

## AFFIRMATIVE ACTION: WHO, HOW AND HOW LONG?

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“Non-racialism” is the founding myth of the new South Africa.”

- Neville Alexander<sup>1</sup>

‘(W)e’re going to have a hell of a problem after liberation ... We mustn’t just speak about non-racialism – we must act in a non-racial way.’

- Jessie Duarte<sup>2</sup>

‘(T)here is a danger in making racial identities too central to our conceptions of ourselves; while there is a place for racial identities in a world shaped by racism, I shall argue, if we are to move beyond racism we shall have, in the end, to move beyond current racial identities.’

- K. Anthony Appiah<sup>3</sup>

### 1. INTRODUCTION

Recently former President Mbeki invited South Africans to subject the interrelated questions of building a non-racial South Africa and the role affirmative action plays in this regard to continuous examination and critical review.<sup>4</sup> My paper takes up that invitation.

It would not be an overstatement to say that affirmative action has emerged as one of the most controversial and divisive issues in post-apartheid South Africa. My paper proceeds from the standpoint that redress or affirmative action is both necessary and just as a corrective for the legacy of colonialism and apartheid. I will nonetheless argue that we need to pose critical questions about the current manner in which affirmative action is implemented, if we are to avoid a situation in which affirmative action becomes a policy that only generates resentment and strengthens, rather than weakens, existing social divisions.

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<sup>1</sup> N Alexander *Affirmative Action and the Perpetuation of Racial Identities in Post-Apartheid South Africa*, lecture delivered at the East London Campus of the University of Fort Hare, 25 March 2006, 19.

<sup>2</sup> Jessie Duarte cited in Julie Frederikse *The Unbreakable Thread: Non-Racialism in South Africa* (1990) 202.

<sup>3</sup> A Appiah “Race, Culture, Identity: Misunderstood Connections”, in K.A. Appiah & A. Gutman, *Color Conscious* (1996) 32.

<sup>4</sup> ‘There is no doubt that ... [the questions of building a non-racial South Africa and the role of affirmative action in this regard] are challenging questions that our country as a whole must subject to continuous examination and critical review. This is particularly important because, apart from anything else, the very medium and long-term stability of our democracy depends, critically, on our collective ability visibly and meaningfully to sustain the advance towards the creation of a non-racial South Africa.’ Thabo Mbeki ‘Employment Equity & the Birth of a Nation’ 7(28) *ANC Today* (21-26 July 2007).

It warrants pointing out that the meaning of restitutionary or affirmative action measures and their areas of application in the South African context are wide-ranging. My paper, however, will focus on the implementation of the policy in the employment context. The issues under discussion often defy neat categorisation, but I will nevertheless attempt to divide the paper into three distinct parts, each focusing on an aspect that I believe is crucial to the debate in this sphere. The first part will focus on the beneficiaries of affirmative action (the 'who' question); the second on how the benefits are extended to these beneficiaries (the 'how' question); and the third and final part on whether, if ever, there will come a time when the benefits should be withdrawn (the 'how long' question).

## 2. THE WHO QUESTION

The Constitution leaves the identity of the potential beneficiaries of affirmative action deliberately vague and open-ended, referring to 'persons or categories of persons disadvantaged by unfair discrimination'.<sup>5</sup> The Employment Equity Act 55 of 1998 (EEA), however, is less circumspect in its approach, and identifies three very distinct categories of disadvantage that warrant redress – race, gender and disability.<sup>6</sup> The Act therefore recognizes black people, women of all races, and people with disabilities as the potential beneficiaries of affirmative action in the workplace. The category 'black' is intended to encompass all those previously classified as 'African', 'Coloured' and 'Indian', meaning that it reproduces what are in fact the same racial categories and divisions that underpinned apartheid.<sup>7</sup> Henk Botha fittingly calls this 'one of the great paradoxes of South Africa's constitutional transition'.<sup>8</sup> Evidence suggests that actual implementation favours 'race' over 'gender' and 'disability', and 'African' over 'Coloured' and 'Indian'.<sup>9</sup> This should not come as a surprise, because as recently as 2005 the ANC reconfirmed that the national question in

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<sup>5</sup> Section 9(2).

<sup>6</sup> Section 1.

<sup>7</sup> See the Population Registration Act 30 of 1950, section 1 (xv), (x) and (iii). See also D Posel 'What's in a name? Racial categorizations under apartheid and their afterlife' (2001) 47 *Transformation* 50, 56.

<sup>8</sup> H Botha 'Equality, Plurality, and Structural Power', inaugural lecture, Faculty of Law, University of Stellenbosch, 8 March 2008.

<sup>9</sup> See K Bentley & A Habib 'Racial Redress, National Identity & Citizenship in Post-Apartheid South Africa' in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 21. Also see M MacDonald *Why Race Matters in South Africa* (2006) 174.

South Africa is about the liberation of the African majority.<sup>10</sup> In addition, the decision by the ANC in the late 1970s to endorse the black consciousness movement's use of the term 'black' to refer to Africans, Coloureds and Indians, was a contested one, and remains so today. Many believe that it homogenized the political experience of the three groups, underplaying their varying locations on the hierarchical structure of apartheid's racial oppression.<sup>11</sup> It also implies equal claim to post-apartheid redress, without taking into account the severity of the racial oppression of Africans and the relative advantages enjoyed by Coloureds and Indians.<sup>12</sup> This tension is at present also reflected in the discussion about so-called 'degrees of disadvantage' that has played itself out in the courts and arbitrators forums, where affirmative action plans that prioritize Africans over other designated groups have been justified on the basis of the relative disadvantage of Africans vis-à-vis Coloureds and Indians.<sup>13</sup>

Implicit in the Constitutional provision is the recognition that disadvantage and inequality take on particularly complex forms in South Africa, and that affirmative action measures may be tailored to a variety of groups, provided of course that they 'have been disadvantaged by unfair discrimination'. In *Van Heerden*, the Constitutional Court endorsed the broad sweep of section 9(2), stating that its purpose is to redress disadvantages based not only on race, but also on the basis of gender and class and 'other levels and forms of social differentiation and systemic under-privilege which still persist.'<sup>14</sup> In other words, there is an acknowledgement that disadvantage not only follows the axis of race, but that '(r)acial

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<sup>10</sup> See Bentley & Habib (note 9 above) 5.

<sup>11</sup> M Ndletyana 'Affirmative action in the public service' in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 90-91.

<sup>12</sup> Ibid.

<sup>13</sup> See, for instance, *Motala & another v University of Natal* 1995 (3) BCLR 374 (D); *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); *Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another* (2004) 25 ILJ 1716 (LC); *Public Service Association – Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 May 1998 (unreported); *Solidarity obo Christiaans and Eskom Holdings Ltd* (2006) 27 ILJ 1291 (ARB). It is submitted that the EEA provides no basis for the emphasis on 'relative disadvantage' as a criterion for differentiation among sections of the black population. The EEA expressly adopts the criterion of 'equitable representation' as the cornerstone for distinguishing between members of the designated groups (see section 2 (b) EEA), meaning that the degree to which persons of particular racial or gender groups are underrepresented in a particular occupational category or level within a workplace should guide the actual implementation of affirmative action measures, and not whether one group has been relatively more disadvantaged than another. In this regard, see *Baxter v National Commissioner, Correctional Services & another* [2006] 9 BLLR 844 (LC).

<sup>14</sup> *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC) para 27 (per Moseneke J).

cleavages are cross-cut with rural-urban, gender, class, regional and cultural divides which complicate the nature of disadvantage and discrimination.<sup>15</sup>

The virtually exclusive emphasis on race-based affirmative action denies this complexity and potentially excludes some of the most deserving beneficiaries of measures of redress. The current focus on race as the locus of redress is based on the assumption that the apartheid state was in the first instance racially exclusive, denying political and equal economic rights to a black population, and only secondarily economically exploitative.<sup>16</sup> If this is correct, the policy of redress would look much like the current policy, namely one aimed at making workplaces reflect the racialised demographics of South African society. However, this interpretation of the nature of apartheid is disputable. Many argue that it was also about class exploitation, about spatial separation, about gender domination and about the complex articulation of these and other elements.<sup>17</sup> This interpretation would favour a more nuanced approach to affirmative action – one involving the need to study each domain in which affirmative action is to be undertaken in detail, in order to identify the real sources of disadvantage suffered by the relevant individuals and groups.<sup>18</sup>

The significance of replicating apartheid's racial grid in the pursuit of redress may also have important implications for the pursuit of non-racialism, which is, we are told, the ultimate goal of a race-based strategy.<sup>19</sup> This instrumental approach of using race to overcome the effects of racial discrimination is perhaps best exemplified by the statement of Justice Blackmun of the US Supreme Court, that '[i]n order to get beyond racism, we must first take race into account'.<sup>20</sup> In *Van Heerden* the Constitutional Court endorsed this instrumental approach, regarding race-based redress as the means to ultimately achieve the non-racial

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<sup>15</sup> See *Report of the Presidential Commission to Investigate Labour Market Policy* (June 1996) (dissenting opinion of Commissioner Nicoli Natrass).

<sup>16</sup> G Maré 'The state of the state: Contestation and race re-assertion in a neoliberal terrain' in J Daniel et al (eds) *State of the Nation: South Africa 2003-2004* 25, 33.

<sup>17</sup> G Maré 'Race Counts in Contemporary South Africa' (2001) 47 *Transformation* 75, 90.

<sup>18</sup> See Alexander (note 1 above) 11.

<sup>19</sup> See *Van Heerden* (note 14 above) para 44 (per Moseneke J). Defenders of affirmative action in the United States argue along the same lines. As Dworkin writes: 'Affirmative action programs use racially explicit criteria because their immediate goal is to increase the number of members of certain races in (the) professions. But their long-term goal is to reduce the degree to which American society is overall a racially conscious society.' See R Dworkin 'Bakke's Case: Are Quotas Unfair?' in SM Cahn (ed) *The Affirmative Action Debate* (2002) 111.

<sup>20</sup> See *Regents of the University of California v Bakke* 438 US 265, 407 (1978) (Blackmun J, plurality opinion).

end.<sup>21</sup> Being instrumental, this approach requires us to assess whether race-based affirmative action programmes have the potential to bring about the non-racial ideal. If it turns out, for example, that they will exacerbate racial prejudice and hostility, thereby making it harder to achieve a truly non-racial society, that is a reason that counts against the instrumental desirability of race-based programmes.<sup>22</sup> This would not settle the matter, of course, for there might also be respects in which race-based programmes would advance the coming of a non-racial society, for example, by redistributing positions of power and authority to black people, thereby creating previously unavailable role models and changing widely held prejudicial attitudes.<sup>23</sup>

While most people today proudly proclaim commitment to a non-racial society, the meaning of the term remains elusive and is seldom interrogated. This is indeed curious, because the Constitution identifies 'non-racialism' as a 'founding value'.<sup>24</sup> It is clear that, for the term 'non-racialism' to have any meaning, it must mean more than 'non-racism' because otherwise, as MacDonald points out, 'non-racialists could call themselves non-racists and be done with it'.<sup>25</sup> The new constitutional order casts itself as both anti-racist and non-racial, confirming that the two terms do not refer to identical phenomena.<sup>26</sup> 'Non-racialism' is

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<sup>21</sup> For example, in *Van Heerden* (note 14 above), the court referred to a non-racial society as 'the long-term constitutional goal' that must be taken into account in assessing whether a redress measure will in the long-term promote equality. See para 44 (per Moseneke J).

<sup>22</sup> See RA Wasserstrom 'Racism, Sexism, and Preferential Treatment: An Approach to the Topics' 24 *UCLA LR* (1976-1977) 581, 616.

<sup>23</sup> See O Dupper 'Remedying the past or reshaping the future? Justifying race-based affirmative action in South Africa and the United States' (2005) 21 *The Int Journal of Comparative Labour Law and Industrial Relations* 89-130.

<sup>24</sup> Section 1(b) of the 1996 Constitution states that South Africa is a sovereign democratic state founded on a number of values, including '(n)on-racialism and non-sexism'. It has been noted that this is indeed a rare situation 'because there can be few, if any, societies which have declared non-racialism as a central guiding policy.' See R Taylor & D Foster 'Advancing non-racialism in post-apartheid South Africa' in M Palmberg (ed) *National Identity and Democracy in South Africa* (1999) 328-9.

<sup>25</sup> See M MacDonald *Why Race Matters in South Africa* (2006) 93. However, at times the ANC leadership confined it to this narrow meaning. At a press conference in Lusaka in 1985, Oliver Tambo, then President of the ANC, responded as follows to a question asking him to explain the difference between nonracialism and multiracialism: 'There must be a difference. That is why we say nonracial and not multiracial... We mean nonracial, rather than multiracial. We mean nonracial - *there is no racism*. Multiracial does not address the question of racism. Nonracial 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 understand by nonracial.' See Press conference, Lusaka, June 25, 1985 <<http://www.anc.org.za/ancdocs/history/or/or85-7.html>> (own emphasis added).

<sup>26</sup> Section 1 of the Constitution refers to the values of '(n)on-racialism and non-sexism'; not 'non-racism and non-sexism'. However, it is interesting to note that in *Van Heerden* (note 14 above), Justice Sachs in one place seems to use the two terms interchangeably, referring to 'the constitutional goal of achieving an egalitarian society based on *non-racism* and non-sexism,'(para 136) and in the very next paragraph reverting back to the term '*non-racialism*' (para 137) (own emphasis added).

therefore an ideal that has two objectives at its core, namely overcoming racism *and* eradicating official racialism. However, whatever the technical meaning, the term 'non-racialism' is understood by many in South Africa to mean that people are weaned from concern with race. Especially for minorities in this country, 'non racialism' means what it seems to mean: 'negating, or striving to negate, the social meaning of race.'<sup>27</sup>

To what extent, then, does race-based affirmative action contribute to this ideal? In setting out to answer this question, it becomes apparent that while there may be a rhetorical commitment to the goal of a non-racial society, open debate on the implications of race-based affirmative action for this goal is so rare that 'it may as well not occur'.<sup>28</sup> Often the link between the two is regarded as self-evident. Closer scrutiny, however, reveals that the link is a complex one, based on a particular understanding of 'non-racialism'. While 'non-racialism' may run like an 'unbreakable thread' through the history of the ANC<sup>29</sup>, its meaning has never remained stable. It has been continuously modified and recast for a variety of reasons, not least being the practical experience of the struggle against apartheid. The concept of non-racialism that developed in the course of the anti-apartheid struggle during the 1980s can be described as a transformational one. Non-racialism as an ideal of societal transformation refers to a process in which a commitment to the eradication of both the practices of apartheid and the system of ideas concerning 'race' on which these practices were built is complemented by a concerted programme to provide wide-ranging redress for the disadvantages that the majority of South Africans suffered in the past.<sup>30</sup> On this view, the principle of non-racialism, far from precluding the adoption of racist policies, instead makes it an essential element. To put it simply, talk of non-racialism is nonsensical in the context of a society characterised by deeply entrenched socio-economic inequalities that are largely racially-based. Unless these racially-based inequalities are redressed by means of racially-based measures, as one commentator has noted, 'whites will remain subjects and

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<sup>27</sup> MacDonald (note 25 above) 174.

<sup>28</sup> Maré (note 17 above) 89.

<sup>29</sup> This is the claim that Julie Frederikse makes in her book, *The Unbreakable Thread: non-racialism in South Africa* (1990). This is a disputed claim. If such an enduring feature of the ANC, some commentators ask, why did the ANC wait until 1969 to adopt a restricted open-membership policy towards whites and other racially designated members? See H Bernstein 'The Breakable Thread' (March/April 1991) *The Southern African Review of Books* 3, 20-21 (cited in N Ndebele 'The African National Congress and the policy of non-racialism: a study of the membership issue' (2002) 29(2) *Politikon* 133, 134).

<sup>30</sup> See J Sharp 'Non-racialism and its discontents: a post-apartheid paradox' (June 1998) 50 (156) *International Social Science Journal* 243, 243.

blacks objects, just as before'.<sup>31</sup> This means that claims to racial exclusivity inherent in race-based redress may function, paradoxically, as a means by which the disadvantaged press for a proper deracialisation of society.

However, there are certainly significant costs involved in the replication of apartheid's racial categories. One of the consequences of making these categories salient is that it gives them, to borrow Melissa Nobles's phrase, an 'illusion of ordinariness',<sup>32</sup> which prevents a critical and reflective consideration of the socially meaningful existence of races. Race – especially the idea that South African society is comprised of four distinct races – is simply a given in the manner in which we think of society. It becomes a habit of thought and experience, a facet of everyday 'common sense', an explanation of events, behaviours, the past, present and future that is considered adequate and obvious, requiring no elaboration.<sup>33</sup> In addition, it gives legitimacy to thoroughly discredited bioculturalist categorisations of race, which may be one of the more disturbing ironies of post-apartheid redress.<sup>34</sup> There is no need to question apartheid's race allocations, as the present provides us with a seamless continuity, accepting the validity of and the ability to recognise races that are so necessary for policies based on this construction.<sup>35</sup> Studies also indicate that people still overwhelmingly claim a

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<sup>31</sup> MacDonald (note 25 above) 176.

<sup>32</sup> M Nobles *Shades of Citizenship: race and the census in modern politics* (2000) 180 as cited in Maré (note 17 above) 82.

<sup>33</sup> See Mare (note 17 above) 89-90; Posel (note 7 above) 51.

<sup>34</sup> Posel (note 7 above) 71.

<sup>35</sup> Mare (note 17 above) 89. As Deborah Posel points out, this, of course, begs a very important (but ignored or hidden) question, namely how, in a post-apartheid era, do we determine who is 'African', 'Coloured', 'White' and 'Indian'? Unlike under apartheid, it is not so easy to allocate people into racial boxes because the 1951 *Population Registration Act* that allocates people to different groups no longer exists. See Posel (note 4 above) 68. In addition, as Bentley notes, 'if the post-apartheid project is successful, and segregation between the races fades (or even disappears altogether), it will become impossible to enforce policies and laws that rely on racial classification, because the hard and fast racial segregation that apartheid relied upon is supposed to disappear.' See K Bentley 'Rethinking the ultimate goal of affirmative action: who and what is it for', paper prepared for the 61st Harold Wolpe Memorial Trust Open Dialogue, 19 July 2007, p 2. The EEA proceeds on a model of 'self-classification', placing the authority to define membership in one of the designated racial groups on the individual concerned. Item 5.3.10 of the *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices* (Notice 1358 of 2005) provides as follows: 'It is preferable for employees to define themselves to enable the employer to allocate them to a designated group. Only in the absence of an employee's self identification, can an employer rely on existing or historical data to determine the employee's designated group status' (item 5.3.10). Presumably, in order for the affirmative action policy to function effectively, it must preclude those previously advantaged from defining themselves as African, Coloured or Indian for convenience. In the unlikely event of this happening, it would place the employer in the difficult position of having to determine the particular individual's racial category on the basis of 'existing or historical data'.

racialised identity as their primary means of describing themselves.<sup>36</sup> This should not be surprising because ‘the everyday banality of race classification’<sup>37</sup> permeates South Africa on an regular basis: from meeting the requirements of the EEA, to gaining or being refused admission to universities, to registering births, to completing a census form – all require the specification of ‘race’ or ‘population group’ or ‘ethnic group’ (where these all mean exactly the same thing).<sup>38</sup>

To be sure, race-based redress may have contributed to an ideal of non-racialism in other ways. The value of making workplaces and educational institutions more racially representative can hardly be underestimated. It provides an opportunity for individuating interaction between members of different groups and for the creation of cross-cutting sources of social identity, which, while not guaranteed to eliminate inter-group prejudice, are unquestionably necessary to that end.<sup>39</sup> Social identity theory suggests that placing members of different social categories into situations involving cooperative interdependence and individuating social interactions also appears to reduce categorical responding.<sup>40</sup>

It may well be that in the particular case of South Africa, the costs associated with a race-based approach would have to be significant in order to outweigh the benefits. After decades of formal racial classifications, on the basis of which some of South Africa’s most fundamental social goods such as employment, land, housing and education were distributed, it is only to be expected that these racial categories will retain salience in South African society for some time to come. These ‘racial groups’ were, in effect, *created* by the original unjust practice of racial discrimination, and to deny that fact (by pursuing a policy of ‘colour blindness’ or by denying that races exist) would be to deny a social reality – a reality that cannot morally be ignored as long as the wrongs that created them have not yet been

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<sup>36</sup> See A Zegeye, I Liebenberg & G Houston “Resisting Ethnicities from Above: Social Identities and Democracy in South Africa” in Y Muthien et al (eds) *Democracy and Governance Review: Mandela’s Legacy 1994-1999* (2000) 164.

<sup>37</sup> Mare (note 17 above) 82.

<sup>38</sup> Ibid.

<sup>39</sup> See L Hamilton Krieger ‘Civil Rights Perestroika: Intergroup Relations After Affirmative Action’ (1998) 86 *California LR* 1251, 1276.

<sup>40</sup> Ibid.

rectified.<sup>41</sup> Nonetheless, even if this view is accepted, it does not relieve us of the burden to ensure that, in the words of Justice Sachs, ‘the baby of non-racialism is not thrown out with the bath-water of remedial action.’<sup>42</sup> There may come a point where the benefits of race-based redress no longer outweigh the harm of perpetuating race consciousness. In this regard, the democratic state has a particular responsibility – one that derives from numerical and political power – of reshaping the way in which we identify ourselves. If it is agreed that identities are not given but constructed, the state has a vital role to play in creating non-racial South Africans through full citizenship in the universal state.<sup>43</sup> If, however, it turns out that ‘the state’s non-racialism is merely formal, it follows, as MacDonald points out, ‘that the non-racial people [will] remain merely formal too.’<sup>44</sup>

### 3. THE HOW QUESTION

Amartya Sen has written extensively on the idea of the diversity of spaces in which equality may be demanded and pursued. Any proposal that addresses problems in the social sphere, must, to avoid a charge of being arbitrarily discriminatory, demand equality of something. But, to borrow Sen’s now classic question, *equality of what?*<sup>45</sup> A choice has to be made (based on acceptable reasons, of course) and this choice will inevitably lead to people being treated unequally in other respects. To quote Sen: ‘Equality in what is seen as the “base” is invoked for a reasoned defence of the resulting inequalities in the far-flung “peripheries”.’<sup>46</sup> What is base and what periphery, and how to justify the choice made, naturally raise difficult issues, which for reasons of time and space I am unable to explore here. However, one advantage of taking this approach, and an important one, is that it draws attention to the fact that certain measures in the pursuit of equality involve treating people unequally. This

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<sup>41</sup> See O Dupper ‘In Defence of Affirmative Action in South Africa’ (2004) 121 *SALJ* 187, 213. I of course do not mean to imply that racial categories have fixed scientific referents beyond the presence of genes for mere morphological features such as skin pigmentation or facial features. I am merely pointing out that the vague and unquantifiable bundle of characteristics that South African society associates with various “racial” identities has had, and continues to have, a dramatic impact on a people’s lives. In this respect I therefore agree with Christopher Ford’s claim that race is real while at the same time being wholly illusory. See C Ford ‘Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action’ (1996) 43 *UCLA LR* 1953. 2000. For a discussion of the contingency of racial identification, see A Gutman ‘Responding to Racial Injustice’, and A Appiah ‘Race, Culture, Identity: Misunderstood Connections’ in KA Appiah & A Gutman *Color Conscious* (1996) 30-105.

<sup>42</sup> *Van Heerden* (note 14 above) para 137.

<sup>43</sup> See Alexander (note 1 above) 11.

<sup>44</sup> MacDonald (note 25 above) 174.

<sup>45</sup> A Sen *Inequality Reexamined* (1992) 19.

<sup>46</sup> *Ibid.*

much the Constitutional Court acknowledged in *Van Heerden*, noting that the achievement of equality may often come at a price for those who were previously advantaged.<sup>47</sup>

However, the Court noted, because the long-term constitutional value of equality is the establishment of a 'non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity', the 'price' that the previously advantaged have to pay must be a reasonable one.<sup>48</sup> This tension between, on the one hand, ensuring equal treatment of all citizens regardless of certain characteristics such as race or sex, and on the other hand, achieving a more equal distribution of welfare or resources among citizens that may in some instances require different treatment on the grounds of those very same characteristics, is a familiar one, and one that has also confronted courts in other jurisdictions. The predominant method of resolving this tension in Europe is to use a test of 'proportionality', whereas in the United States courts apply the equivalent test of 'strict scrutiny'. The essence of these tests is that specific measures designed to achieve substantive equality (such as affirmative action) must not be disproportionate violations of the equal treatment principle.<sup>49</sup> In *Van Heerden*, the Constitutional Court stressed that the resolution of this difficult question is not an abstract one, but one that is influenced by each country's constitutional design, history and social context.<sup>50</sup> Ours enjoin courts to adopt an approach to equality that goes beyond equal treatment to some understanding of social and economic equality between individuals or groups.<sup>51</sup>

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<sup>47</sup> *Van Heerden* (note 14 above) para 44 (per Moseneke J).

<sup>48</sup> *Van Heerden* (note 14 above) para 44 (per Moseneke J). I will unfortunately not be able to discuss the highly interesting question of why those who have benefited in the past should now bear the costs of affirmative action. Suffice it to state that my views correspond largely with those of Amy Gutman, who writes: 'Those of us who have unfairly benefited in the past... have special obligations...to help others. We have these special obligations not because we asked to be unfairly advantaged, but because we *have been* and *are* unfairly advantaged. Because being white and affluent has been a source of unfair benefits in this country, fairness generates special obligations that are color- and class-conscious.' (Gutman (note 41 above) 342, emphasis in original). Also see Ross, who criticizes the invocation of the 'rhetoric of innocence' by those belonging to the previously advantaged sector of the society in order to place limits on affirmative action: '...(T)he rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of [black people], that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways. Thus, the rhetoric of innocence obscures this question: What white person is "innocent," if innocence is defined as the absence of advantage at the expense of others?' See T Ross 'Innocence and Affirmative Action', (1990) 43 *Vanderbilt LR* 297, 301. Also see K Sullivan 'Sins of Discrimination: Last Term's Affirmative Cases' (1986) 100 *Harvard LR* 78, 97 (also criticising the rhetoric of innocence and its search for perpetrators and victims).

<sup>49</sup> See H Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern LR* 16, 18.

<sup>50</sup> *Van Heerden* (note 14 above) para 29 (per Moseneke J).

<sup>51</sup> As Albertyn and Goldblatt point out: 'In rejecting a formal or abstract notion of equality which ignores concrete differences in a quest for equal treatment regardless of those differences, the Constitutional Court has aligned itself with an understanding of equality which seeks to address and remedy material inequalities. A

In implementing this approach the Constitutional Court held that the level of scrutiny of affirmative measures is lower than that which applies to claims of unfair discrimination. In particular, there is less emphasis on the negative impact of the measure - which would generally be on an advantaged group - and more emphasis on the group that is to be advanced.<sup>52</sup> Nonetheless, courts must still ensure that the measure does not amount to 'an abuse of power' and that it does not impose 'substantial and undue harm' or 'disproportionate burdens' on those excluded from the measure.<sup>53</sup> Ultimately, transformation must be carried out responsibly and its adverse impact minimised.<sup>54</sup> Otherwise, courts have a 'duty' to intervene.<sup>55</sup>

The interests of the previously advantaged often loom particularly large in the employment context, where persons belonging to this group are often passed over for appointment or promotion in the pursuit of an affirmative action policy. This raises the following question: under which circumstances would courts consider the failure to be appointed or promoted to be a disproportionate burden and worthy of intervention? The question really goes to the magnitude of the preference afforded to members of the disadvantaged groups in the pursuit of an affirmative action policy. In other words, when competing claims for scarce resources, such as jobs, are weighed, 'how heavy is the thumb that affirmative action actually places on the scales?'<sup>56</sup> This question is important because the larger the preference, the greater its tension with the merit principle (and it is worth pointing out that this is so however one conceives of merit)<sup>57</sup> and the greater the amount of disruption of the interests of the non-preferred.

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commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development.' See C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 250.

<sup>52</sup> *Van Heerden* (note 14 above) paras 78-80 (per Mokgoro J); see also C Albertyn 'Equality' in H Cheadle and D Davis (eds) *South African Constitutional Law: The Bill of Rights* (2004) 4-26.

<sup>53</sup> *Van Heerden* (note 14 above) para 44 (per Moseneke J) and para 152 (per Sachs J).

<sup>54</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 106 (per Ngcobo J).

<sup>55</sup> *Van Heerden* (note 14 above) para 152 (per Sachs J).

<sup>56</sup> See PH Schuck 'Affirmative Action: Past, Present, and Future' (2002) 20 *Yale Law and Policy Review* 1, 17.

<sup>57</sup> Affirmative action preferences have, in many ways, diverted our attention from the biases inherent in the construction of merit. The familiar argument that all appointments made purely on merit constitute an unacceptable lowering of standards derives some of its force from the erroneous notion that we would have a meritocracy were it not for affirmative action. See Wasserstrom (note 22 above) 619. It is based on an

The *least disruptive* effect on their interests would occur when the preference merely serves as a tie-breaking factor between two 'equally qualified' candidates for a position.<sup>58</sup> This would cause marginal harm to those excluded, and in terms of the *van Heerden* analysis, not fall foul of section 9(2). However, as one court made clear, to argue that affirmative action considerations should only play a role where the candidates have the same qualifications and merits would not advance the achievement of equality 'in a situation where a society emerges from a history of unfair discrimination.'<sup>59</sup> The *most disruptive* of the interests of the non-preferred would be the appointment of someone wholly unqualified for the position and incapable of doing the job required of him or her. This would cause 'substantial and undue harm' to those excluded from the measure and no doubt fall foul of section 9(2).<sup>60</sup>

We see then that the two extreme positions set out above yield relatively easy answers. Requiring equal qualifications would impose marginal harm on those excluded, but would have limited effect.<sup>61</sup> Using race as the only criterion for appointment would not only be

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assumption that 'merit' is verifiable, determined by objective, pre-existing standards. However, for the most part, employers who allocate a job on the basis of merit properly define it in their own ways. Merit's content is wholly contextual; it derives meaning only from one's particular conditions and purposes. See Schuck (note 56 above) 7. Therefore, as Stanley Fish points out, the '(m)erit is not one thing but many things, and even when it becomes a disputed thing, the dispute is between different versions of merit and not between merit and something base and indefensible.' See S Fish 'The Nifty Nine Arguments Against Affirmative Action in Higher Education', *The Journal of Blacks in Higher Education* (Spring 2000) 79, 80.

<sup>58</sup> This essentially represents the approach adopted by the European Court of Justice in respect of affirmative action. See O Dupper 'Affirmative Action in South Africa: (M)any Lessons for Europe?' (2006) 39 *Verfassung und Recht in Übersee* (Law and Politics in Africa, Asia and Latin America) 135, 161 and the cases referred to there. Whether it is possible to determine when two candidates possess 'equal qualifications', is of course open to debate.

<sup>59</sup> *Stoman v Minister of Safety and Security and others* 2002 (3) SA 468, 482. This raises an interesting question, namely whether initiators of affirmative action who implement affirmative action on this limited and 'weak' basis can be compelled to adopt a more robust approach to affirmative action. The court in *Stoman* characterized the implementation of affirmative action on this basis as 'too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality' (see *Stoman* at 482). In other words, does section 9(2) of the Constitution (or Chapter 3 of the EEA) provide a sword to those who want to compel, for example, an employer to implement affirmative action measures or, if already being implemented, to implement it in a manner more in keeping with the constitutional vision of equality? The prevailing opinion (both under the Constitution and the EEA) militates against such a view (see Albertyn (note 49 above) 4-31; *Dudley v City of Cape Town* [2004] 5 BLLR 413 (LC); *Cupido v Glaxosmithkline SA (Pty) Ltd* (2005) 26 ILJ 868 (LC)). However, it is submitted that the last word has not been spoken in this regard. When the *Dudley*-decision reached the Constitutional Court, the Court refused to hear the matter, citing lack of jurisdiction (see *Dudley v City of Cape Town* 2005 (5) SA 429 (CC). See also *Harmse v City of Cape Town* [2003] BLLR 557 (LC).

<sup>60</sup> See *Stoman* (note 59 above) 482. The more general point is that tokenism, that is to say appointing a black person or woman solely on the basis of race or sex, would be irrational.

<sup>61</sup> As one commentator in Europe notes: 'While their validity by E.C. standards is beyond question, the effectiveness of positive action plans is a different matter. Where these schemes have been applied, the proportion of women in the workplace has remained static rather than having improved. One reason for this

irrational, but impose undue burdens on those excluded.<sup>62</sup> The more difficult situations arise between these two extremes. It would be myopic to deny that immense weight is given to race in situations where certain positions or places are expressly set aside on that basis. However, when would the point be reached when, in the words of Denise Meyerson, ‘any further sacrifices of the principle of merit would make not only whites but also blacks worse off?’<sup>63</sup>

The EEA gives us at least one indication. In terms of the EEA, candidates from designated groups will have to meet two criteria before being considered for appointment or promotion under an employment equity plan. The first is membership of the designated group; the second proof that they are ‘suitably qualified’.<sup>64</sup> The definition of ‘suitably qualified’ in the Act indicates that membership in a ‘designated group’ is not only a tie-breaking factor when two candidates are equally qualified, but is a consideration that may even outweigh other qualifications, provided the person in question has, in the view of the employer, the potential to ‘grow’ into the job within what is seen to be a reasonable period of time.<sup>65</sup> I have argued elsewhere that despite the broad and seemingly open-ended definition of ‘suitably qualified’, employers should nevertheless employ the idea of a ‘threshold of performance’ that candidates for a certain position must attain.<sup>66</sup> A strategy whereby it is

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may lie in the plans’ most debatable feature – the need to demonstrate equivalent qualifications of male and female candidates before any preferential criterion is triggered.’ D Caruso ‘Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives’ (2003) 44 *Harvard Int LJ* 331, 341-342.

<sup>62</sup> In *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC), for example, the Court held that the appointment of someone solely on the basis of name and race, without considering the applications properly, and without conducting interviews, constitutes an absolute barrier for those belonging to the disfavoured race. As the court said in this case, the employer may as well have said that ‘whites and Indians need not apply for the position’ (at 1961). This amounts to a situation that Justice Sachs in *Van Heerden* refers to as ‘hand-outs given simply on the basis of race.’ (para 156). It bears pointing out that the EEA does not preclude the use of quotas (see section 15(3)), nor does it preclude the employer from adopting a policy that places a moratorium on the employment of members of the non-designated group, namely white males. Section 15(4) of the EEA provides that ‘subject to section 42, nothing....requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups’. This section, in effect, provides that an employer cannot be forced to establish policies or practices that eliminate non-designated groups from prospective employment or continued employment. This is not to say an employer is precluded from doing so. It would be permissible when justified, and could even be ‘required’ to achieve the demographic targets referred to in section 42 (see note 35 above). In fact, establishing a fixed quota for members of designated groups in effect means that those set-aside positions operate as an absolute barrier for members from the non-designated group. This is the way quotas normally work in practice.

<sup>63</sup> See D Meyerson ‘How Useful is the Concept of Racial Discrimination?’ (1993) 110 *SALJ* 575, 579.

<sup>64</sup> Section 15; 20(3) EEA.

<sup>65</sup> A ‘suitably qualified person’ is defined as a person who may be qualified for a job as a result of any one of, or any combination of, that person’s formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job. Section 20(3) EEA.

<sup>66</sup> Dupper (note 41 above) 207-209.

enough simply to be a member of a group with some qualification may lead to a level of performance below this threshold, and surely reinforce rather than change stereotypical and prejudicial views towards members of disadvantaged groups.

Indications are that the failure to take a 'threshold of performance' into consideration occurred with some regularity in the public service. The transformation of the public service from one that was overwhelmingly white and male in 1994 to one that is today broadly reflective of national racial demographics is nothing short of remarkable,<sup>67</sup> and has far surpassed that of the private sector.<sup>68</sup> However, many have argued that the accelerated drive to transform the public service often led to the appointment of people who did not have the qualifications, experience, commitment or culture of service needed to be productive and loyal public servants.<sup>69</sup> In short, it led in certain instances to the appointment of people who were not 'suitably qualified'. By 2003 even the state admitted that the shakeout of the public service had been severe and even counter-productive.<sup>70</sup> It led to a skills exodus and, most importantly, has impeded the state's ability to spend revenue and deliver effective services, something that impacts most adversely on the poorest and most marginalized of the citizenry.<sup>71</sup>

As a general rule, courts will be reluctant to interfere with the manner in which employers define 'suitably qualified.' However, when these criteria amount to 'insurmountable obstacles' for members of the disfavoured group, they have not survived judicial scrutiny. For example, in a decision regarding the appointment of regional magistrates, the High Court

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<sup>67</sup> In 1994, 94% of the management echelon of the public service was white and 97% was male. The current racial composition of the population is 77.9% African, 8.5% Coloured, 2.5% Indian, and 11.1% White; while the racial composition of the public service at national level is 74% African, 10.0% Coloured, 4.0% Indian, and 12% White. The same holds true for the public service at provincial level. See K Naff 'Passive Representation In The South African Bureaucracy: A Lot Has Happened, But It's A Lot More Complicated' 17 (unpublished paper on file with the author) 7, 12. Also See V Naidoo 'Assessing Racial Redress in the Public Service' in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 99.

<sup>68</sup> See Naidoo (note 67 above) 112-113. The difference between the implementation of affirmative action in the public- and private sectors is an interesting topic, and worthy of separate analysis. Suffice it to say that the goals of transformation in the two sectors differ significantly, and impacts on the manner in which transformation is pursued. See Ndletyana (note 11 above) 80.

<sup>69</sup> See, for example, S Terreblanche *The History of Inequality in South Africa: 1652-2002* (2002) 447-448; Alexander (note 1 above) 5.

<sup>70</sup> See G Ruiters 'Public Services: Transformation or Stasis' in *Public Services Yearbook 2005/6* 129.

<sup>71</sup> Ibid 129. Also see K Bentley & A Habib 'An alternative framework for redress and citizenship', in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 342. Naidoo, however, warns that it is difficult to make a causal connection between redress and efficiency in the public service in light of the massive increase in the mandate of the post-apartheid public service. See Naidoo (note 67 above) 117.

held that a formula allocating marks to applicants based on race and gender, and resulting in the automatic exclusion of any white male in competition for a position with a black female, irrespective of qualifications, experience or skills, amounts to an unacceptable barrier.<sup>72</sup> In addition, courts have also been willing to investigate whether the criteria that comprise suitable qualifications have been applied properly. For example, in the case of *Greater Louis Trichardt Transitional Local Council*, the Labour Court overturned the appointment of a person to the position of town treasurer in part because the employer failed to demonstrate that any of the criteria for the position were considered in making the appointment, including the potential to develop the ability to perform the work.<sup>73</sup>

Efficiency considerations in the private sector are largely self-enforcing, with financial incentives compelling employers to define 'merit' in a manner that advances their own interests. Private employers will therefore, as a matter of self-interest, sail quite close to merit principles despite the relatively open-ended definition of 'suitably qualified' contained in the EEA. However, because this mechanism is less salient in the public service, legislation has to step in to fill the void. In South Africa the need to balance equality with efficiency considerations finds expression in the Constitution. The Constitution states that the public service must be both 'broadly representative' and 'efficient', and the police service must discharge its responsibilities 'effectively'.<sup>74</sup> To be sure, these two objectives (promotion of equality and efficiency) need not necessarily be in conflict. As the court pointed out in *Stoman*, a police service 'could hardly be efficient if its composition is not ... representative of the population or community it is supposed to serve.'<sup>75</sup> The argument is simple: only a police force representative of the community it serves will enjoy the trust, co-operation and the support of that community needed to perform its functions effectively. This means that the appointment of a suitably qualified African male over a white female to the position of captain in a police station variously described as 'an old apartheid style police station' and a 'bastion of white privilege', can be justified on efficiency grounds.<sup>76</sup>

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<sup>72</sup> See *Du Preez v Minister of Justice and Constitutional Development and others* [2006] 8 BLLR 767 (SE).

<sup>73</sup> See *IMAWU v Greater Louis Trichardt Transitional Local Council* (2000) ILJ 1119 (LC).

<sup>74</sup> See section 195(1) and section 205(2).

<sup>75</sup> *Stoman* (note 59 above) 482.

<sup>76</sup> See *Fourie v SAPS* (2004) 25 ILJ 1716 (LC) at 1732 and 1735, where the court upheld the contention of the respondent that the appointment of a white woman in an overwhelmingly white police station would not have promoted efficiency, while the appointment of an African male would increase the legitimacy of the police in the eyes of the community that it is meant to serve.

However, there may be situations in which the goal of the achievement of equality will yield to efficiency considerations. For example, in *Coetzer v Minister of Safety and Security*,<sup>77</sup> the employer decided to keep positions in its explosives unit open rather than filling them with suitably qualified members of the non-designated group. The court held that the balance between the imperatives of representivity and efficiency should be a rational one.<sup>78</sup> In this case, however, the employer had failed to embark on this balancing exercise, thereby ignoring the constitutional imperative that the police service should maintain its efficiency.<sup>79</sup>

The decision in *Coetzer* casts doubt on the lawfulness of what some studies indicate has become common practice in the public service, namely the refusal to fill positions even though qualified members of the non-favoured groups are available.<sup>80</sup> If one takes into consideration the fact that the public service is experiencing an alarmingly high rate of vacancies, especially at senior management level, this judgment takes on additional significance.<sup>81</sup>

#### **4. THE HOW LONG QUESTION**

When, if ever, will we be able to say that we have had enough affirmative action, and that it should end? Opponents of affirmative action, who argue that legislation such as the EEA should contain a so-called 'sunset-clause' stipulating that racial and other preferences will be abolished at a specified future date, have posed this question with regularity. Unless a specific cut-off date is established, they argue, affirmative action has the potential to become, at best, a permanent feature on the political landscape of the country and, at worst, an institutionalized racial spoils system.

It is widely acknowledged that affirmative action is a temporary measure with a specified goal or goals. Once these are achieved, the case for affirmative action is correspondingly

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<sup>77</sup> (2003) 24 ILJ 163 (LC).

<sup>78</sup> Ibid 173.

<sup>79</sup> Ibid 176-177. It is interesting to note that in American law, it is an established principle that goals must be waived if qualified members of the targeted group cannot be found. See E Anderson 'Integration, Affirmative Action, and Strict Scrutiny' (2002) 77 *New York University LR* 1195, 1248 and the cases referred to there.

<sup>80</sup> Bentley & Habib (note 71 above) 343.

<sup>81</sup> Vacancies at especially senior management level has taken on alarming proportions, where it ranges between 44 and 48 per cent in departments such as Justice and Constitutional Development, Home Affairs and Trade and Industry. The average vacancy rate at senior management level is slightly more than 25 per cent. See Naidoo (note 67) 122-123.

weakened and continued efforts in the interest of affirmative action might well be regarded as discriminatory. The question of the duration of affirmative action programmes is therefore closely tied up with the justification that is offered for its existence. If the justification is purely backward-looking, namely as a form of compensation for past discrimination, then a convincing argument may exist for establishing a specific expiration date for its demise.<sup>82</sup> In *van Heerden*, for example, the purpose of the differentiated employer contributions to the pension scheme was indeed backward-looking, namely to ameliorate past disadvantage, and therefore had a finite lifespan of five years.

However, affirmative action in South Africa is not only justified as a remedial, backward-looking measure, but also as a way of redressing existing inequality. This is a more amorphous goal, which makes the establishment of a specific expiration date difficult, if not impossible. What is important to note, however, is that this relatively open-ended goal is again given more specific meaning in the employment context. The EEA makes it clear that inequality in the employment context manifests itself in the under-representation of members of disadvantaged groups. The goal is therefore one based on more equitable representation, determined primarily with reference to the relevant regional, provincial or national demographic data.<sup>83</sup> Does this mean that once the workplace is more representative (however this may be defined by the employer), affirmative action should end? This question yielded opposing answers in two recent decisions of the Labour Court. In *Willemse*, the court held that where an employer had adopted a policy stating that once targets have been reached, 'merit' should be the only consideration for appointment, continued consideration of race and gender after the targets had been met were unfair.<sup>84</sup> However, in the case of *Alexandre* the Court expressed doubt that a policy committing an employer to end affirmative action once targets have been reached 'advances the spirit and purpose of employment equity and the notion of substantive equality'.<sup>85</sup> It is thus not for the employer to decide when to call an end to affirmative action, even if that decision may have been the result of agreement between the employer and employees.<sup>86</sup>

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<sup>82</sup> See Anderson (note 79 above) 1251.

<sup>83</sup> Section 42 of the EEA lays down an objective criterion in this regard, referring to the 'demographic profile of the national and regional economically active population'. See also the Code of Good Practice on Preparation, Implementation and Monitoring of Employment Equity Plans 7.3.2 (b).

<sup>84</sup> *Willemse v Patelia NO & Others* (2007) 28 ILJ 428 (LC) at par 73.

<sup>85</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 777.

<sup>86</sup> One of the duties of a designated employer is to consult with its employees on the content of the Employment Equity Plan. See sections 16 and 17 of the EEA.

The implication is that affirmative action measures may be used not only to *attain* equitable representation, but also to *maintain* it once the targets set have been reached. In the United States, on the other hand, the Supreme Court made it clear that an employer may only aim to ‘attain’ but never to ‘maintain’ a racial balance in the workforce.<sup>87</sup> This reflects the narrow compensatory idea that employers may practice affirmative action only to compensate for their own past sins – a significant constraint on workplace affirmative action measures in the United States.<sup>88</sup> This restrictive requirement is not part of our law and, in my view, the court in *Alexandre* appropriately cautioned against its incorporation. The possibility of experiencing what one commentator calls a ‘re-segregation nightmare’<sup>89</sup> once an end to affirmative action is announced is a real possibility in South Africa given the extent to which inequality and disadvantage have solidified to become part of the very structure of society. To be sure, *maintaining* rather than *attaining* ‘equitable representation’ will impact on the status of affirmative action. It may mean a supporting rather than a leading role, but a role nonetheless.

At the end of this part of the paper, I want to return to a thesis that I advanced at the outset, namely that inequality and disadvantage have complex root causes. If we are serious about addressing disadvantage in all its complexity, then race-based redress seems a very blunt instrument indeed. This becomes even more apparent as the current transformation project begins to shift the social and economic relations of our society. Economists like Sampie Terreblanche and Nicoli Nattrass have pointed out that while the gap between blacks and whites has decreased in recent years (although it still remains a matter of concern), there has been a sharp increase in the levels of inequality *within* racial groups, especially among Africans.<sup>90</sup> Thus while *interracial* inequality has declined, *intra-racial* inequality has increased. While this intra-racial inequality has its origins in the political and economic changes that occurred during the last 20 years of apartheid, it has increased significantly

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<sup>87</sup> See *Johnson v. Transport Agency* 480 U.S. 616, 639 (1987).

<sup>88</sup> See Anderson (note 79 above) 1215. Also see Sullivan (note 48 above) 78.

<sup>89</sup> Schuck (note 56 above) 73. There is considerable evidence in the United States that the end of affirmative action at certain universities led to an immediate and calamitous drop in black admissions, indicating the need for continued affirmative action to maintain the level of enrolment. See S Issacharoff ‘Can Affirmative Action be Defended?’ (1998) 59 *Ohio State LJ* 669, 675.

<sup>90</sup> See Terreblanche (note 69 above) 400; J Seekings & N Nattrass *Class, Race, and Inequality in South Africa* (2005) 307-308.

during the past fifteen years as the race-based redress project begins to take effect.<sup>91</sup> Affirmative action has been remarkably successful at deracialising the apex of the class structure, but has left the lower levels largely untransformed.<sup>92</sup> While the creation of a black elite may be an important moral and strategic imperative in South Africa,<sup>93</sup> the process of creating this elite has highlighted the limitations of an exclusively race-based strategy.<sup>94</sup> It has created a small group of increasingly multiracial 'insiders' who participate in and benefit from South Africa's prosperity, while the large group of 'outsiders' who are poor, unemployed, and disproportionately rural and young, remains almost exclusively black.<sup>95</sup> The continuous shifts in South Africa's social and economic relations as a consequence of current race-based redress strategies in my view demand a re-evaluation of the very strategies themselves.

Such a re-evaluation, for instance, ought to revive class as a tool of analysis in South Africa – something that since 1994 has largely been relegated to the past, where it had occupied such a central role in the analysis of apartheid and in constructing visions for the future.<sup>96</sup> Other than in the United States, where affirmative action based on class or socio-economic status will disproportionately benefit whites who, by simple force of numbers, still make up the majority of the poor in that country,<sup>97</sup> apartheid and segregation bequeathed to South Africa a class structure that is largely, although by no means exclusively, racially defined.

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<sup>91</sup> Terreblanche (note 69 above) 133. The most widely used measure of the degree of inequality in a household income distribution is the Gini coefficient. The lower the value of the Gini coefficient, the more equally household income is distributed. A Gini of 0 denotes perfect equality (all individuals in the population receive the same income), while a Gini of 1 denotes perfect inequality (one individual in the population earns everything). The most recent Gini coefficient figures are as follows: African 0.63; Coloured 0.59; Indian 0.57; White 0.56. See Statistics South Africa *Income and expenditure of households 2005/2006: Analysis of results* (2008) 35.

<sup>92</sup> Bentley & Habib (note 9 above) 22.

<sup>93</sup> See Terreblanche (note 69 above) 133, Bentley & Habib (note 71 above) 347; MacDonald (note 25 above) 150, 154-158.

<sup>94</sup> As Benatar notes, '[Those who are most disadvantaged by injustice] are so disadvantaged that they often cannot even begin to compete for the positions that beneficiaries of racial affirmative action obtain. D Benatar 'Affirmative Action Not the Way to Tackle Injustice', Inaugural lecture, University of Cape Town, 11 April 2007. This argument also has echoes in the US debate. See, for example, *Fullilove v Klutznick* 448 US 448, 538 (1980) (Stewart, J., dissenting) ('[T]hose who are the most disadvantaged . . . are the least likely to receive any benefits from the special privilege.') and the discussion in R Kennedy 'Persuasion and Distrust: A Comment on the Affirmative Action Debate' (1986) 99 *Harvard Law Review* 1327, 1333-1334..

<sup>95</sup> MacDonald (note 25 above) 158; See Seekings & Nattrass (note 90 above) p 343.

<sup>96</sup> Gerhard Maré points out that 'anti-apartheid writing, until the transition in 1994, was filled with intense and widely accessible debate on the essentially class exploitative nature of capitalist South Africa.' See Mare (note 17 above) 87.

<sup>97</sup> However, it must also be pointed out that even though there are more poor whites than poor Latinos or Blacks, white poverty rates are lower than that of the latter two groups. See DC Malamud 'Assessing Class-Based Affirmative Action' (1997) 47 *Journal of Legal Education* 452, 465.

And, as Adam Habib points out, this broad overlap between race and class categories ‘allows for a situation where a redress strategy with class objectives at its core would in substance have the effect of mediating historical racial disparities...without reinforcing racial identities and aggravating racism.’<sup>98</sup> There may also be a strategic advantage to use socio-economic considerations rather than race as the basis of a redress strategy. In a recent analysis of a variety of surveys, Steven Friedman and Zimitri Erasmus conclude that while there is a degree of openness to redress on the part of white South Africans, framing it exclusively in racial terms is not the most effective way of securing their acquiescence. Where possible then, they argue, ‘redress is least likely to face resistance where measures which would serve to redress racial inequities can be phrased as anti-poverty measures rather than as a means of reversing racial power and privilege, even if this is ultimately the goal.’<sup>99</sup>

What my analysis points to is the need for a more nuanced approach to affirmative action – one that takes account of the complexity of disadvantage and of the continuous shifts taking place in our social and economic relations.<sup>100</sup> In this regard, much can be learned from the Indian example. India has tackled with some sophistication the issue whether different, particular groups have different needs for affirmative action. India maintains an extensive list of disadvantaged groups and use empirical factors, including social discrimination, educational deprivation and economic status, to determine group status. Some groups - the most disadvantaged - have their own independent quotas, generally proportional to population. Other groups also receive a set-aside, but one smaller than their population share. Individual entitlements may depend on whether the relevant individuals have been

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<sup>98</sup> A Habib ‘Conversations with a Nation: Race and Redress in South Africa’, in E Pieterse & F Meintjies (eds) *Voices of the Transition: The Politics, Poetics and Practices of Social Change in South Africa* (2004) 247. Neville Alexander argues along similar lines: ‘In the South African context, because of the demographic fact of a black majority at this stage of the evolution of the population’s cultural consciousness, the strategy would be equally effective and more precisely targeted at the level of individual beneficiaries if class or income groups were used as the main driving force of the programme. The large area of overlap between “race” and “class” in South Africa makes this approach possible. In addition, it would make it possible for all economically disadvantaged individuals, irrespective of colour, to benefit from the programmes that derive from the strategy.’ N Alexander *Implications of Brown v Board of Education: A Post-Apartheid South Africa Perspective* PRAESA Occasional Papers No. 20, 2004 16.

<sup>99</sup> S Friedman & Z Erasmus ‘Counting on “Race”: What the surveys say (and do not say) about “race” and redress’, in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 67.

<sup>100</sup> Although the various specific alternatives to using race as the primary means of bringing about redress are not directly of interest here, it is worth pointing out that they involve not only a class-based approach discussed above, but also class-based redress agenda supplemented by more specific race-based initiatives (Bentley & Habib (note 71 above) 348); one based on the urban-rural divide (Maré (note 17 above) 90); one based on language (Alexander (note 1 above) 11), etcetera. These approaches all share the same premise, namely that the root causes of inequality are complex, and consequently require innovative, nuanced and context-specific solutions.

raised in privileged circumstances. Thus there is a careful, elaborate and quite refined method for determining how affirmative action will counteract or even dismantle disadvantage.<sup>101</sup>

This begs the question: how receptive is government to an alternative, more nuanced approach to affirmative action? Many people, including myself, have pointed out that complex political and economic reasons severely limit government's ability to manoeuvre, and may lead to an entrenchment of current race-based policies.<sup>102</sup> Much has been written about the vastly unequal economy inherited by the ANC in 1994, and about the nature of the compromise that was reached with capital and the apartheid state. In agreeing to respect the 'market' and implement neoliberal, supply-side policies in exchange for the acquiescence of state and capital to democracy, the ANC severely limited its ability to narrow economic inequalities and eradicate poverty.<sup>103</sup> This makes all the more important the improvements that have occurred, namely the broadening of the racial composition of the elite. Under these circumstances of limited options, the strategy of embracing identity politics as an alternative to a more broad-based economic redistribution serves the government well. As MacDonald notes, racialism operates on a seductive logic, because it 'maintains that helping some members of the group helps the group, and helping the group helps all of its members.'<sup>104</sup> In other words, the assumption is that all black people benefit when some of them join the capitalist elite. This assumption of a shared identity of interest of all black people serves to legitimate the exclusion of the majority of blacks from sharing in the benefits of redistribution.

The Minister of Labour recently announced that affirmative action would never be repealed.<sup>105</sup> There are two ways to interpret this comment. Given the political and economic realities just described, it can be viewed as the endorsement of the continuity of current

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<sup>101</sup> See CD Cunningham & NR Madhava Menon "Race, Class, Caste...? Rethinking Affirmative Action" (1999) 97 *Michigan LR* 1296; CR Sunstein 'Affirmative Action, Caste, and Cultural Comparisons' (1999) 97 *Michigan LR* 1311, 1316.

<sup>102</sup> See Dupper (note 41 above) 214.

<sup>103</sup> See, for instance, MacDonald (note 25 above) 172-174; Terreblanche (note 69 above) 439.

<sup>104</sup> MacDonald (note 25 above) 175.

<sup>105</sup> See 'No stopping affirmative action yet' *Pretoria News* (7 March 2007). While some members of the governing party have recently softened their position on affirmative action (for example even going as far as expressing qualified support for a 'sunset clause' (see 'Motlanthe on affirmative action' *Independent Online* (22 August 2008), the dominant view within the ANC is still one in support of the continuation of the current policy (see 'Affirmative action to stay: Zuma' *Independent Online* (31 October 2008) and 'Will Affirmative Action stay?' *Independent Online* (9 January 2009).

race-based strategies. However, an alternative interpretation, perhaps less plausible than the first, but more along the lines argued for in this paper, is to view it as a recognition that the shifts in social and economic relations resulting from race-based redress strategies may necessitate a rethink of the strategies themselves. This would imply that the Minister may be correct: while the end of affirmative action as we now know it may be near, redress measures that respond in a focused and refined way to the complex and continuously shifting forms of inequality in South Africa may very well be here to stay.

## **5. CONCLUSION**

I have considered three questions that I believe are vital to the current debate on affirmative action, namely who should benefit, how these benefits should be allocated, and when the allocation of benefits should end. Each of these raises important questions about the society we wish to become, and it matters enormously which choices are made.

In respect of the 'who' question, I have argued for a complex understanding of inequality and disadvantage – one that recognizes that inequalities follow many axes, of which race is only one. Current redress strategy, by placing society into two (or four) simplified camps, denies the complexity of causal relationships and of corrective action. In addition, it perpetuates race consciousness, which has implications for the goal of creating a non-racial society.

In respect of the 'how' question, my argument centred on the recognition that affirmative action, in the words of the Constitutional Court, disturbs rather than freezes the status quo. Although due attention must be paid to the interests of those previously advantaged, the focus is squarely on the group to be advanced. This is significant, because it frees one from the shackles of what is essentially a conservative discourse about minority rights and notions of innocence that so often bedevil the affirmative action debate. I have nonetheless argued for an approach to the implementation of affirmative action measures that weakens, rather than reinforces, stereotypical and prejudicial views.

Finally, in respect of the 'how long' question, I have argued for an appreciation of the shifts in social and economic relations that result from current race-based redress strategies. If we

are committed to addressing disadvantage in all its complex manifestations, then the consequences of current race-based strategies should drive home the recognition that the time may have come - if not to replace - then at least to augment, the blunt instrument of race with something infinitely sharper.