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Non-Racial Constitutionalism: Transcendent Utopia or Colour-Blind Fiction?

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ABSTRACT: This article considers non-racialism in the South African Constitution. It locates non-racialism as a founding provision of the South African constitutional order and then proceeds to trace its history in the anti-apartheid movement up until its inclusion in the Constitution. An understanding of this history clearly shows that the most prominent proponents of non-racialism have always rejected the existence of race on an ontological level, while accepting its salience in social reality. The article then analyses a string of decisions in affirmative action cases where the Court has had to contend with the principle of non-racialism in circumstances where race-conscious remedial action has been affirmed by the Court. The article contends that a proper understanding of these cases and, moreover, the entire constitutional scheme indicates that non-racialism in the Constitution does not stand as an impediment to race-conscious redistributive efforts – it instead rejects colour-blindness and acts as a powerful licence to dismantle all forms of racial hierarchy by being actively attentive to race in decision-making.

KEYWORDS: affirmative action, discrimination, founding provisions, non-racialism, remedial measures

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I INTRODUCTION

> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> […]
> b. Non-racialism and non-sexism.[1]

The Constitution underpins the new Republic of South Africa that emerged from the racially divided system of apartheid and centuries of colonialism. In establishing the new South Africa, the Constitution declares that one of the values which underlies this new Republic is 'non-racialism.'

However, what does 'non-racialism' mean? And how should this founding constitutional value shape our commitment against not only the continued historical consequences of centuries of colonialism and apartheid but also the contemporary strife of South Africa's intractable relationship with race? What role does it play in constitutional law cases that deal with race? Does it operate as a neutral value that does not have any determinative effect on cases, or does it place demands on cases that implicate race? In this article, I attempt to answer some of these questions.

Non-racialism as a phrase and a concept abounds across contemporary South African life and is invoked in politics, culture and media often to mean contradictory things. Considering it is a value defended by the Constitution, it is also the subject-matter of constitutional litigation. One recent example is the *Masuku* case, the outcome of which was awaited at the time of writing in November 2021.[2] The case deals with an allegation of hate speech made in the context of protests related to the conflict between Palestine and Israel. In advocating for a particular construction of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 ('Equality Act'), one of the amicus parties contended that non-racialism demands that the government 'will not treat individuals of different races differently for that reason alone'.[3] This assertion offers one view of what non-racialism means in a constitutional sense. The opportunity to make such an argument exists precisely because, unlike some of the other founding values in the Constitution such as the 'rule of law,' 'constitutional supremacy' and 'human dignity,' non-racialism is an international concern,[4] but it has a particular history in South Africa. Furthermore, it has never been expressly pronounced upon by our courts. In an increasingly strained South African landscape, where we are likely to see a growing contestation about the continued salience of race in our society, our courts are going to have to confront what the founding value of 'non-racialism' means in the constitutional setting and what bearing it has on difficult cases dealing with racial conflict.

To address the questions raised above, I propose to proceed as follows. Firstly, I will explore an interpretation of the concept of non-racialism as it is provided for by the Constitution and consider the bearing that the concept has as a founding provision. Secondly, I will look back to explore the history of non-racialism in South African politics, with specific reference to its roots and, at times, its competing conceptions. In this exercise, I hope to show that non-racialism is

[1] Constitution of the Republic of South Africa (1966) s 1 ('the Constitution') .

[2] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* (CC)('*Masuku*') (judgment forthcoming).

[3] *Masuku* Fifth Amicus Curiae Heads of Argument (submitted by the Rule of Law Project) at para 39.

[4] United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 1969).

a praxis which demands a commitment to dismantle the material consequences that continue to give race such importance in South African life. I argue that both the particular pre-1994 understanding of non-racialism, together with its contemporary articulation, have relevance for how the Constitutional Court must view the concept within the Constitution. I will then analyse a particular line of cases which bring to bear some of the competing considerations of race, non-racialism and discrimination. I focus on a series of affirmative action cases before the Constitutional Court to assess how the Court itself has theorised non-racialism in the Constitution and the bearing it has on some of these difficult cases. Lastly, I contend that the Court has undervalued the substantive obligations of non-racialism, which would mean that a commitment to non-racialism does not stand in opposition to race-based affirmative action policies and redistribution efforts. In this regard, non-racialism stands not as empty neutral platitude but as a powerful and potentially transformative ideal that authorises far-reaching measures to challenge and dismantle all instances of racial subordination.

II NON-RACIALISM AS A FOUNDING PROVISION

As described above, 'non-racialism' is ensconced in the Constitution, in a section which the National Assembly may not amend without a 75 per cent majority.[5] What are the implications for non-racialism's prominence in the Constitution?

As Fowkes notes, the structure of section 1 of the Constitution shares similarities with the document submitted by the Panel of Constitutional Experts (an independent panel of seven members set up to advise the Constitutional Assembly on constitution drafting) on the criteria that should be applied when considering issues for inclusion in the constitution.[6] Fowkes argues that given that these ideas were considered to be framing principles, which undergirded the writing of the entire Constitution, the values set out in section 1 operate as 'descriptions of particularly important aspects of what other parts of the Constitution *already protect and uphold*.'[7]

This understanding of the founding provisions is important as it aims to reconcile some of the debate that exists as to the role of the values listed in section 1 in the Constitution. One interpretation which was defended in the *NICRO* case is that, in the Court's parlance, the section does not 'give rise to discrete and enforceable rights in themselves'.[8] However, there are contrary approaches which contend that section 1 may act as a source of independent and justiciable obligations, such as the apparent approach in the *Modderklip* case, which considered the rule of law in section 1(c).[9] This is buttressed by the Court's jurisprudence on the principle of legality which also draws its authority from the founding provisions in section 1(c).[10]

Fowkes contends that these two positions may be reconciled if one considers that the founding provisions constitute 'descriptive principles' which 'describe basic features of South

[5] Constitution s 74.

[6] J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2006) 12.

[7] Ibid.

[8] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 21.

[9] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*') at para 38: 'The first aspect that flows from the rule of law is the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in [the section 34 right]'.

[10] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at para 17.

Africa's constitutional order.'[11] It follows then that they operate by indicating certain values that the Constitution itself aims to uphold and protect. Thought of the other way, particular features of the Constitution – both in its structure and specific provisions – are designed to live up to the values set out in section 1. That means that the obligations set out in section 1 do not exist independently purely because of section 1 but are given life and effect by the provisions of the Constitution.

Thinking about this in terms of non-racialism, as a value, it is given effect by specific provisions in the Constitution. Thus, when aiming to determine what non-racialism means in the context of the Constitution, the most defensible approach would be to define non-racialism with reference to how the Constitution provides for its inclusion as a value. In a Dworkonian sense, this requires us to determine the best concept of non-racialism which fits our case law.[12] In addition, on a normative basis, what conception of non-racialism best justifies the provisions of the Constitution and our existing case law?

The challenge, however, is that courts have left the value of non-racialism sufficiently vague that numerous conflicting conceptions of it could constitute a 'best fit'. As such, there is the further task of adjudicating which of these conceptions we should adopt as the meaning of non-racialism. In accomplishing this, I believe that reference to the history of the concept's development is instructive. I do not believe that this is a capitulation to originalism – the American school of interpretation which looks at what the words meant at the time they were drafted – a proposition which our courts have largely rejected.[13] However, studying the history of non-racialism helps inform an understanding of a particular philosophy around race that is able to justify the way the Constitution treats race and what non-racialism therefore entails.

Non-racialism implicates how we understand race and its role in society, both historically and in the present. In addition, it provides a vision for the future of South African society and race's role (if any) in that future. It also contends with the strategies and means by which we reconcile with our past and move from the present to that future. In many respects, the key contestations around non-racialism exist because it is used equivocally in different contexts. Yet, the Constitution's founding values are presumed to have definitive meaning; a meaning which accords with the Constitution as a whole. In tracing the concept's history, a history which no doubt substantiated its inclusion in the Constitution, I hope to identify the interpretation that best accords with South Africa's foundational law.

III HISTORY OF NON-RACIALISM

A The 1950s and multi-racialism

Non-racialism has had a long and complicated life in South African political history and has been articulated in different ways by disparate groups. In its modern prefiguration, it was developed in the 1950s by groups opposing apartheid.[14]

[11] Fowkes (note 6 above) at 12.

[12] R Dworkin *Taking Rights Seriously* (1st Ed, 1977), specifically 'The Model of Rules I' (chapter 2), 'The Model of Rules II' (chapter 3), 'Hard Cases' (chapter 4).

[13] For example, *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 19. Also L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2006) 171.

[14] D Everatt 'Non-racialism in South Africa: Status and Prospects' (2012) 1 *Politikon* 10.

Non-racialism had its first emergence in South Africa in the argument that the franchise in the Cape Province should not be restricted by race.[15] However, in the 1950s, non-racialism was appropriated in response to a number of developments in both South Africa and the decolonisation movement across the African continent.[16] Non-racialism owes its contemporary meaning to the theorising around a different term that began in the 1930s, namely, 'multi-racialism'. At that time, white South African liberals began to speak of a 'multi-racial society' as a new vision for South Africa. The new perspective was seen as a middle-ground approach which would respond to demands for increased power from the Black African majority, while still ensuring that whites maintained their disproportionate dominance in South African life.[17] This form of multi-racialism would consist of separate qualified franchises for each of the racial groups based on a federalist model. Meanwhile, as the calls for decolonisation spread across the continent, there was much debate about what these post-colonial societies would look like, as they comprised native populations, Asian populations and white settler communities. In what is now Zimbabwe, colonial officials argued for a Central African Federation of the two Rhodesias (North and South) with Nyasaland into a multi-racial partnership of the territories now known as Zimbabwe, Zambia and Malawi.[18] A similar configuration in the Kenyan Constitution of 1954 saw increases in the representation of Black Kenyans and Indian Kenyans with the consolidation of power by whites.[19] As Soske adds, these configurations of multi-racial society were seen by their proponents 'as the only alternative to barbarism'.[20]

In South Africa, the tumult of the Defiance campaign (launched in 1952 as a large-scale mobilisation against apartheid laws) reinvigorated debate about an alternate anti-apartheid vision for South Africa. The national unity and racial diversity that coalesced in the Congress Alliance saw an inclusive vision of South African society where everyone would have a claim to the territory. This culminated in the adoption of the Freedom Charter in 1955. In contrast to the premise that the separate racial groups needed separate representation, Chief Albert Luthuli began speaking of a multi-racial, but united, people of South Africa and the need for a 'common society'.[21] Later on Luthuli himself began to use the phrase 'non-racial' to describe his vision for South African society.[22] In this early theorising non-racialism was understood as a vision of a universal, generic humanism.[23] This form of humanism rejects the biological essentialism of race as a category of human difference. The central justification for the ruling National Party's race classification was based on the alleged importance of biological, social and observable characteristics which were considered objective and therefore scientifically

[15] J Soske 'The Impossible Concept: Settler Liberalism, Pan-Africanism and the Language of Non-Racialism' (2015) 47(2) *African Historical Review* 1, 4.

[16] Ibid.

[17] Ibid at 6.

[18] Ibid at 10.

[19] Ibid at 12.

[20] Ibid.

[21] A Luthuli 'Letter on the Current Situation and Suggesting a Multi-Racial Convention, addressed to Prime Minister Strijdom' in G M Gerhart (ed) *From Protest to Challenge: A Documentary African Politics in South Africa, Volume 3, 1953–1964* (1st Ed, 1974), 396. R Suttner 'Understanding Non-racialism as an Emancipatory Concept in South Africa' (2012) 59(130) *Theoria: A Journal of Social and Political Theory* 22, 25.

[22] Suttner ibid.

[23] Ibid.

verifiable.[24] As such, the policy of apartheid was predicated on the idea that because of these distinctions between racial groups, it was necessary to keep them separate in all spheres of life. By arguing that, ontologically, race was an illusion, non-racialism attacked one of the key pillars of apartheid thought.[25]

Theorisation about non-racialism was indebted to the powerful critiques of multi-racialism made by anti-colonial critics such as Tom Mboya in Kenya, who argued that multi-racialism was effectively a form of segregation.[26] Non-racialism was asserted as a means to oppose the multi-racialism of apartheid and white liberal thought.[27] This was picked up by the African nationalist wing of the ANC and what effectively became the PAC, as Robert Sobukwe noted, 'we reject multi-racialism in favour of a non-racial democracy because multi-racialism suggests a maintenance of racial groups'.[28] Rejecting biological essentialism, they argued that race was a consequence of divisions wrought by settler colonialism. For Sobukwe this meant that it was of paramount importance that African liberation should be led by Black Africans.

However, non-racialism's proponents did concede that while race was not biologically determinative, its social construction had material consequences. This was self-evident in apartheid South Africa, where depending on the colour of your skin, and how you were subsequently classified, your entire life trajectory would be shaped and determined. In that way, race was very real. As Suttner notes, an analogy could be drawn with classification based on class, which is also a social construction without any biological truth, but which had real world effects.[29]

B The 1960s and onwards: challenging the meaning of non-racialism

This conception of non-racialism as the antithesis of the multi-racialism of the apartheid project became a crucial pillar of the liberation movement after the 1950s. It became a key organising praxis for the Congress Alliance which comprised coalitions of different racial groups opposing apartheid. The ANC began to conceive of a 'multi-racial society and non-racial democracy.' Oliver Tambo would later describe the commitment to non-racialism as robust anti-racism:

> There must be a difference. That is why we say non-racial. We could have said multi-racial if we wanted to. There is a difference. We mean non-racial, rather than multi-racial. We mean non-racial – there is no racism. Multi-racial does not address the question of racism. Non-racial does. There will be no racism of any kind and therefore no discrimination that proceeds from the fact that people happen to be members of different races. That is what we understood by non-racial.[30]

Non-racialism became a rallying cry for the entire movement and this reached its apotheosis with the formation of the United Democratic Front in 1983, which, with its diverse membership of organisations, saw non-racialism as a response to the fragmentation of the anti-apartheid

[24] To read more on this, see L Thompson *The Political Mythology of Apartheid* (1st Ed, 1985) and P Rich 'Race, Science, and the Legitimization of White Supremacy in South Africa, 1902–1940' (1990) 23 *The International Journal of African Historical Studies* 665.

[25] Suttner (note 21 above) at 24.

[26] Soske (note 15 above) at 17–18.

[27] R Petersen *Over the Rainbow* (2020). Unpublished manuscript on file with the author.

[28] 'Editorial – 3 Africanists Tipped for New "Presidency"' *Golden City Post* (9 November 1958).

[29] Suttner (note 21 above) at 27.

[30] OR Tambo quoted in G Mare 'Race Thinking and Thinking about Race in South Africa' (November 1999) 1 (Paper presented at the Conference of the African Studies Association of Australasia and the Pacific, Perth Australia).

movement at the time.[31] However, some adherents of non-racialism who emanated from the Unity Movement such as Neville Alexander warned that any vision of non-racialism could not capitulate to the language of race.[32] This amounted to an insignificant negation of apartheid's '*herrenvolkism*'.[33] In his view, non-racialism had to amount to a 'complete deconstruction of the category of race, and a refusal to allow its re-emergence in any form, particularly in progressive politics'.[34]

There were other theorists of race and non-racialism, who noticed Sobukwe's more radical understanding of non-racialism, namely, Steve Biko with his theorisation of Black Consciousness (BC). For him, the liberal adoption of the concept of non-racialism was merely a fig leaf for purportedly multi-racial collaboration that would only lead to white domination in organising spaces – as his experiences in multi-racial student politics had demonstrated convincingly.[35] For Biko, non-racialism was an end and not a means.[36] As he said, 'I think what we want is a non-racial society. That is non-racial within the context of the country and peoples where we are.'[37] As Biko writes, BC would be unnecessary in a society which was not exploitative and did not stratify on the basis of race.[38] Biko's vision of race, and thus non-racialism, was material in that race was not merely the problem of classification by race but also applied to the distribution of material resources resulting from that classification. Moreover, Biko saw race not as a question of skin colour, but one of law, economics, politics and sociology. This is shown in how he described people who were 'Black': 'those who are by law or tradition politically, economically and socially discriminated against as a group in the South African society and identifying themselves as a unit in the struggle towards the realisation of their aspirations'.[39] The journey to this process required passage through Black Consciousness which would liberate the oppressed racialised groups in South Africa from the material and psychological oppression of racism. As Modiri writes:

> It is worth recalling the classic Black Consciousness dual formulation of liberation in terms of the 'psychological' and the 'physical'. Freedom from psychological oppression entails 'emancipation from mental slavery' and from an inferiority complex. It extends also to epistemological and cultural liberation. On the other hand, 'physical' liberation from the material oppression suffered by Blacks in a racist society includes freedom from economic deprivation, social death, political disenfranchisement and legally sanctioned discrimination. *It is only once Blacks are liberated in this manner, that a truly non-racial post-colonial nation can come into being*. That is to say that for Biko, liberation must entail both respect for plurality and difference as well as the restoration of material and symbolic parity between whites and Blacks such that those categories cease to be of any meaning or value.[40] (emphasis added).

[31] Petersen (note 27 above) at 69.

[32] Ibid.

[33] Ibid.

[34] Ibid. Also No Sizwe/N Alexander 'One Azania, One Nation' in B Pityana et al *Bounds of Possibility: The Legacy of Steve Biko & Black Consciousness* (1st ed, 1991), 250.

[35] S Biko *I Write What I Like* (2004) 21. JM Modiri *The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-Apartheid* (PhD thesis, University of Pretoria 2017) at 93, available at https://repository.up.ac.za/bitstream/handle/2263/65693/Modiri_Jurisprudence_2017.pdf?sequence=1&isAllowed=y

[36] D Hook *Voices of Liberation: Steve Biko* (1st Ed, 2014) 147.

[37] Ibid.

[38] Biko (note 35 above) at 96.

[39] Ibid.

[40] Modiri (note 35 above) at 176–177.

In fact, anything short of that material commitment to upending racial hierarchy by recourse to colour-blindness would merely entrench racism, and as Biko deliberately labeled it, 'white racism.'[41] As such, Biko's conception of non-racialism was fully emancipatory of the lived conditions of racial oppression, and he wrote against versions of the ideology which would have resorted to colour-blind concessions to the status quo. Moreover, the dismantling of race would require attending to its legal, economic, political and social manifestations too.

Posel argues that non-racialism can be understood as both an ethical and a strategic imperative. The ethical motivation is, as described above, a theory of humanism which worked to transcend the artificial barriers which race erected. As Posel argues, this was not merely a reincarnation of Enlightenment principles which had seen humanism as only adhering to white European males but one which drew upon the racialised and colonised experience of South Africa. Drawing from interviews with Ahmed Kathrada, it was a 'mode of mutual recognition as human beings notwithstanding historical and contextual differences of race.'[42] This was an inheritance from the Congress movement which had taken up non-racialism in the 1950s without ever denying the social fact of race. From a strategic standpoint, the recognition that there was a need to galvanise and unite the disparate groups which formed the liberation movement. Although Kathrada conceded that the term was under-theorised even then, he argues that it was effective as an organising tool to bring the different factions together for a common goal – which was toppling the apartheid system.

By the dying days of the apartheid regime, non-racialism had emerged as an organising political ideal among a broad swathe of the anti-apartheid groups. In 1991, the African National Congress produced a guiding document for the constitutional negotiation process called the 'Constitutional Principles for a Democratic South Africa.' In terms of that document, the ANC set out that:

> A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all … A non-racial Constitution can be adopted rapidly but a non-racial South Africa would take many years to evolve … the Constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.[43]

This gives an indication of at least what the ANC, which had a great influence over the constitutional negotiations, understood non-racialism to mean. Given the trajectory of the ANC's embrace of non-racialism over the previous 40 years, this understanding of non-racialism was to inform the constitutionalisation of the concept. It is telling that the ANC's understanding involved the removal of barriers that not only separated South African

[41] Biko (note 35 above) at 54:
In terms of the Black Consciousness approach we recognise the existence of one major force in South African society. This is white racism. It is the one force against which all of us are pitted. It works with unnerving totality, featuring both on the offensive and in our defence. Its greatest ally to date has been the refusal by us to club together as Black people because we are told to do so would be racialist. So, while we progressively lose ourselves in a world of colourlessness and amorphous common humanity, whites are deriving pleasure and security in entrenching white racism and further exploiting the minds and bodies of the unsuspecting masses.

[42] D Posel 'Whither "Non-Racialism": The "New" South Africa Turns Twenty-One' (2015) 38(13) *Ethnic and Racial Studies* 2167, 2168.

[43] African National Congress *Constitutional Committee Discussion Document: Constitutional Principles for a Democratic South Africa* (1991) 13–14.

but importantly, 'maintained domination.' This understanding, at the very least, seems to extend beyond a bare rejection of race but also the power relations that race had created. This is also corroborated by the fact that ANC was embracing non-racialism but espousing policies that would use race to reshape economic, political and social relations in South Africa. As described earlier, it was this journey from the ANC's guiding document to the paper submitted by the Constitutional Experts that brought non-racialism as a founding provision of the Constitution. However, as Everatt describes:

> Unfortunately, the drafters of the Constitution took no time to define what non-racialism meant, how it ought to be realised in practice, how behaviours need to change or – most importantly – how to amend the economic underpinning of both racism and apartheid, a necessary precondition for realising any kind of nonracialism in practice.[44]

Even though non-racialism is not expressly defined in the Constitution, I argue that an analysis of how the Constitutional Court has dealt with affirmative action cases illuminates a particular vision of non-racialism. It is one which accords with its radical understanding of race as part III on the history of non-racialism has attempted to uncover. However, before I proceed with the analysis of the Court's affirmative action judgments, I need to briefly sketch some of the contemporary challenges to non-racialism that have been prevalent since the inception of the Constitution. These challenges, I believe, will have to be faced as the Court begins to deepen its theorisation of non-racialism.

C The 1990s, constitutionalism and new challenges

In the early 1990s, non-racialism was eclipsed by the frantic attempts at reconciliation on a policy level. This culminated in the idea of South Africa as a 'rainbow nation'. It is at the very least debatable whether we must consider the idea of the rainbow nation as a version of non-racialism. As Posel argues, the idea of a rainbow seems to concede that there is some racial plurality.[45] As opposed to contesting the idea of race it accepts it because of our multi-racial history. As has been detailed above, while non-racialism is an ethical pursuit which aims to create a society where the concept of race does not have material consequences, it very much accepts race as an existing social fact that cannot be ignored in any attempt to transcend race.

The limits of this rainbow nation rhetoric can be seen in the challenge brought about by the 'Rhodes Must Fall' and 'Fees Must Fall' movements of the last five years. These student movements reacted directly to the persistence of racism in white-dominated university spaces 20 years after the end of apartheid. The critique that these movements made of the rainbow nation concept was that it merely acted as an illusion of transformation while not fundamentally modifying the privileging of whiteness in South African university spaces. However, this critique does not seem to me to be one which is fundamentally irreconcilable with the concept of non-racialism. One of the strands of the 'Fallist' thinking was that whiteness was not a natural consequence of varying phenotypes but a social construction which resulted in those who were deemed not to be white to suffer material consequences. Similarly, non-racialism as an ethical concept also regards the dismantling of the concept and privileging of whiteness as a key element in moving towards a non-racial society.

[44] Everatt (note 14 above) at 12.

[45] Posel (note 42 above) at 2169.

From the other side, however, non-racialism has been taken up by political forces to effectively argue for colour-blindness. In particular, at a conference in 2020 the Democratic Alliance (DA) proposed to adopt a policy of 'non-racialism over multi-racialism'.[46] While conceding that race is a social construct, the DA asserted that this new policy would aim to move past the apartheid classifications of race that prevented economic redress to the millions of impoverished South Africans. As discussed in detail above, the main protagonists of non-racialism have understood it not only to recognise that race is a social construct, but also to use race to dismantle itself. The DA's policy seems to attempt to dispense with race as a means of understanding South African society while glossing over the fact that South Africans have been disadvantaged by centuries of white supremacy. Colour-blindness most often has the effect of freezing the material racial resource allocations at a particular point and being unsuitable to create the transformative society that the country has committed itself to. This articulation of non-racialism was like the one contended by the amicus in the *Masuku* case I described above.

In this regard, Petersen identifies four conceptions of non-racialism which serve as a useful frame for uncovering non-racialism in the Constitution.

1 *Non-racialism as a deconstruction of race*

In this conception of non-racialism, the notion of race as a scientific category is rejected, together with any other essentialist arguments for its salience.[47] As Petersen describes in this regard, 'non-racialism is a radical project, therefore, that at once confronts racial domination and essentialist notions of difference and identity'.[48] Race is therefore seen not as skin colour but as systems of domination and subordination that render whiteness as proximate to power. As such, dismantling 'race' as a category requires opposing these systems that delineate resources along racial lines.[49]

2 *Non-racialism as anti-racism*

Non-racialism as anti-racism could appropriately be seen as a closely linked, yet broader, concept to non-racialism as a deconstruction of race. As anti-racism, non-racialism is a key theoretical underpinning to the idea of racism and racial domination. As espoused by Biko, this is a frontal attack against the multi-racialism of apartheid but also the liberal theorising around race that

[46] L Basson 'Opinion – Why the DA chose non-racialism over multi-racialism' (10 September 2020), available at https://www.da.org.za/2020/09/opinion-why-the-da-chose-non-racialism-over-multiracialism.

[47] Petersen (note 27 above) at 64.

[48] Ibid.

[49] For a sustained understanding of 'whiteness' as a legal-property regime see C Harris 'Whiteness As Property' (1993) 106(8) *Harvard Law Review*, 1707, 1737:

> Moreover, as it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.

See also Crenshaw's observation in 'The Eternal Fantasy of a Racially Virtuous America' *New Republic* (22 March 2021) that 'We must grapple with the fact that whiteness – not a simplistic racial categorization, but a deeply structured relationship to social coercion and group entitlement – remains a vibrant dimension of power', available at https://newrepublic.com/article/161568/white-supremacy-racism-in-america-kimberle-crenshaw.

emerged from the Freedom Charter. As discussed above, in this vision, non-racialism was not the means of transformation but the end. As such, it was a critique of the Unity Movement's argument that any discussion of race was a slippery-slope to the reification of racial categories, because any deconstruction of race had to fully tackle race and its physical and psychological wages *now*.[50] The sophistication of Biko's argument is that he theorises the category of Black not as a settler-colonial and apartheid category but one which is linked to the struggles of all racialised and oppressed groups.[51] Further, this also charted the history of race not back to apartheid but to the first colonial encounter and the dispossession and pillage that followed thereafter.[52]

3 *Non-racialism as cross-racial alliance and co-operation*

In this conception, non-racialism as described above by Kathrada was used as an organising tool for various anti-apartheid groups attempting to form alliances and networks across racial divides. This became dominant in the UDF and the ANC (once it allowed white members to form parts of its Executive Committee after 1985) during the politics of the 1980s. Non-racialism in this conception was a retort to the Black Consciousness's deep suspicion of even white liberals' presence in activist spaces. After the formal end of apartheid this conception of non-racialism as a defence against the BC movement's suspicion was still often used to describe organisations and spaces which allowed membership and participation of all races.[53]

4 *Non-racialism as anti-racialism*

A fourth deployment of non-racialism is that which is against all discussion of race. As articulated above by the DA, this does not share any of the critical attempts to deconstruct race but is better described as a form of race-neutrality or colour-blindness. In this regard, race is a discredited theory but is also something that has necessarily been *overcome* or *superseded*. The demise of formal apartheid ended the legitimate uses of race as a social category and as such attempted to evoke race-talk only to revive race logics, particularly when discussing affirmative action. The argument goes further, however, this commitment to anti-racialism means that *any* invocation of race is racist. Therefore, an equivalence is drawn between groups as diametrically opposed as white supremacists and 'Black Lives Matter'. As Soske writes, this is only possible because the language of race is only ever mediated through supposedly neutral institutions, so that whiteness is equivalent to blackness, when in fact whiteness can only function in a hierarchical system where blackness is subordinated.[54] As Petersen writes,

> firstly, unlike the deconstruction position, this position does not recognise the salience of racial domination as an historical construct with a long and brutal tail that continues to wreak havoc in peoples' lives. Secondly, non-racialism here does not mean deconstructing the notion of race but means opposing all categorising and organising of people in terms of 'racial' groups.[55]

[50] D Roediger *The Wages of Whiteness: Race and the Making of the American Working Class* (1991) 55 for a discussion of WEB du Bois's reading of whiteness as a 'public and psychological wage' that benefits even poor whites and its relation to the formation of white identity.

[51] Biko (note 35 above) at 96.

[52] JM Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 295, 300.

[53] See, for example, the ANC Membership Policy, available at https://www.anc1912.org.za/how-to-join-the-anc/.

[54] Soske (note 15 above) at 2.

[55] Petersen (note 27 above) at 66.

The heterogenous interpretations of non-racialism have shown that while it has always been a contested and nebulous concept, it emerged out of opposition to the concretisation of race that apartheid mandated and out of visions of a society that would still rely on race as its organising theory. This shows that it required a radical commitment to anti-racism which would seek to break the conditions by which race was made real but, in opposition to colour-blind understandings of race, this did not mean an ignorance to the social fact of race.

At this stage, however, it seems most appropriate to see how the Constitutional Court has grappled with the concept of and commitment to non-racialism. I propose to do so by looking at those dealing with race conscious affirmative action. It is evident that we see strands of all these conceptions of non-racialism in the case law, and yet no single version has consistently been used in all cases that implicate race, its history, and its implications for the Constitution's transformative project. However, the Constitutional Court's affirmative action cases, I argue, have implicitly conceived of a version of non-racialism which is most coherent with the concept's history, and therefore, the Constitution.

IV CONSIDERING THE CONSTITUTIONAL JURISPRUDENCE

A Race conscious affirmative action

The affirmative action cases are instructive because they expose an apparent tension between some conceptions of non-racialism and the fact that race-conscious affirmative action policies, not only actively take race into *account* in the allocation of benefits, resources and employment, but they therefore also treat people *differently* on the basis of their race. Of course, there are other areas of constitutional law where non-racialism would be implicated, namely hate speech and pure discrimination cases. By analysing these cases, I hope to assess how the Court has squared the apparent contradiction at the heart of affirmative action cases together with how this is illuminated by the standards that review courts use to justify affirmative action policies.

1 *Van Heerden*

Although the phrase non-racial or non-racialism has been used in previous cases before the Court, one of the first major instances where the commitment required interrogation was in the case of *Van Heerden*.[56] The case concerned certain pension fund provisions which were intended for parliamentarians. Because there had been a transition between the apartheid-era Parliament and that of the democratic Parliament, the Minister of Finance had devised certain pension provisions which would have had the effect of benefiting members who had entered Parliament in 1994 as opposed to those who had entered prior to democracy. Aggrieved members challenged this on the basis that this amounted to unfair discrimination based on race (almost all the members of the pre-1994 Parliament would have been white).

The Court had to consider whether these pension provisions fell within the purview of a remedial measure in terms of section 9(2) of the Constitution or should be adjudicated under the unfair discrimination provisions of section 9(3).[57]

[56] *Minister of Finance v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121, 2004 (11) BCLR 1125, [2004] 12 BLLR 1181 (CC)('*Van Heerden*').

[57] Section 9 of the Constitution is 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

Moseneke J, writing for the majority of the Court, was of the view that the measure fell under section 9(2). Moseneke J affirmed again that section 9 of the Constitution demands substantive equality and not a mere formal equality where differently situated individuals are treated in the same way.[58] Following this reasoning, he held that section 9(2) of the Constitution did not amount to a deviation of the principle of equality or some concession for 'positive' or 'reverse' discrimination; instead, these remedial measures formed a crucial part of the 'foundational equality objective of the Constitution and its broader social justice imperatives'.[59] In his view the test to determine whether an act fell within a remedial measure in terms of section 9(2) was three-fold:

> It seems to me that to determine whether a measure falls within section 9(2) the inquiry is threefold. The 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.[60]

This principle has come to be known as the *Van Heerden* test.

However, what is pertinent is that Moseneke J reaches this conclusion without seriously interrogating what the commitment to non-racialism means in the context of the race-conscious remedial efforts. There are passing references to the commitment to building a non-racialist society[61] but the judgment seems to implicitly accept that this society may only be reached through the remedial measures envisioned in section 9(2).

Sachs J in a concurring judgment goes a little further in engaging in that enquiry. While concurring with Moseneke J's judgment that the remedial action should be considered under section 9(2), he was also sympathetic with the view that assessing a measure under section 9(2) could not completely insulate it from the assessment of fairness in section 9(3). Interestingly on this issue, he had this to add, '[a]t the same time it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bathwater of remedial action.' Here Sachs J sees that without some supervision of the fairness of remedial measures, the goal of non-racialism may be stymied. However, he stops short of engaging the question of what the commitment to non-racialism means under the Constitution.

At a minimum, the Court's rejection of a formal equality framework represents an implicit disavowal of a mere anti-classification view of the equality provisions in section 9 of the Constitution.[62] In this regard, the classification of individuals on the basis of race does not

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.

58 *Van Heerden* (note 56 above) at para 26.

59 Ibid at para 30.

60 Ibid at para 37.

61 Ibid at para 44:
However, it is also clear that the long-term goal of our society is a non-racial, nonsexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes.

62 For more on the distinction between the anti-classification and anti-subordination views of equality jurisprudence see JM Balkin & RB Siegel 'The American Civil Rights Tradition: Anticlassification or Antisubordination?'

infringe section 9 and neither does the differential treatment of people on the basis of race either, provided that the treatment is done in accordance with the test set out by Moseneke J, the measure would fall within the purview of section 9(2) and thus escape being deemed unfair discrimination under section 9(3). It therefore follows that not only would race-conscious affirmative action policies not be in contradiction with the aspiration of non-racialism as set out in section 1 of the Constitution, but it also seems implicit in all the judgments that they are necessary to reach such a non-racial society. In addition, the Court has taken a deferential approach to remedial policies, requiring that the state must show that these policies are designed to achieve equality but not necessarily to show that they factually have. This indicates that the Court must be of the view that a permissive attitude to remedial measures under section 9(3) is a vital component of non-racialism. While the Court does not, unfortunately, directly contend with why non-racialism is not an impediment but a strut for this expansive notion of race and remediation, the Court does seem to reject the narrow notion of non-racialism as merely anti-racialism, in favour of a notion that sees the commitment to non-racialism authorising efforts to dismantle substantive barriers that serve to prop up racial hierarchy.

2 *Barnard*

The next time the Court had to consider the relationship between section 9(2) and section 9(3) would be in *Barnard*.[63] The case dealt with a white woman police officer who was not promoted to various roles because her promotion would not have fulfilled various racial and gender goals of the police. Despite the fact that *Barnard* came after the *Van Heerden* case, it was apparent that courts in the wake of *Barnard* have used divergent reasoning to adjudicate affirmative action claims.[64] Given this uncertainty, there was hope that the Court would use *Barnard* to settle this confusion once and for all. Unfortunately, the case sowed more confusion than it clarified. While all four judgments agreed that Ms Barnard's dismissal was constitutionally justifiable, they arrived there in different ways.

The majority judgment penned by Moseneke ACJ (who also penned the test in *Van Heerden*) avoided having to apply the *Van Heerden* test to this case which had emanated out of the Employment Equity Act 55 of 1998 (EEA). Moseneke J was of the view that the central basis of the claim was unclear and had not been properly pleaded. Moreover, in that event, there was no proper unfair discrimination claim before the Court. However, he went on to say that despite not having to rule on the exact question, the *Van Heerden* test did apply to remedial measures taken within the auspices of the EEA – at least at the stage of their formulation. When it came to challenging their implementation, he suggested, *obiter*, that the intensity of review was one which encompassed rationality and legality, but he did not have to decide in this matter. A second judgment penned by Cameron, Froneman and Majiedt JJ concluded the unfair discrimination challenge was before the Court and the appropriate test was one of fairness, drawing from the EEA itself and labour law. A third judgment by Van der Westhuizen J was

(2003) 58 *University of Miami Law Review* 9.

[63] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC)('*Barnard*').

[64] See further C Albertyn 'Adjudicating Affirmative Action Within a Normative Framework of Substantive Equality and the Employment Equity Act – An Opportunity Missed? *South African Police Service v Solidarity obo Barnard'* (2015) 132 *South African Law Journal* 711; C McConnachie 'Affirmative Ation and Intensity of Review: *South African Police Service v Solidarity obo Barnard'* (2018) 7 *Constitutional Court Review* 163–197.

also of the view that the unfair discrimination claim was before the Court, the *Van Heerden* test should be applied here but the appropriate standard to assess the implementation of the remedial measure was one, drawing from section 36 of the Constitution, of proportionality. A fourth judgment by Jafta J criticised the second judgment's use of fairness and argued that the standard should be one of rationality in achieving the purposes of representativity and equity.

In attempting to understand how the Court conceived of non-racialism's role in the adjudication process, it is useful to draw from what the Court said about it. From the outset Moseneke ACJ situated remedial measures within a constitutional understanding of substantive equality which is designed to work 'towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.'[65] On the other hand, Moseneke ACJ was of the view that:

> Remedial measures must be implemented in a way that advance the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society. [66]

In this regard, remedial measures have two opposing effects on non-racialism. Firstly, they are necessary measures to create a non-racial society but, secondly, they must not unduly invade human dignity of those affected by them if a non-racial society is to be created. The second judgment by Cameron, Froneman and Majiedt JJ picked up this tension but then went further in noting that the Constitution empowers the use of race in remedial measures:

> Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we *must foresee a time when we can look beyond race*. (emphasis added)

In this statement, the second judgment does something interesting. While rightly encouraging us to look at other factors of disadvantage beyond race, it then hopes for a minimised role for race in the future. But in deploying its argument that the standard by which race-conscious affirmative action should be tested is 'fairness', a higher standard than one of rationality, it makes race more suspect, in the parlance of US constitutional law. By making race more suspect as a category of remedial measures, it invites policy-makers to avoid it if they must. In many respects, the argument could be made that things should cut the other way: the *more* we speak about race now and address its consequences, the *less* it may continue to be a feature of our society. This problem is another aspect that goes missing when non-racialism is under-theorised as a concept. In addition, it is evident that for the second judgment, race is merely instrumental to, or indicative of, disadvantage as opposed to being the disadvantage in and of itself. This narrow view of race's continued dominance in South African society reveals a myopia regarding how race was used to allocate resources and how racism continues to subordinate those not defined as white in contemporary South Africa.

The third judgment in *Barnard* engages further by noting that an individual who has been excluded by a remedial measure may have their dignity impaired in the use of race. In a society committed to becoming non-racial, how can this be accepted? Van der Westhuizen J was of the view that this is because remedial measures are meant to restore the dignity of people who were victims of past discrimination. Furthermore, while the dignity of one individual cannot be weighed against those of millions, at the very least, a proportionality enquiry that considered

[65] *Barnard* (note 63 above) at para 30.

[66] Ibid at para 32.

these factors would have been appropriate. Van der Westhuizen J added that such an enquiry 'must take into account whether the measure undermines the goal of section 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society'.[67] As he noted earlier in the judgment this requires an intersectional analysis of the harm suffered by the individual and that of the beneficiaries.[68] While again not expressly dealing with the notion of what non-racialism means, this judgment provides a nuanced analysis of how race continues to play a controlling factor in remedial measures cases even in a society striving to become non-racial. In this regard, this is not by minimising race at the expense of other factors of disadvantage, but in considering all these factors, intersectionally. A non-racial society would thus be one that did not continue to offend the dignity of people based on their race.

3 *Solidarity*

The next case to consider race-conscious remedial measures was *Solidarity*.[69] In *Solidarity* the Court had to consider a challenge against an employment equity plan formulated by the Department of Correctional Services which had set certain national targets for the representation of racial groups in the Department. One of the key issues the Court had to consider was whether the use of national targets had been appropriate without reference to regional targets too. This was because most of the applicants were Coloured correctional officers in the Western Cape (where Coloured people form a larger share of the population than they do nationally). They alleged that they had not been promoted because of the unfair discrimination mandated by the planned national targets.

In deciding this question, Zondo J, writing for the majority, considered whether the *'Barnard* principle*'* was also applicable to Coloured individuals.[70] Identifying the *Barnard* principle as being the question of 'whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment?'

The Court concluded the answer in the affirmative.[71] This was even though Coloured people represented a group which had suffered previous disadvantage and comprised Black people in terms of employment equity legislation.[72] However, the Court found that the numerical targets set by the Department were not quotas. However, he declared the plan for racial targets at a national level to be unconstitutional on the basis that the Department did not consider regional demographics.

Not unsurprisingly, the Court made short shrift of what the commitment to non-racialism entailed in a matter where a disadvantaged racial group alleged unfair discrimination in terms of a remedial measure. The majority judgment did not mention it at all and the dissenting

[67] Ibid at para 147.
[68] Ibid at para 153.
[69] *Solidarity v Department of Correctional Services* [2016] ZACC 18, (2016) 37 ILJ 1995 (CC), 2016 (5) SA 594 (CC), [2016] 10 BLLR 959 (CC), 2016 (10) BCLR 1349 (CC).
[70] Ibid at para 38.
[71] Ibid at para 38.
[72] Employment Equity Act 55 of 1998 'Definitions'.

judgment from Nugent AJ only referred to the principle in relation to a discussion of *Barnard.* This must be understood as a missed opportunity for the Court to expand on a discussion which had been opened in *Barnard*.

However, Zondo J in the majority, expounded on the *Barnard* principle. He held that it connotes that in the context of workforces 'the level of representation of each group must broadly accord with its level of representation among the people of South Africa'.[73] However, this conclusion was reached without the preceding logical steps that would have justified that conclusion. However, the presumption underlying that argument must be that where workplaces do not accord with population demographics this must be a symptom of structural race, gender and other societal barriers that prevent the inclusion of underrepresented groups. In this regard then, affirmative action measures which aim to bring about demographic representativity in the workplace are justified under section 9(3) of the Constitution. It therefore follows that the use of race, in this instrumental fashion, is thus crucial to realising the aspirations of non-racialism. The Court's inability to substantiate this bold step is symptomatic of the under-theorisation of non-racialism in constitutional discourse.

4 *SA Restructuring and Insolvency Practitioners Association*

At the time of writing in November 2021 the most recent case in which the Court had to consider race-conscious affirmative action policies was *SARIPA CC*.[74] This matter concerned a policy implemented by the Minister of Justice and Constitutional Development to overhaul the system of appointing trustees by the Master. In terms of the policy, certain groups of people, based on their race and gender, were to have preferential treatment in the allocation of trustee appointments. The policy was challenged, inter alia, as being in violation of section 9 of the Constitution. The High Court found that the policy did not to pass the *Van Heerden* test. While the policy passed the first leg of the test, which required that it aim to target persons disadvantaged by unfair discrimination, Katz AJ, writing for the court, held that the policy was not rationally related to its purpose and, importantly for these purposes, thirdly, held that the policy amounted to a rigid racial quota.[75]

In this regard, Katz AJ held that quotas were inimical to the aspiration of achieving equality and violated the dignity of non-beneficiaries of the affirmative action policy. To support this argument, Katz AJ stated the following, 'a scheme of this nature does violence to the notion of transformation from a racist, racialised, sexist and gendered past to a non-racial and non-sexist future.'[76] As Ramalekana has written, Katz AJ held that the 'the commitment to non-racialism and non-sexism required individual skill and expertise to be approached from a neutral perspective.'[77]

[73] *Solidarity* (note 69 above) at para 40.

[74] *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20, 2018 (5) SA 349 (CC), 2018 (9) BCLR 1099 (CC)('*SARIPA CC*').

[75] *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC), 2015 (4) BCLR 447 (WCC)('*SARIPA HC*').

[76] Ibid at para 215.

[77] N Ramalekana 'What's So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution' (2020) 10 *Constitutional Court Review* 251, 282.

In the Supreme Court of Appeal the policy was also deemed to be irrational.[78] Further, Mathopo AJ writing for that court agreed that quotas are unconstitutional, and this policy amounted to a quota.[79] He held that 'one form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota.'[80]

When the matter came before the Constitutional Court, the majority judgment penned by Jafta J, sidestepped the issue of whether the policy amounted to a quota but concluded on the basis of the *Van Heerden* test that the policy was irrational for largely similar reasons as those given by the Supreme Court of Appeal.[81]

Most relevant for these purposes is the powerful minority judgment written by Madlanga J. Departing from the majority's reasoning that the policy fell to be set aside because it was not reasonably likely to achieve equality, Madlanga J concluded that this was not supported on the facts and, moreover, precision was not a requirement of the *Van Heerden* test and some deference had to be accepted if equality was to be achieved.[82] In addition, while not definitively holding that quotas were constitutionally permissible, Madlanga J was sceptical about the conclusion that they were impermissible.[83] He held that the assessment of every policy had to be done on a case-by-case basis and no general rules could be divined.[84] Further, an ineluctable conclusion of remedial efforts was that there would be individuals who would be harmed by policies but that alone was insufficient to invalidate an affirmative action policy. He held:

> after all, *Van Heerden* has held that remedial measures will have casualties or result in 'hard cases'. Lest redress towards the attainment of substantive equality will move at such a snail pace that the dream for equality will be as good as not being realised, it just cannot be business as usual.[85]

Again, while none of these judgments (barring the high court's) explicitly contend with how a commitment to non-racialism rubs up against race-conscious affirmative action, they do offer different visions of how courts must contend with race.

The high court judgment's conception of non-racialism can best be described as anti-racialism, or in other words, it locates the harm as the use of racial classifications in and of themselves. While accepting a history of racial disadvantage and the need for redress the high court ultimately treated the use of race with suspicion and as being inherently problematic.[86] As Katz AJ explained, 'such harm to the core value and right of dignity is the product of a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place'.[87] Furthermore, in balancing the social categories of race and gender against individual 'merit' required that they

[78] On the basis that in category D of the policy white men were in the same category as certain non-white groups which may not stand a chance of appointment in that category.

[79] *Minister of Justice and Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others* [2016] ZASCA 196, 2017 (3) SA 95 (SCA)('*SARIPA SCA*') at para 34.

[80] Ibid at para 32.

[81] These were namely the category D applicants.

[82] *SARIPA CC* (note 74 above) at para 90.

[83] Ibid at para 79–80.

[84] Ibid.

[85] Ibid at para 86. He also approvingly cited *Thibaudeau v Canada* (1995) 2 SCR 627 (cited in *Van Heerden*) that held that 'the fact that a [measure] may create disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial'.

[86] *SARIPA HC* (note 75 above) at para 214.

[87] Ibid at para 215.

be treated from a neutral perspective which meant that if race or gender was used without regard to individual 'merit', this would have the effect of being racist to the *non-beneficiary* of the policy.

As argued above, such a view on non-racialism can only be described as a dehistoricised neutralisation of the history of race. The commitment to equality cannot result in non-racialism being used as a cudgel to treat all applications of racial categories as the same. As Sachs J noted in *Van Heerden*, there is a need to distinguish the use of race in 'measures taken to enforce racism and those taken to overcome it'.[88] In many ways, the judgment of the Supreme Court of Appeal picks up on this with its supposition that the policy was problematic because it failed to take into account the individual merits of non-applicants – as Ramalekana describes, the 'individualised' approach.[89]

The minority judgment of Madlanga J offered a radically distinct conception of how race could be used in remedial efforts. Firstly, Madlanga J exposed the distinction between the use of race against individualized 'merit' as fallacious. Individual merit itself was a consequence of South Africa's racialised and gendered history. As the Judge described

> therefore, the reason white people were – and continue to be – disproportionately better qualified and more experienced is a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid.[90]

As such, an attempt to draw a delineation between the history of racism and individualized merit was misguided as they exist on the same continuum of settler coloniality and white supremacist notions of what constituted 'merit' in the first place. In addition, considering this, it became evident why Madlanga J aptly described it as 'outrageous' to attempt to draw an equivalence between the harm suffered by non-beneficiaries of affirmative action policies and those who have been harmed by centuries of racist discrimination.[91] While he did not expressly rely on non-racialism for this argument, the Judge described how that would never be countenanced in a 'normal society'.[92] This judgment accords with the view of non-racialism which treats it as an end and not as a means. It is only by confronting this legacy of racism that South Africa can transition from an unequal and racially divided society to a normal, *non-racial* society.

B Analysing the race-conscious affirmative action cases

Brassey argues that this line of cases amounts to the courts' rejection of non-racialism in favour of endorsing a policy of multi-racialism.[93] Multi-racialism as has been previously discussed, had been eschewed as a model of race relations by anti-apartheid groups in the 1950s. Interestingly, Brassey reaches this conclusion without seriously describing what non-racialism is. Instead, Brassey charts the history of how courts have treated race-conscious policies in both South Africa and the USA. In particular, he cites with approval Justice Harlan's dissent in *Plessy v Ferguson* the case which enshrined segregation in the United States through the 'separate but

[88] *Van Heerden* (note 56 above) at para 147.
[89] Ramalekana (note 77 above) at 274–275.
[90] Ibid.
[91] *SARIPA CC* (note 74 above) at para 81.
[92] Ibid.
[93] M Brassey 'The More Things Change … Multiracialism in Contemporary South Africa' (2019) 9 *Constitutional Court Review,* 443, 459.

equal' doctrine.[94] However, Harlan's dissent also advocated for the colour-blind view of the Bill of Rights which is still the dominant treatment of race in US constitutional law.[95] As has been argued by numerous scholars, but perhaps most forcefully by the critical race theorists, colour-blindness is an ideology that not only fails to weaken but actually reinforces white supremacy. In Brassey's estimation, the very language of race, amounts to a rejection of non-racialism – an argument as I detail above which does not comport with critical understandings of non-racialism. Colour-blindness has clearly been repudiated by our Constitution and by the Court.[96]

In her essay arguing for the constitutional permissibility of racial quotas, Ramalekana contends that what section 9(2) prohibits from a dignitarian position, is the creation of an 'underclass' which deems non-beneficiaries as less worthy in society.[97] Drawing from the dignity jurisprudence of the Court, Van der Westhuizen's powerful third judgment in *Barnard* as discussed above, and the distinction between individual and collective dignity, Ramalekana contends that:

> the principle that affirmative action measures which treat persons or groups as second class, marking them with a badge of inferiority, as an 'underclass,' and which obliterate the chances of admission and advancement, creating an absolute barrier, violate the right to dignity – they are a disproportionate means of promoting the achievement of equality.[98]

This is an argument not only about dignity but one which incorporates an understanding of social power. In this regard, it is not the mere use of race which is an affront but the use of race in such a way to relegate non-beneficiaries to second-class citizenship. It follows then that most affirmative action policies should attempt the opposite, viz., uplift those who for centuries have been relegated to second-class citizenship (and in South Africa's case, to no citizenship at all). This comports with a powerful understanding of non-racialism which sees the privileges and resources that adhered to whiteness in this country as necessary to dismantle. As such, it is only by targeting the structural barriers that race created using race itself that we can move towards non-racialism.

While in all four cases, the Court has not expressly contended with what the constitutional commitment to non-racialism entails, the remedial measure (affirmative action) cases give us some key insights. Firstly, they tell us that there is no obvious tension between sections 1(b) and 9(2) of the Constitution. Remedial race conscious measures are a necessary component to create a non-racial society that is undergirded by a conception of substantive equality. Secondly, there are factors to be balanced, which means that, at the very least, non-racialism entails that remedial race-conscious efforts must be rational. Thirdly, although the commitment to non-racialism is aspirational, the Constitution recognises the social fact of race, and it must be contended with by the courts. In fact, the Court's inability to grapple with this critical notion of non-racialism undermines the powerful anti-subordination principles which underlie its inclusion in the Constitution.

[94] Ibid at 450. *Plessy v Ferguson* 163 US 537 (1896).

[95] *Plessy* at 1145 ('I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of citizens is involved.')

[96] Sach J's judgment in *Van Heerden* (note 56 above) at para 147 (endorses Thurgood Marshall J's rejection of colour-blind ideology in his dissenting judgment in *City of Richmond v JA Croson Co*. 488 US 469 (1989)).

[97] Ramalekana (note 77 above) at 257

[98] Ibid at 272.

Returning to the idea of non-racialism as a founding provision of the Constitution, which has created specific contours and obligations about how the Constitution governs race relations, the study of the above cases shows that the vision of non-racialism that the Constitution endorses is one which creates both negative and positive obligations. The negative obligation prohibits unfair discrimination, hate speech and other injury based on race, while the positive obligations mandate that active measures are taken, which consider race, to dismantle power relations defined by race in South Africa.

While non-racialism remains a contested concept in South African life, I contend that its meaning in the Constitution, informed by the history that gave rise both to its conceptualisation and its inclusion in South African constitutionalism, favours this understanding of non-racialism. Because of the controversy non-racialism invites, it opens a particular discursive space for its definition. This is something the Court cannot ignore, particularly as litigants submit competing versions of the concept in litigation. However, when assessing the vision of the Constitution and the ways in which the above cases have justified the use of race in response to difficult questions about the allocation of resources, it is clear that the only coherent vision of non-racialism is one which accepts the social reality of race and aims to dismantle that social reality by *considering* race. Moreover, the apparent tension between prohibiting unfair discrimination by race on one hand and mandating race-conscious remedial efforts on the other proves to be illusory given the understanding of non-racialism that aims to dismantle racism as well as all power relations shaped by race. While the Court is likely to receive more arguments for a retreat to a colour-blind understanding of non-racialism, which have increasing traction in popular discourse, it should work to theorise non-racialism's role in the Constitution more robustly to limit the proliferation of alternative views which do not accord with the transformative mission of the Constitution. The Court's failure to do so, and its under-theorisation of the concept, is in danger of allowing for the regression on the bold constitutional commitments on the question of race.

V CONCLUSION

In conclusion, this article has located non-racialism as a founding provision of the Constitution, a descriptive principle which elucidates the vision the Constitution establishes with respect to the question of race. In revealing this vision, I have looked at the history of non-racialism as it emerged as a mode of political organising, as a vision of future race relations and as a philosophical understanding of race itself. This history of non-racialism has revealed that while it has been deployed in disparate contexts, it was never merely just a rejection of the social salience of race. In its political manifestations and its ethical considerations, it encompassed a sustained critique of racial hierarchy and not the bare rejection of racial classifications.

Given this material understanding of race, it is unsurprising that in dealing with race, the Court has rejected formal equality arguments in favour of a substantive equality which not only permits, but demands, that race is considered and addressed in remedial efforts to undercut persistent racial hierarchy. This is borne out with the dominant standards of review utilised in assessing affirmative actions which show a deference to policies that seek to remedy the continued lived consequences of racial stratification. While the Court has under-theorised what the commitment to non-racialism means in a constitutional context, I contend that its

jurisprudence affirms this substantive understanding of non-racialism, which is more than a rejection of colour-blindness but stands in contrast to multi-racialism too.

What is evident is that as far as the Court is concerned, non-racialism requires an active engagement with the idea of race in historical and contemporary South African life. It is my view that such engagement requires a frankness, boldness and urgency in dealing with the persistence of racial subordination in the present if we are to envisage a society which is no longer structured along its oppressive fault lines in the future.