is No – multiracial measures will not be tested by reference to fairness and the reverse onus will not be applicable in considering them. The rationality criterion will govern them and the challenger, not the 'sponsor', will bear the onus of proving irrationality.

B *Barnard*

In *South African Police Service v Solidarity obo Barnard*,[85] it was common cause 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. However, each time she 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.[86] On each occasion, the post was left unfilled so Barnard continued to perform the role in an acting capacity.[87]

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. The scheme was a multiracial one, pure and simple. Being so, its legitimacy had to be determined by reference to the anti-discrimination provisions in s 9 of the Act, which had received their expression in the comparable provisions of the Employment Equity Act 55 of 1998.[88]

Justice Moseneke, again writing for the majority, opened his judgment by trumpeting the virtues of non-racialism. 'Our constitutional democracy is founded on explicit values. 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.'[89] If we are to achieve this aim, he explained,

[85] [2014] ZACC 23, 2014 (6) SA 123, [2014] 11 BLLR 1025, 2014 (10) BCLR 1195, (2014) 35 *Industrial Law Journal* 2981 (CC) ('*Barnard*').

[86] 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. The Plans in which the grids are to be found generally follow a 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.

[87] After the case, she sought and obtained employment with Solidarity, her trade union. What does not 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.

[88] Section 10.

[89] *Barnard* (note 85 above) at para 28.

remedial measures must be implemented, but they must remain 'within the discipline of the Constitution [so that they do 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.'[90] It is only by these respecting this mandate that we can achieve the ultimate goal of 'a more equal and fair society that hopefully is non-racial, not sexist and socially inclusive.'[91]

After so promising a start, the judge might have been expected to examine the Department's scheme in order to determine whether it constituted a remedial measure and, if it did, whether it satisfied the requirements of non-racialism and non-sexism. If he had, the conclusion would have been inescapable: the scheme, by treating white males in the same way as everyone else, cannot conceivably be remedial. Once properly examined, its true object became plain. The Department was dividing people by race and gender and using the resulting grid to secure proportional demographic representation within the workplace. Such a scheme, classically one of a multiracial nature, constituted naked social engineering far removed from a properly-conceived system, that is, one 'directed at remedying past discrimination … formulated with due care not to invade the dignity of all concerned.'[92] The application of the Plan was unconstitutional and a proper remedy had to be fashioned for Captain Barnard, who had been wronged by reason of its implementation.[93]

This is not how the learned judge reasoned, however.[94] Woefully failing to engage with the central issue in the case, he took it as read that the Plan constituted a measure designed to remedy past discrimination even though, on its own terms, it was characterised as a mechanism by which demographic representation within the service would be secured. Then he recited the *Van Heerden* test even though, once again expressly, its scope is limited to measures that 'target a particular class of people who have been susceptible to unfair discrimination'.[95] The test, he complacently recorded, gave the Court only a limited capacity to review the decision to refuse Barnard's promotion. It entailed an application of the principle of legality which meant that the decision, to be 'a legitimate restitution measure[,] must be rationally related to the terms

[90] Ibid paras 28 and 32 respectively.

[91] Ibid at para 30.

[92] *Barnard* (note 85 above) at para 30.

[93] The fact that no challenge had been mounted against the Plan itself was not regarded by the judge as an obstacle to relief. Even presuming the Plan to be valid, there 'is no valid reason why courts are precluded from deciding whether a valid [Plan] has been put into practice lawfully.' Ibid at para 38.

[94] For the sake of clarity, I have concentrated on the cardinal jurisprudential issue, but there are two points, peculiar to the case, that I gloss over in the text. It is as well that I deal with them, albeit briefly, before proceeding. Both stem from the fact that the Plan itself was never subjected to formal challenge in the case.

1. The first is the contention that, in the absence of a challenge to the Plan formally mounted by way of proceedings on review, a decision made pursuant to it had to fail. (Ibid at para 60.) This conclusion is wrong in law. Plans are framed and filed by the state in its capacity as an *employer*, and such conduct (not being state action) is not susceptible to review: *Chirwa v Transnet Limited & Others* [2007] ZACC 23, 2008 (4) SA 367, 2008 (3) BCLR 251, [2008] 2 BLLR 97, (2008) 29 *ILJ* 73 (CC).
2. The second is that 'Mrs Barnard accepted that the [Plan] was a valid affirmative action measure' (ibid at para 52). There is simply no basis for this finding, and it is wholly misconceived. The case mounted on her behalf accepted that the legitimacy of the Plan had not formally been challenged but proceeded on the basis that, since it was bad in law, its implementation was equally bad. The concession concerned a matter of procedure; the argument was based on the substance of the measure.

[95] *Barnard* (note 85 above) at para 36.

and objects of the measure.'[96] The onus to show this was hers to discharge.[97] On the facts, she had failed to do so.

In their minority judgment, Cameron, Froneman and Majiedt JJ took 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.[98]' Resolving the clash requires 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. Van der Westhuizen J, for his part, stressed that the interests of the group cannot be determinative since measures to promote equality can affect individual dignity. A balance, he emphasised, had to be struck between the two constitutional imperatives in order to resolve the tension immanent within them.[99]

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 had no such qualms, but 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.'[100] The reverse is true, however. Representivity, pursued as a goal, is nothing but multiracialism dressed up in different clothes.

C *Correctional Services*

Solidarity & Others v Department of Correctional Services & Others[101] ('*Correctional Services*') 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 had found no favour with the majority, who held that the Commissioner had properly '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].'[102]

Building on this statement, Zondo J, writing for the majority, embraced the concept of representivity in the following words:

[96] Ibid at para 39.
[97] Ibid at para 53.
[98] Ibid at para 77.
[99] On the facts, however, he felt that Barnard's personal interest should bow before those of the group.
[100] (Ibid 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.
[101] [2016] ZACC 18, (2016) 37 *ILJ* 1995, 2016 (5) SA 594, [2016] 10 BLLR 959, 2016 (10) BCLR 1349 (CC).
[102] Ibid at para 62.

> 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.[103]

Then, to his intellectual credit, the judge recognised the implications of what *Barnard* portended and he was now saying. Representivity entailed the division of the workforce into streams based on race (plus gender) and decision-making that ensured the proportionate distribution of each segment in every layer of the workforce.

> 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.[104]

In his view, it was only by effectuating such a distribution that equity could be achieved. Anything less would be 'unacceptable'.

> 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.[105]

The Employment Equity Act, which provided the immediate basis for the challenge, required a construction in conformity with the Constitution. Upon a proper interpretation, the Act must be seen as striving for 'a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. … It will not be enough to have one group or two groups only and to exclude another group or other 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.'[106] A grid, race-based though it might be, was a proper basis upon which to determine matters of appointment or promotion, and all that mattered was whether the apportionment was rationally contrived.[107] (In the instant case, so it happens, the apportionment was held to be irrational as no account had been taken of regional imbalances. For this reason, and for no other, the applicants succeeded in their challenge to the grid.)

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.[108]

He accepted that 'for powerful historical reasons the statute has focused on race and gender as

[103] Ibid at para 40.
[104] Ibid.
[105] Ibid.
[106] Ibid at para 49.
[107] '(T)he determination that the group is already adequately represented or overrepresented [must have] a proper basis' (ibid).
[108] Ibid at para 102.

markers of employment equity'[109] and that its purpose is the attainment of 'representivity in the workplace,'[110] but this could not be done in so mechanical a way.

> That [mandated] goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. … 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.[111]

The judge was right. Gradgrind[112] might be proud of such a system, but we should not be.

D The *Insolvency Case*

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*[113] (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. In general, the system intended to endow those liquidators who, in the eyes of the creditors, could be expected to wind the estate up most effectively. Traditionally they have been overwhelmingly white and, for years, the imbalance has been keenly felt. Over the past two decades the Master, supported by the industry, has elected to supplement the appointees by adding a black person to the team who, by learning the ropes, might promote the cause of transformation in this field. Established liquidators, subscribing to the object, were content with the system even though 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.

[109] Ibid at para 121.

[110] Ibid at para 125.

[111] Ibid at para 133.

In *Barnard*, Zondo J explained, the 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 C said in *Barnard* that rigid quotas 'amount to job reservation' At para 118.

[112] 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.'

[113] [2018] ZACC 20 (CC), 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC).

The scheme has proved over time to be less than completely successful,[114] and the Chief Master, encouraged by the Department, decided it needed an 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 to be appointed 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'[115]
- 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.

Justice Jafta, who penned the majority judgment, began by issuing a clarion call of the sort that customarily adorns judgments in this field. The evils of the past, the consequence of nakedly racist attitudes, had created imbalances that required remedial action and the policy with which the Court was now concerned was, in his view, just such a restitutionary measure. Counsel for the practitioners was wrong to suggest that the policy was not designed to redress past injustice but to operate as a system of race-based social engineering. In his view, the scheme was a proper mechanism of redress and this, it seems, was true even though whites would, in rotation, profit by it as well. He could see nothing wrong with a policy that, ignoring the merits of individual practitioners and the wishes of creditors, made race the sole determinant for appointment. Multiracialism, rigorously employed, was to be the touchtone of the system.

VII WHY IS THIS ALL WRONG?

Multiracialism, I have contended, is a bad thing. There is no need to take my word for this. Our common law, which is simply common sense writ large, reprobates the use of race-based classifications in the control and regulation of society. Courts steeped in the common law, generally reject them when they can, even if the implementation of the system of separation is grounded on or designed to encourage equality.

When mandated by a race that is socially superordinate, 'separate but equal' is a pernicious doctrine that serves to demean, marginalise and subjugate members of the subservient race. *Brown* tells us as much, and so do the minority judgments in *Plessy* and, closer to home, *Rasool.* Our lived experience tells us the same thing about the policy of separate development, a policy consciously crafted in the belief that races are to be separately defined, disaggregated and managed. Whether cynical or genuine in conception and implementation scarcely matters for present purposes: what does signify is that it perpetuated the subordination of black people and stripped them of their dignity as individuals. In dealing with matters of race, judgments

[114] Knowing they would not ultimately be accountable, black supernumeraries often failed to pull their weight. They were happy to take the money but not to do the work. There is, I hazard, nothing surprising in this.

[115] The disparate treatment of citizens by naturalization was the principal reason why the scheme was condemned as illegitimate by the Court.

repeatedly recall the horrors of our past and, however repetitious this can seem, the courts cannot be castigated for doing so. We need to be reminded, and reminded frequently, of our past lest, by forgetting, we perpetuate the cycle of race-based repression: here, as elsewhere, 'never again' is an excellent *cri de coeur*.

Does 'separate but equal' become acceptable if mandated by a race that is socially subordinate? The ready answer is yes: the policy becomes a means by which imbalances will be systematically redressed without traducing the principles of formal equality. When black people have been shut out of the workplace throughout many years of racial discrimination, they will naturally find themselves under-represented as a group, especially in the upper echelons of the hierarchy. If racial discrimination is exclusively responsible for the disparity, a good moral case exists for redressing the imbalance; if not, the programme can still be justified as a means by which black people can, in the interests of social cohesion, be 'brought into the economy'. A policy designed to produce proportional representation by race will naturally have an equalizing effect and it will provide a plausible answer to whites who complain that they are now become the victims of reverse discrimination. So much certainly underlies the thinking of the Court in the judgments considered above and Justice Zondo must be thanked, for this if nothing else, for taking the trouble to make the attitude explicit.

These contentions contain the essence of the case for multiracialism. Before making an effort to reply to them, as obviously I must, I should make the battle-lines plain. Nowhere in the essay have I contended that race should never be a basis for decision-making by the state. Such an argument can, in the abstract, be made, but as a matter of law, it would be hard to sustain in the face of the express provisions of s 9. They seem plainly to permit, even mandate, a measure of race-based action, and have been authoritatively so construed by the Court.

Placing the matter squarely within these parameters, it need hardly be said, reduces the scope of the issues. It all but eliminates moral and ethical questions – is it right to make race a criterion for decision-making? – and, in the same vein, it all but eliminates such mechanical and functional questions as whether there is truly such a thing as race and, if so, how do we decide into which racial category a person falls. By reducing the issues in this way, we discover that only one remains – 'how much'? If we want a system of race-based classification in all its glory, then multiracialism should be our choice. If not, we should prefer the more modulated system that we have learned to call affirmative action, where race is but one factor in the plurality of circumstances by which the decision is informed.

The answer appears simple enough on the face of it. At the outset of this essay, we reminded ourselves that equality is an empty idea which we have to fill by reference to our societal values. We have come full circle, only now we must leave the realms of the abstract and fill the void concretely. Let us tap into our societal values, then, and see what we bring back.

In the absence of an obvious consensus about what these values might be, we, as lawyers, must seek them in the sources I have described above – the Constitution, first and foremost, and then common law. Taken in the round, they can, I maintain, be said to favour the individual over the collective, liberty over coercion and remedy over regulation. They countenance the employment of the race-based criterion to redress the harm caused to an individual by the discriminatory use of the self-same criterion. But in doing so, they invoke the criterion only when it is reasonably necessary to achieve the remedial purpose and anxiously guard against its gratuitous employment for goals going beyond that. They most certainly cannot be taken to espouse the broad-ranging social engineering, arbitrary in form and rigid in content that

finds its expression in the kind of multiracialism so favoured by judges such as Zondo J. They recognise, first, that streaming people in this way produces injustices to individuals such as Captain Barnard; secondly, that it impairs entrenched and carefully nurtured interests of people such as the insolvency practitioners, who have invested much time, effort, skill and money into the development of their commercial and concomitant interests; and thirdly, that it engenders social divisions that ultimately foster a culture of envious complaint[116] which, left unchecked, can culminate in genocidal tendencies[117] and civil war. In contrast to the multiracial impulse, which celebrates the use of race as a determinant, the values I have identified can only deplore the racial criterion as an evil, a necessary one, that they are forced to endorse.

Of course such a system does nothing to parade the supposed virtue of a system of social engineering designed to 'create a black middle class'. Multiracialism, by contrast, serves this purpose admirably. However, this is precisely why multiracialism is racist and precisely why we should denounce it as unconstitutional. In our constitutional democracy, there is no place for race-cum-gender grids of the sort with which our society has become familiar. 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.[118]

Why the Court has accepted multiracialism so enthusiastically is a complex question whose answer travels way beyond the scope of this paper.[119] Here it is enough to observe that, by espousing multiracialism, mechanistic and inflexible as the system is, the Court has undermined the development of a genuine non-racial jurisprudence in our country. Under the latter philosophy, which is foreshadowed by aspects of our common law, recourse to race as a

[116] James Myburgh depicts the horrific consequences that multiracialism can produce when taken to its logical conclusion. See 'Race quotas: The Terrible Power of "Demographic Representivity"', available at http://www.politicsweb.co.za/news-and-analysis/race-quotas-the-terrible-power-of-demographic-repr.
He provides an excerpt from a Nazi party bulletin that is especially chilling: 'There are more than 8,000,000 unemployed in Germany. Among them hundreds of thousands of Intellectuals. Nevertheless the German People have admitted hundreds of thousands of Jewish Intellectuals to the liberal professions. The same academic Jewish circles today thank Germany by lowering her in the estimation of the world. To check this, a demand will now be voiced to admit Jews to universities and to the professions of attorney and physician only in proportion to their numerical strength among the population of Germany.' Later he quotes Goebbels as saying that 'the Jewish question in Germany is not treated as a racial question [but] merely intended to return the Jewish element to that participation in public life and other activities which is in proportion to its quota within the general population.' In a 1937 article in *Die Transvaler*, referenced by Myburgh, Hendrik Verwoerd, then editor, pursued the theme assiduously. 'Legislation must gradually but purposefully ensure that each section of the population [Jews, Afrikaners and English] should, as far as practicable, enjoy a share of each of the major occupations, according to its proportion of the white population.'

[117] See Charles Simkins 'Genocide', available at https://hsf.org.za/publications/hsf-briefs/genocide. Genocide Watch places South Africa at Level 6 on the Stanton Scale which ranges from one (mildest) to ten (worst). At this level a country is considered to be in a state of 'Polarisation, with extremists driving groups apart, hate groups broadcasting polarising propaganda, and, possibly, laws forbidding intermarriage or social interaction.'

[118] *Richmond v JA Croson Co* 488 US 469 (1989) 527.

[119] Inadvertence is not an explanation, it must be said. In each of the three cases in point, the Court was told that multiracialism was at the heart of the grid system.

criterion for decision-making would be permissible only if legitimate aims could reasonably be attained by no other means. Laurie Ackerman, a judge elevated to the Court at its inception, has written eloquently in support of such a system.[120]

> [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 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.

Since poverty and race are highly correlated, the integration of black people into society might as readily be achieved using Ackermann's approach, and the disadvantages of an overt race-based structure – its capacity to create rancour among whites and triumphalism among blacks – will in the process be, if not eliminated, then certainly reduced. 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 utilised, as Judge Ackerman says, only when an individualised approach is impracticable, allowing always for the fact that, where appropriate, race-based information and statistics can be used as only one metric, among others, by which to evaluate the scheme.[121] Such an approach would do justice to the notion that, while racial quotas are taboo, equivalently framed targets are not.

To some, the propositions I make and the distinctions I draw might seem to be trivial. Obviously I do not think so. I share the view that 'splitting society into so many more or less fixed groups, all ceaselessly seeking privileges at the expense of all the rest, [makes] equality both meaningless and impossible.'[122] A nation state cannot be built on such foundations and must, history teaches us, collapse into internecine conflict if the attempt is made.[123] Our Constitution was devised to prevent, by such means as the law can command, so unhappy a result. The Court was charged with holding the fort but, traducing its trust, has meekly surrendered it to the structural and societal forces that are driven by race-consciousness.

The Court was wrong to be so acquiescent. As Sachs J said,[124] 'the state may not impose orthodoxies of belief systems on the whole of society' and this is as true of racialism as of homosexuality, the topic with which he was concerned. 'At the heart of equality jurisprudence,' he rightly emphasised in the same case, 'is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to

[120] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 358, emphasis supplied.

[121] 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) 317 n51.

[122] Martin van Creveld *Equality: The Impossible Quest* (2015) 299.

[123] Surely no one needs a recital of such cases. What we do need, in our racially charged society, is to think much harder about them, and the genocide in Rwanda provides as good a spur as any for the process: see P Gourevitch *We wish to Inform You that Tomorrow We will be Killed with our Families* (1998), a truly horrific tale.

[124] Cf *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) para 137.

a particular group.'[125] Nor is there any actual need for the Court to be complacent. After a comprehensive survey of the role of race in society, Kenan Malik, perhaps the foremost authority on multiculturalism and identity politics, says 'I am not suggesting that there may not be an evolved tendency to form in-groups and out-groups. But group conflict is not a given. The nature and strength of such conflict is historically contingent.'[126] It is as well to duck it if we can, but we will certainly not do so if we continue to divide people into groups framed by the immutable fact of skin colour, and dispose of them accordingly.

[125] Ibid at para 129.

[126] K Malik *Strange Fruit: Why Both Sides are Wring in the Race Debate* (2008) 270.