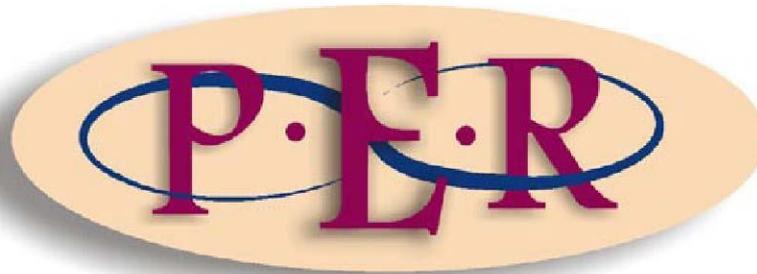


**Author: AM Louw**

**THE EMPLOYMENT EQUITY ACT, 1998 (AND OTHER MYTHS ABOUT THE  
PURSUIT OF "EQUALITY", "EQUITY" AND "DIGNITY" IN POST-  
APARTHEID SOUTH AFRICA)  
(PART 2)**

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**"I am not a number! I am a free man!"\***

**THE EMPLOYMENT EQUITY ACT, 1998 (AND OTHER MYTHS ABOUT THE  
PURSUIT OF "EQUALITY", "EQUITY" AND "DIGNITY" IN POST-APARTHEID  
SOUTH AFRICA)  
(PART 2)\*\***

**AM Louw\*\*\***

***Introduction (to Part 2)***

Part 1 of this piece undertook a critical analysis of the constitutionality of the affirmative action scheme as contained in Chapter III of the *Employment Equity Act*, 1998 (or EEA). The author argued that the scheme, and especially its obsession with demographic representivity as a primary objective of affirmative action in employment, is unconstitutional. In this second part the author will critically evaluate the Constitutional Court's judgment in the recent case of *South African Police Service v Solidarity obo Barnard* 2014 ZACC 23. After a brief discussion of the recent amendments to the EEA (in respect of its affirmative action provisions), the author will then provide conclusions and further reasons for the imperative to reject the Act's version of affirmative action (and, more broadly, the notion of demographic representivity within our equality paradigm).

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\* A line from the introduction to a 1967 UK television series, *The Prisoner* (about a man who, after resigning from a government agency, is kidnapped from his London home and awakes in a strange village, where he is known only by the name Number Six).

\*\* The numbering of sections in the text and footnotes is sequential and follows on that of Part 1.

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#### **4 The disappointment of *Barnard* (CC)**

I referred (in Part 1 of this piece) to the "usual suspects" who are often found to criticise affirmative action and other aspects of transformation of our society. The *Barnard* (CC) judgment was roundly welcomed by another group of usual suspects on the other side of the fence, including the Black Management Forum (its rather controversial former head, Jimmy Manyi, who has never seemed really grounded to me, must now have finally flown the coop and be over the moon). But apart from its positive reception in such quarters, there is a significant number of commentators who have criticised it, and, for a significant proportion of them, the word "disappointment", apparently, best sums up their feelings. I was also disappointed in reading this judgment; not because of the outcome, but because this prominent and long-awaited case had promised so much more in the way of potential clarification of extremely important questions within the equality and affirmative action discourse. I will highlight just three aspects here, which I believe the judges of the Constitutional Court dealt with most disappointingly. These are the following:

- the appropriate *standard of review* of the constitutionality of purported affirmative action measures;
- more specific to the facts and context of this case, the court's treatment of the issue of the impact of the claimant's non-appointment on *service delivery*; and
- more generally, and more in line with the theme of this piece, the court's treatment of the concept of *representivity*.

I will say something on each in turn.

##### ***4.1 The appropriate standard of review of the constitutionality of purported affirmative action measures***

Before I include discussion of the appropriate standard for the constitutional review of affirmative action programmes (as treated in *Barnard* (CC)), I should just mention that I will later call for the complete removal of affirmative action disputes under the EEA from our equality jurisprudence in terms of section 9 of the Bill of Rights. Accordingly, what follows has little to do with the EEA, which, as I argue *ad nauseum*

in this piece, should bow out sooner rather than later. However, this being said, I expect that *Barnard* (CC) will generate some academic commentary regarding the court's treatment of the standard of review of affirmative measures, and I will also weigh in briefly in this regard.

In respect of the standard of review issue, and when considering the differences in opinion between the various judges in *Barnard* (CC), it might not be inaccurate to characterise this judgment as providing little more than an amplification of consternation. Some academic commentators have written, very convincingly, in criticism of *Van Heerden's* rationality test.<sup>1</sup> Yet, the judges of the Constitutional Court dealt only cursorily with such criticism, if at all – notably, Moseneke ACJ, writing the majority opinion, did not refer to it at all; neither did Cameron J *et al.* Van der Westhuizen J refers to one of the pieces written in this regard in a footnote, without apparent approval or comment (with the terse remark that "[t]he *Van Heerden* test has been criticised for failing to incorporate a fairness standard").<sup>2</sup> I believe that the academic criticism of *Van Heerden's* test deserves proper consideration by the courts. I will not elaborate here beyond providing what I believe to be the main points of criticism against the "rationality test" (others have written in more detail on this issue, and I will refer to such views where relevant):

1) A rationality standard of review, as explained by Moseneke J in *Van Heerden*, pays an inappropriate measure of deference to decision-makers in respect of the formulation of affirmative policies and measures. Pretorius makes the point that there is an intimate relationship between the standard of review of an affirmative action measure and the degree of justification (and therefore accountability) required of decisions which impact on constitutional rights and interests.<sup>3</sup> I tend to agree with the author that the *Van Heerden* approach's measure of deference paid towards state actors involved in drafting and implementing affirmative measures is out of line with the more general standard of review set by the drafters of the *Constitution*, and as

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<sup>1</sup> See, for example (all of the following having been referred to earlier in Part 1): McGregor 2013 *TSAR*; Pretorius 2013 *SALJ*; Pretorius 2010 *SAJHR*; Malan 2014 *De Jure*.

<sup>2</sup> Van der Westhuizen J *SAPS v Solidarity obo Barnard* 2014 ZACC 23 (2 September 2014) para 160 and fn 159 (hereinafter *Barnard* (CC)).

<sup>3</sup> Pretorius 2013 *SALJ* 37.

contained in section 36 of the Bill of Rights.<sup>4</sup> On my reading of *Van Heerden* it does not provide a clear reason for this discrepancy (apart from the frequent emphasis placed, in the various judgments in this case, on the apparently "special" place and role for the equality right within our constitutional dispensation). But within the greater scheme of the *Constitution* the potential cost of such an ill-justified approach is just too high: "By adopting a deferential standard, courts protect the state from having to explain a decision in the first place, thereby circumventing the need to develop a judicial standard of scrutiny commensurate with the demands of the principles of openness and accountability, implicit in the s 36 norm of an open and democratic society".<sup>5</sup> Pretorius also explains how a fairness approach leaves much broader scope for inclusive adjudicative reasoning ("since fairness review also involves the balancing of competing claims, it opens discursive avenues for a wider spectrum of relevant concerns to influence judicial deliberation"<sup>6</sup>). Malan points out that rationality review may also implicate the separation of powers when one considers the role of the courts in respect of constitutional adjudication (and their discrete oversight role over the conduct of the executive).<sup>7</sup> Rationality review may impair the courts' role of providing justice in individual cases (Malan explains how the Labour Appeal Court's judgment in *Barnard* is an example of this). Accordingly, there may be a case to be made for arguing that such a rationality review may in fact be incompatible with the fundamental right of access to courts as guaranteed in section 34 of the Bill of Rights).

2) A second reason why *Van Heerden's* rejection of a role for fairness (and proportionality) appears strange in that it seems to ignore the clear text of the equality

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<sup>4</sup> Pretorius explains: "The Constitution ... commits itself to a standard of review which requires all rights limiting action to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This is the standard prescribed by the Constitution a right in a particular context are justified. It is the standard that the drafters believed to be necessary to afford the fundamental character of constitutional rights its due recognition." Pretorius 2013 *SALJ* 38.

<sup>5</sup> Pretorius 2013 *SALJ* 39. Pieterse calls s 36 (and the requirements it entails) "arguably the most significant provision enabling the fostering of a 'culture of justification'" under our *Constitution* – see Pieterse 2005 *SAPL* 163.

<sup>6</sup> Pretorius 2013 *SALJ* 43.

<sup>7</sup> "The central focus of the judicial function and primary responsibility of courts, unlike that of the legislature and the executive, are not these general collective social policies and goals, but the protection of individual (constitutional) rights ... [Courts] must not primarily pursue policies deemed to advance or secure an economic, political or social situation for the benefit of all. That is the distinctive terrain of the legislature and the executive" (Malan 2014 *De Jure* 134-135).

right. What makes this especially strange is the fact that Moseneke J in *Van Heerden* specifically emphasised that the respective sub-sections of section 9 should be read together<sup>8</sup> (an "intra-textual" reading of the equality right). But the exposition of the rationality standard of review based on section 9(2)'s internal test for the compliance of an affirmative measure would appear to follow a different approach; it ignores the content of a significant part of this sub-section, particularly its first sentence (i.e. it fails to recognise an "inter-textual" approach). Such an approach ignores the fact that this first sentence tells us that "[e]quality includes the full and equal enjoyment of all rights and freedoms". Malan explains:

Following the basic tenets of contextual interpretation, section 9(2) must be read as a whole. It cannot be interpreted as if its first provision is not in existence. In fact, measures for remedial equality, including affirmative action adopted in terms of section 9(2), are indeed regarded as expressions of the right to equality and not exceptions thereto, because the provision (the second sentence of s9(2) follows on the first) includes into the right to equality the full and equal enjoyment of all rights and freedoms. This underscores the importance of reading section 9(2) as a whole.<sup>9</sup>

The importance of this point is, of course, that a proper reading of the first sentence of section 9(2) would seem to demand the consideration, in reviewing any affirmative measure which purports to comply with section 9(2), of the "full and equal enjoyment" of all rights and freedoms – ie it demands consideration of the impact of any such measure on those disadvantaged by it.<sup>10</sup>

3) I would suggest that Moseneke ACJ in *Barnard* (CC) himself exposed the possible inappropriateness of the rationality standard of review, in his remarks regarding the importance of the lawfulness of the implementation of affirmative

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<sup>8</sup> Moseneke J declared as follows (in *Minister of Finance v Van Heerden* 2004 25 ILJ 1593 (CC) paras 28, 30 (hereinafter *Van Heerden*): "A comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9 ... In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives."

<sup>9</sup> See Malan 2014 *De Jure* 139.

<sup>10</sup> Which is why Malan argues that, even if ss 9(3) and (5) were not applicable to the decision of the National Commissioner in *Barnard* (as Moseneke ACJ in *Barnard* (CC) para 51, held as the basis for rejection of the approach in *Solidarity obo Barnard v SAPS* 2014 2 SA 1 (SCA) (hereinafter *Barnard* (SCA)), and even if such a decision was to be considered solely on the basis of s 9(2), the Supreme Court of Appeal's reasoning and its conclusion would remain valid – see Malan 2014 *De Jure* 138-139.

measures (even though such remarks were made in the context of or with reference to rationality).<sup>11</sup> I would suggest that the lawfulness of a policy or measure is largely moot until such time as it is implemented. The emphasis on the lawfulness of implementation (a measure must be applied to advance its legitimate purpose and nothing else, and implementation of corrective measures must be rational) would suggest that a perfectly rational measure can be abused. And the consideration of such potential abuse naturally implicates the impact of the measure on those it serves to disadvantage. If the mere rationality of the measure in terms of *Van Heerden's* interpretation of the internal test for compliance as found in the text of section 9(2) is truly sufficient to mark such a measure as being constitutionally compliant, then these considerations regarding its implementation must surely be irrelevant? Accordingly, the buck simply cannot stop at the point of merely measuring the rationality of the measure. After all, in the context of demographic representivity as not only the yardstick for success but also as the clearly stated legislative objective<sup>12</sup> of affirmative measures under the EEA (which, for the first time faced and then, puzzlingly, withstood the scrutiny of the Constitutional Court in *Barnard*), it is submitted that it is patently clear that one finds here a system that unashamedly displays "naked preference" for one or more (but, in practice, it is invariably and by definition one) race groups in the process of differentiating between persons. Is this to serve a "legitimate governmental purpose"?<sup>13</sup> If not, this same court warned us in the past that this is unacceptable under our Constitution.<sup>14</sup> But one must then ask: what is the standard for the determination of the lawfulness of implementation? Moseneke ACJ says it is rationality (implementation must be for the purpose of achieving the legitimate objective of the measure and "nothing else"). But we cannot remove this determination from the *context* of affirmative measures, whose legitimate purpose

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<sup>11</sup> *Barnard* (CC) para 39: "As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally."

<sup>12</sup> See, again, the wording of s 2(b) of the *Employment Equity Act* 55 of 1998 (the EEA), as referred to earlier.

<sup>13</sup> *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) paras 24-26.

<sup>14</sup> *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) paras 24-26.

(*Van Heerden* tells us, and this is confirmed in *Barnard* (CC)) is "remedial", "restitutionary" or "corrective". The only logical implication is that the determination of the lawfulness of the implementation of such an otherwise rational measure must be its fairness and/or the impact of such implementation on the rights of those disadvantaged by it. I would suggest that this is borne out by the words of Moseneke J in *Van Heerden*:

[A] measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.<sup>15</sup>

The reference to substantial harm on those excluded from benefits simply cannot refer merely to the lawfulness of the implementation of a measure being measured with reference to rationality; it must require interrogation of the fairness of such implementation. In fact, Pretorius, Klinck and Ngwena have highlighted the fact that the court in *Van Heerden*, even after pronouncing on the aptness of the rationality standard, in effect applied a form of fairness review to the case at hand.<sup>16</sup> Cameron J *et al* in *Barnard* (CC) tell us that fairness is a foundational, constitutional value.<sup>17</sup> As observed elsewhere, Moseneke ACJ, however, tells us that a rational measure which complies with the test in section 9(2) cannot be unfair, but his own wording is confusing (or, at best, ambiguous) and it would appear as if he is referring only to the fact that such a measure cannot be presumptively unfair in the meaning of section 9(5)). The question for me remains: can an affirmative measure that complies with the internal requirements of section 9(2) still be unfair? I would suggest that the answer is yes, as borne out by the example of the background to the litigation in *Naidoo v Minister of Safety and Security*.<sup>18</sup> A member of a designated group (who is also a woman, and thus "doubly disadvantaged" by past unfair discrimination) is faced with an absolute bar to advancement in employment for the simple reason that her group constitutes a minority (and its numerical representation in the broader population disqualifies her from benefitting from a demographically-based target). She

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<sup>15</sup> *Van Heerden* para 44

<sup>16</sup> Pretorius, Klinck and Ngwena *Employment Equity Law* 9-28.

<sup>17</sup> *Barnard* (CC) para 98.

<sup>18</sup> *Naidoo v Minister of Safety and Security* 2013 3 SA 486 (LC) (hereinafter *Naidoo*) as referred to earlier.

has no control over this, and is faced with a highly arbitrary (and as I've argued, irrational) ground of differentiation, on the basis of an immutable characteristic (her membership of the group). The measure would apparently qualify as rational under *Van Heerden's* test, as would its implementation for the purpose of advancing designated groups in the workplace. But it is grossly unfair and constitutes a grave limitation of Ms Naidoo's rights. The abuse inherent in the implementation of this measure lies not (solely) in its irrationality, but in its inequity.<sup>19</sup>

Apart from the above, there are other reasons why the *Van Heerden* approach might be objectionable. One of these reasons is what I view to be its inappropriate focus on and hegemonic treatment of the equality right (and, more specifically, section 9(2)). Even though section 9(2) has been characterised as "[p]erhaps the most pivotal of the transformation-orientated provisions in the Bill of Rights",<sup>20</sup> is there a hierarchy of rights in the Bill of Rights which means that this section (or, the equality right, more generally) trumps other fundamental rights, without more?<sup>21</sup> One must ask, what about the other specifically entrenched rights? Earlier landmark case law from this same court placed great emphasis on the role of the fundamental human dignity of all South Africans (*Harksen*, of course, but compare also *Hoffmann v SAA*:<sup>22</sup> one might ask whether *Barnard* (CC)'s implied approval of the EEA's numbers game on the basis of its application of a rationality standard of review might lead to future complainants relying on being members of a "vulnerable group in society" – similar to HIV-positive persons in the words of Ngcobo J - and based on the impairment of their dignity when faced with such arbitrary and irrational demographic target-setting). Would there be

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<sup>19</sup> As Pretorius, Klinck and Ngwena, explain: "It is difficult to see how fairness considerations can be purged from the notion of substantive equality underlying the whole of section 9. The reasoning in the *Naidoo* case demonstrates that fairness and proportionality considerations cannot be excluded from the evaluation of affirmative action, if justice is to be done to the third *Van Heerden* criterion, namely that the measure must promote the achievement of substantive equality. It seems hardly contestable that unfair or unreasonably disproportional forms of affirmative action would be irreconcilable with realising the long-term ideal of equality based on the affirmation of equal worth and respect." Pretorius, Klinck and Ngwena *Employment Equity Law* 9-27.

<sup>20</sup> Pieterse 2005 *SAPL* 162.

<sup>21</sup> Some believe this to be the case – Partington and Van der Walt 2005 *Obiter* 608 declare that "Equality is the most important value in our fledgling democracy".

<sup>22</sup> *Hoffmann v SAA* 2000 21 ILJ 2357 (CC).

merit in such a claim? Maybe not if it concerns a white male, but what about the probably more sympathetic case of an Indian female (such as in *Naidoo's* case)?

A final reason why I believe the *Van Heerden* approach is inappropriate is that it appears to seek to remove the equality right from the broader scheme of the Bill of Rights; it privileges equality over other fundamental rights and foundational values (e.g. non-racialism);<sup>23</sup> and it ignores the scheme of the limitations clause (where rationality is just one of the broader range of relevant factors to consider in the weighing up of rights and interests).<sup>24</sup> And too many judges (even of the Constitutional Court) have by now highlighted the importance of our constitutional project and its foundational values (including non-racialism and the promotion of human dignity), either expressly or by implication, for us to say simply that the rationality of the source of an affirmative measure (be it a provision of the EEA, or the Act's chapter III more generally, or an employment equity plan that purports to implement the provisions of the Act) should be determinative of its legality and constitutionality. We have seen too many examples of illegitimate "affirmative" measures – compare *du Preez's* irrational race-based scoring system for applicants;<sup>25</sup> *Naidoo's* ludicrous calculations of race and gender representation to the third decimal;<sup>26</sup> *Coetzer's* non-filling of essential posts in a clearly essential service;<sup>27</sup> and Jafta J's (in *Barnard* (CC)) approval of job reservation

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<sup>23</sup> In the process, I would suggest, ignoring at least one characterisation of our transformative constitutional project: "The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships" (Albertyn and Goldblatt 1998 *SAJHR* 249). Replacing one systemic form of domination and material disadvantage with another (admittedly, probably more politically correct) such system is hardly desirable.

<sup>24</sup> I would suggest that van der Westhuizen J's reliance on proportionality as the appropriate standard of review in *Barnard* (CC) – borrowing from the use of this concept in s 36 of the *Constitution* – might be indicative of a realisation that the rationality standard is inconsistent with the broader scheme of the Bill of Rights.

<sup>25</sup> *Du Preez v Minister of Justice and Constitutional Development* 2006 27 ILJ 1811 (SE).

<sup>26</sup> *Naidoo v Minister of Safety and Security* 2013 3 SA 486 (LC).

<sup>27</sup> *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC). Dupper, I would submit, is rather diplomatic in his assessment of the practice as exposed in this case: "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. 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." (Dupper 2008 *SAJHR* 438.)

"for black officers".<sup>28</sup> If recent history has shown us anything, it is that the toxic mix of the *Employment Equity Act*, the principle of demographic representivity and *Van Heerden's* rationality test are nothing short of a weapon of mass destruction in the hands of (public service) human resource managers. Our *Constitution* (if not the judges of our Constitutional Court<sup>29</sup>) demands that we draw the line somewhere, and a useful place to do so is at the point where anyone – white male or member of a minority designated group – is faced with an absolute barrier to employment or advancement in employment (or any other form of access to benefits). And the reason, very clearly, must be because of the self-evident, unconstitutional unfairness of such practices. After all, when we consider that the application of affirmative action under the EEA occurs in our workplaces, would/should the right to fair labour practices in section 23 of the Bill of Rights (which is available to "everyone") not provide additional justification for the arguments that a requirement of fairness testing should be a *sine qua non*?

Despite these and other possible objections to the *Van Heerden* standard of review, and whilst no single judge in *Barnard* (CC) would definitively reject it, it is interesting that a few of the judges provided us with teasing indications that they might be willing to do so (by implication). Most striking is Moseneke ACJ's above-mentioned remarks regarding the requirement for the lawfulness of the implementation of a rationally designed affirmative action measure.<sup>30</sup> Of course, this notwithstanding, Moseneke ACJ

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<sup>28</sup> *Barnard* (CC) para 227.

<sup>29</sup> I refer, again, to the apparent express approval of race-based job reservation by Jafta J in *Barnard* (CC) para 227.

<sup>30</sup> I include a *montage* of the judge's thoughts on the subject here. When reading it, please bear in mind the (rather diffident) expression of the "rationality test" as formulated in *Van Heerden*: "Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive." (*Van Heerden* para 30); "Once the measure in question passes the test, it is neither unfair nor presumed to be unfair ... This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2)" (*Van Heerden* para 37); and "As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational.

was not willing to take the leap and reverse his earlier finding on the rationality standard as expressed in *Van Heerden*. Cameron J, Froneman J and Majiedt AJ were more forthcoming in this regard, when they declared that "adjudicating Ms Barnard's challenge requires us to apply a less deferential standard than mere rationality".<sup>31</sup> However, in doing so, they display what I view to be an inappropriate deference to the CC's earlier decision in *Van Heerden*. The judges tell us why they view the rationality standard as inappropriate in this case:

[Barnard's] complaint was that she had been unfairly discriminated against, in contravention of the [Employment Equity] Act. In our view, *that Act imposes a standard different from, and additional to, rationality*. The important constitutional values that can be in tension when a decision-maker implements remedial measures require a court to examine this implementation with a more exacting level of scrutiny.<sup>32</sup>

While I would suggest that these members of the court were (finally) on the right track, it is disappointing to see that they imply that the EEA imposes some standard different to that of rationality, but they then (it is submitted) do a rather shoddy job of explaining what this standard is (without really explaining how/where the Act imposes such a standard):

Alleged discrimination under the Constitution ... raises its own problems. We must therefore formulate a standard specific to the Act, one that is rigorous enough to ensure that the implementation of a remedial measure is "consistent with the purpose of [the] Act" – namely, to avoid over-rigid implementation, to balance the interests of the various designated groups, and to respect the dignity of rejected applicants. For these reasons, we consider the appropriate standard to be fairness.<sup>33</sup>

In the light of the preceding discussion in this piece I would suggest that much more detailed explanation is required. These last three mentioned judges based their claim on such a "special" call for fairness sourced from the *Employment Equity Act* on the provisions of a section we have encountered before – section 2 (which deals with the purpose of the Act). They relied on the wording of section 2(a), and its recognition of "the importance of 'fair treatment in employment'".<sup>34</sup> Let's leave aside the specifics of

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Although these are the minimum requirements, it is not necessary to define the standard finally." (*Van Heerden* para 39).

<sup>31</sup> *Barnard* (CC) para 95.

<sup>32</sup> *Barnard* (CC) para 95.

<sup>33</sup> *Barnard* (CC) paras 97-98.

<sup>34</sup> Cameron J *et al* in *Barnard* (CC) para 98 (and fn 108).

this case (and the question of whether Ms Barnard or anyone similarly placed would recognise this notion of fair treatment in its application through the numbers game). More generally, the EEA is, apart from its grand claims to "equity" and "equitable" representation, hardly a poster child for the promotion or application of fairness in its operation. Apart from its nonsensical obsession with raw statistics as a proxy for equality (which is the main theme of this piece), we have also seen that the Act not only provides such a convoluted and ambiguous "prohibition" of the use of quotas in its section 15(3) that one might be excused for questioning the (rightful) condemnation of the legality of quotas by various judges in *Barnard* (CC). It also displays a significant measure of ambivalence in its "prohibition" on an affirmative measure functioning as an absolute bar to the appointment or advancement of persons who are not from the designated groups (in section 15(4)).<sup>35</sup> Where do these judges find some special standard of fairness in this Act that is not to be found in the *Constitution*? Or was this just a way to avoid direct rejection of the majority's approach in *Van Heerden* (within the paradigm of the equality right and the Bill of Rights, rather than invoking the Employment Equity Act as some "special case")? These same three judges of the court also expressed what I view to be a puzzling degree of deference to the EEA elsewhere in their judgment.<sup>36</sup>

Following *Barnard* (CC), we are probably no closer to a definitive answer on the appropriate constitutional standard for the review of an affirmative action measure. The majority view confirmed *Van Heerden's* rationality standard (albeit, as already noted, with some interesting apparent riders). Cameron J *et al* rejected rationality as too deferential and suggested (a rather vague and general conception of) fairness. Van der Westhuizen J rejected this fairness standard (as too vague and general) and

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<sup>35</sup> As for the fact that the wording of the EEA in both ss 15(3) re quotas and s 15(4) re absolute barriers to employment is so ambiguous that it probably would allow for the implementation of such measures by a designated employer, see Partington and Van der Walt 2005 *Obiter* 598.

<sup>36</sup> *Barnard* (CC) para 89 fn 93, where they declare as follows (with reference to what was said in *Van Heerden*): "[Affirmative action measures] 'must be reasonably capable of attaining the desired outcome', may not be 'arbitrary, capricious or display naked preference' and 'should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.' *The Act has given additional content to this constitutional standard.*" [My emphasis]. In the light of what I have argued above I find the EEA to be the last place one would search for, and find, these constitutional requirements, and the judges did not explain the basis for this last aspect of their opinion.

suggested proportionality loosely based on the use of this concept under the limitations clause of the Bill of Rights. That notwithstanding, and despite the judge's consideration of the role of Ms Barnard's dignity in this case, it was held that the pursuit of (racial) representivity trumped it all – again, without proper explanation. We are, I would submit, not really any closer to determining the appropriate standard for review, and this I view to be *Barnard* (CC)'s single biggest failing and source for justifiable disappointment.

#### **4.2 *The (non-)role of the contentious issue of service delivery in Barnard (CC)***

I do not intend to wade in here on the "representivity vs efficiency" debate<sup>37</sup> that has frequently reared its head in respect of affirmative action. However, one matter that I find particularly worrying in the Constitutional Court's judgment in *Barnard*, in the light of the broader context of the litigation, is the degree of deference paid to the National Commissioner's decision on whether the failure to fill the relevant post would affect service delivery. This is not some peripheral issue; it is extremely important in the context of the greater constitutional milieu. As Pretorius observes:

... the standard of judicial review affects the degree of public accountability expected of the state for actions which limit rights. Judicial review institutionalises the degree of public accountability through the imposition of a particular burden of justification.<sup>38</sup>

Also, please remember that we are faced with almost daily media reports detailing alleged problems within the SA Police Service (quite apart from more general negative reporting on government service delivery). Even though the CC held that Ms Barnard had in fact abandoned her claim that her non-appointment negatively affected service delivery,<sup>39</sup> this was an extremely important issue within the broader context of this case (if not on the pleadings, as such).

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<sup>37</sup> See, for example, *Stoman v Minister of Safety and Security* 2002 23 ILJ 1020 (T); *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC); McGregor 2003 *JBL*.

<sup>38</sup> Pretorius 2013 *SALJ* 31.

<sup>39</sup> See *Barnard* (CC) para 64.

With that in mind, it is one thing for the court to say – as various judges did<sup>40</sup> – that this question of the potential impact on service delivery of the claimant's non-appointment (or the fact that no-one was appointed) was a matter within the sole discretion of the Commissioner and that the court would or should be loath to interfere in this regard (especially in the light of the fact that the respondent had not brought a judicial review challenge to the decision). But it is another thing to consider that the judges of the court are surely all very familiar with the fact that this non-filling of posts through a system that at least bears some resemblance to a *de facto*, if not officially acknowledged, system of job reservation for designated groups, appears to have become quite widespread practice in the public service. At least, this seems to be true for the SA Police Service. If this were not the case we would surely not have seen so many cases similar to Barnard's and implicating the SAPS confronting the courts or arbitrators in recent years.<sup>41</sup> And note also, of course, that at least one judge of the Constitutional Court not only acknowledged but also seemed to have no problem at all with a system of race-based job reservation<sup>42</sup> - this simply must be cause for concern.

A former director of the SA Institute for Race Relations recently published a very provocative piece in the media about the effects of ill-considered affirmative action policies (and other problems) on South African society, with a special focus on the public service and on government's poor record of service delivery.<sup>43</sup> In this piece,

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<sup>40</sup> See *Barnard* (CC) para 64 (per Moseneke ACJ); para 122 (per Cameron J *et al*); paras 187-189 (per van der Westhuizen J)

<sup>41</sup> See *Stoman v Minister of Safety and Security* 2002 23 ILJ 1020 (T); *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC); *Fourie v Provincial Commissioner of the SA Police Service (North West Province)* 2004 25 ILJ 1716 (LC); *Inspector S Govender v South Police Service* Unreported Case No PSSS 803-05/06; *Public Servants Association obo Karriem v SA Police Service* 2007 28 ILJ 158 (LC); *Van Eden and SAPS* 2010 31 ILJ 1286 (BCA); *Munsamy v Minister of Safety and Security* 2013 34 ILJ 2900 (LC); *Naidoo v Minister of Safety and Security* 2013 3 SA 486 (LC); *Munsamy v Minister of Safety and Security* 2013 34 ILJ 2900 (LC).

<sup>42</sup> See *Barnard* (CC) para 227 of the judgment of Jafta J: "By not appointing Ms Barnard *and reserving the post for black officers*, the National Commissioner sought to achieve representivity and equity in the Police Service. This accords with its Employment Equity Plan and is consistent with the purpose of the Act. Therefore, the National Commissioner's decision cannot constitute unfair discrimination nor can it be taken to be unfair. Consequently, unfairness as a standard cannot be sourced from the Act." [My emphasis]

<sup>43</sup> Kane-Berman 2014 <http://www.politicsweb.co.za/opinion/why-south-africa-is-not-working>.

John Kane-Berman blames affirmative action (as applied in the public sector) for some major service delivery problems:

According to the Institute of Municipal Finance Officers, one third of all municipal officers, chief financial officers, and municipal supply chain managers do not have the right skills for the job. Three quarters of these posts are vacant. An audit by the South African Institution of Civil Engineering found that 83 of all municipalities - about a third of them - had no civil engineers, technologists, or technicians on their staff. Some 35% of these posts - enough for a thousand engineers - were unfilled, mainly because of budget constraints. The South African Institute of Electrical Engineers says huge numbers of engineers have been displaced.<sup>44</sup>

What is probably one of the most controversial aspects of Kane-Berman's piece - and the one which I find most interesting - is its bare-fisted indictment of an alleged, rather sinister motive behind affirmative action public service recruitment (I believe that this passage deserves to be quoted in full, as follows):

According to the [Commission for Employment Equity], Africans now hold 69% of top management jobs in government. But Africans within the 35-64 age cohort from which one would expect top managers to be drawn make up only 36% of the economically active population, while only 4.1% of over 20s have post-school training. This suggests that affirmative action has been rigorously implemented in the public sector regardless of levels of experience or formal qualification. Ivor Blumenthal, a business strategy consultant, reported in May 2014 that he was seeing a cleansing of white employees out of the public sector ... Very few people are willing to identify affirmative action as part of the problem. One who has done so is Adam Habib, vice chancellor and principal of the University of the Witwatersrand. In a paper in August 2013 he identified affirmative action and cadre deployment as among the causes of the 'malaise' in the public service. Professor Habib wrote: "As black staff were being recruited, mostly white incumbents were allowed and even encouraged to leave." Part of the reason for this, he said, was budget cuts. It nevertheless "sabotaged the skills-transfer process. The very people who could have played the role of mentors were no longer in the public service, and black recruits, particularly newly qualified young graduates, were set up for failure as they entered." Habib also observed that *"a public service manager would be rewarded for not appointing a white candidate to a vacancy, even if no black candidate was available, since employing a white candidate would compromise that manager's transformation targets and annual bonus. Despite the fact that such behaviour violates the spirit of South Africa's constitution, the quantitative character of the performance management system made it logical for managers to leave vacancies unfilled rather than appoint qualified white candidates."* One consequence, he said, is that the public service *"is now saddled with employees who have severe deficiencies in their skill sets."* These points need underlining. *In the name of "transformation" managers in the public service have actually been incentivised to keep whites out for racial and ideological reasons. Better to leave a vacancy unfilled than to put a white person into it.* Getting rid of whites and leaving vacancies unfilled not only hurts the whites in

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<sup>44</sup> Kane-Berman 2014 <http://www.politicsweb.co.za/opinion/why-south-africa-is-not-working>.

question, but sets up newly qualified young black recruits for failure. Their failures in turn hurt countless numbers of people dependent on the public service. This might be described as a lose-lose-lose situation. Or as madness. Yet despite all of this, the government and the ANC seem determined to pursue affirmative action. [My emphasis]

All of this may be quite alarmist and may very well be open to valid criticism from various quarters, but it would be irresponsible to label this simply as anti-establishment (or party-political) rhetoric, or to say that it departs much from at least a core truth regarding the reality of the experience of the application of transformation measures in the corridors of government offices across the country.<sup>45</sup> Are we to believe that the judges of our highest court are blissfully unaware of this and of other such opinions<sup>46</sup> as are regularly expressed in the public discourse? The Constitutional Court's deference in *Barnard* to the decision of the National Commissioner of Police on whether there might be service delivery implications of such a practice (the non-filling of posts in the interests of ensuring race or gender representivity) seems to ignore this reality (or, at least, perception), and this is troubling not only because of the potentially unfairly discriminatory effects of such a *de facto* "policy". It also ignores the undoubted reality that it is quite possible that only a fraction of cases ever reach the courts - Stuart Woolman has characterised the problem (in another context) as "the structured silence of disputes that never make it to court".<sup>47</sup> Also, what of the

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<sup>45</sup> Even though the EEA, of course, compels designated employers in the private sector to implement its system of affirmative action, Dupper observes that there are differences when it comes to the role of merit (in this context of efficiency) between the private and public sectors: "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." (Dupper 2008 *SAJHR* 437.)

<sup>46</sup> McGregor quotes David Gleason as observing the following: "[The ANC] has made of it [affirmative action] a *racial core issue* in which white South Africans know they've been totally sidelined so far as permanent jobs in the public service are concerned. Those who've hung on have been repeatedly passed over for promotion for reasons that can only have their foundations in race ... The result has been an *extraordinary build-up in resentment and a near-collapse in some areas of government*, notably the municipal sector where cadre deployment ... has been most often employed." (McGregor 2014 *SA Merc LJ* 91 (quoting Gleason *Business Day*); Sapa 2013 <http://www.fin24.com/Economy/Cadre-deployment-contradicts-NDP-DA-20130508>.)

<sup>47</sup> Woolman 2008 *SALJ* 11.

chilling effect of job advertisements clearly labelled as "employment equity" positions, which are so prevalent especially in respect of government jobs? How many potential candidates (from either the non-designated group, or from the minority designated groups) never apply for such positions as a result? It is probable that the problem of such illegitimate job reservation is in fact much more widespread than the law reports might suggest (even though the number of cases that have reached the courts is significant in itself). In this sense, it is instructive to read Pretorius's comment (in his analysis of the Labour Court's judgment in *Barnard*), which raises the spectre that the pursuit of representivity may lead to the devaluation of other, germane and obviously relevant considerations in such cases:

The intended outcome [of the measure applied in *Barnard*] was to enhance the statistical racial balance in the particular subdivision. In this analytical scheme, concerns related to service delivery are of decidedly less importance than in the case where the organising principle of the inquiry is fairness and/or proportionality. The same holds for the weight the court attributed to the applicant's personal circumstances and the fact that the post was left temporarily vacant in the absence of suitable designated candidates.<sup>48</sup>

As I have indicated above, the logical and other inconsistencies inherent in this pursuit of a racial balance in the workforce are just too numerous and significant for this concept (or such a system of target-setting) to serve as justification for ignoring any other relevant factors. In a case such as *Barnard* this applies to the issue of the potential impact of race-based job reservation on service delivery. (This is especially true where posts are left vacant purely in the interests of representivity). One must thus ask whether it is not highly irresponsible of the CC to simply defer to the Commissioner's judgment in respect of such a high profile case (especially in the light of the obvious paucity of the reasons provided by the Commissioner for his decision in this instance), as the CC is probably well aware that the (potential) problem is much more prevalent and that its impact extends well beyond the bounds of one specific case.<sup>49</sup> Examples abound, although *Coetzer's* case<sup>50</sup> may have been the high (or should that be low?) water mark in this respect, due to the obvious illogicality of leaving the relevant posts in a critical division of the Police Service vacant in the

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<sup>48</sup> Pretorius 2013 *SALJ* 37.

<sup>49</sup> Also see Dupper 2008 *SAJHR* 436-437.

<sup>50</sup> *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC). See, again, Dupper 2008 *SAJHR* 438.

interests of transformation/race representation. But that does not mean that less blatant but potentially as invidious (and dangerous) cases of such elevation of policy over function and need do not present on a daily basis. Is it then not strange for van der Westhuizen J (for example) to tell us that *Coetzer's* scenario is distinguishable from that of *Barnard*, because the latter involved a less important police function than the former? The learned judge appears to feel that the SAPS bomb squad (*Coetzer*) does more important work than the section (in *Barnard*) that investigates complaints "concerning police services including inadequate investigations, improper police conduct and corruption".<sup>51</sup> Do the names Andries Tatane, Mido Macia and Marikana (not to mention alleged corruption and other indiscretions – Selebi,<sup>52</sup> Cele and Mdluli) ring any bells? I cannot remember the last public media report of a significant (failed) explosion investigated or thwarted by SAPS, but I don't need to rack my brain much to know that these last types of issues raise their ugly heads on almost a daily basis in most of our public discourse about SAPS.

Instead of an indictment of the practice of such job reservation at the potential cost of service delivery, as probably being blatantly racist and destructive of the developmental ethos of our *Constitution* (and as a contemptuous slap in the face of Ubuntu), the judges of the CC in *Barnard* gave us flowery language regarding the importance of equality and upliftment and the plight of those disadvantaged by unfair discrimination ... without much more of substance. I personally would have appreciated less of van der Westhuizen J's views regarding the value of the words of John F Kennedy for our no doubt understandably disillusioned "born-frees", and more of Jafta J's views on why the reservation of jobs "for black officers" is so undeserving

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<sup>51</sup> See *Barnard* (CC) fn 211 to para 187 of van der Westhuizen J's judgment in *Barnard* (CC). Then read paras 187-188: "[P]ractically, temporary vacancies in certain positions may well be less damaging than in others to SAPS's ability to execute its core mandate to protect citizens. This differs from, for example, vacancies in the special explosives unit in *Coetzer*, which required highly trained and specialised candidates and was fundamental to SAPS' core mandate. There is nothing to suggest that the division [in *Barnard*] could not function effectively without filling this position."

<sup>52</sup> Jackie Selebi, of course, was the serving National Police Commissioner who made the determination not to recommend the appointment of Ms Barnard in the matter under review in *Barnard* (CC), and who was later charged, convicted and jailed for corruption (although (not much later) controversially released on medical parole after serving a fraction of his sentence).

of critical constitutional scrutiny.<sup>53</sup> In my opinion, and at the very least, the CC could and definitely should have sent a warning shot across the bows of public service managers who may feel comfortable in persisting in such practices in the name of ensuring racial (or gender) representivity on a balance sheet *über alles*.<sup>54</sup> After all, as Pretorius observes, "[i]t is the function of courts to 'compel public authorities into a process of reasoned engagement' when a violation of rights is claimed".<sup>55</sup> We find very little if any of this in the CC's judgment. In the light of the *Constitution's* requirement of "broad representation" in the public service (as mentioned earlier), are we to believe that the judges of our highest court are (also) unaware of the *White Paper on Affirmative Action in the Public Service* published in 1998, which declared the end prize of transformation rather unequivocally to be as follows:

The Department [of Public Service and Administration] will, in particular, review national departments' and provincial administrations' progress in achieving numeric targets for representation, and will propose improved and refined targets with the aim of reaching *the ultimate goal of full demographic representation*. [My emphasis]<sup>56</sup>

And:

The targets in the White Paper on the Transformation of the Public Service are minimum national targets. They do not represent the ultimate goal, which is that all groups and levels within the Public Service should be representative of society as a whole. For example, the target of 2% for people with disabilities is still well below the 5% of people with disabilities in society as a whole; and the 30% figure for the

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<sup>53</sup> As observed with reference to the above-mentioned *Coetzer* case: "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. 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." (Dupper 2008 SAJHR 438).

<sup>54</sup> Of course, this is official government policy: "Within national departments and provincial administrations, the implementation of affirmative action policies will be incorporated into individual managers' performance objectives and specifically, into the performance contracts between Directors-General and executing authorities. It is envisaged that the practice of developing performance contracts between the Director-General and the executing authority, also be extended to all managers into which affirmative action will be built as one of the criteria ... Central to the new affirmative action policy is the fact that responsibility for affirmative action is no longer the preserve of the affirmative action specialist but of every manager, supervisor and human resource practitioner who will be required to implement affirmative action plans and held responsible for these." (*White Paper on Affirmative Action in the Public Service*, 1998 (GN 564 in GG 18800 of 23 April 1998) (hereafter the *White Paper*), ch 4(v), p 17; para 3.1, p 33.

<sup>55</sup> Pretorius 2013 *SALJ* 38 (with reference to Kumm 2010 *Law and Ethics of Human Rights* 154).

<sup>56</sup> The *White Paper* ch 4(iii), p 16.

recruitment of women is only an interim step to achieving their full demographic representation.<sup>57</sup>

We have seen that this is *not* what the *Constitution* provides. So is all this then just a(nother) case of "the Constitution says, but government does otherwise", in a climate of Nkandla and/or "Guptagate"-like untouchability? If taking judicial notice of broader developments in the public service were out of the question (for some reason – and I simply cannot agree with the reason provided by van der Westhuizen J),<sup>58</sup> the court could at least have taken a more active interest in the effects of these self-same affirmative action policies specifically in the SA Police Service, which was actually and very directly before it in the dock.<sup>59</sup>

### **4.3 The Constitutional Court and "representivity" in Barnard**

In the light of the central and recurring importance of the concept of (demographic) representivity in the practical experience of application of the constitutional principle of affirmative measures within the equality discourse, it was disappointing to read the judgments in *Barnard* (CC), and to note what I will describe as the very haphazard and superficial treatment of it by the various judges. This is surprising. As I will note later, it is clear that nearly all of the judges in this matter ultimately rejected Ms Barnard's complaints on the basis of the apparent justification for the SAPS affirmative action measure – the pursuit of representivity. For now, though, I will just include a

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<sup>57</sup> The *White Paper* para 1.10, p 23.

<sup>58</sup> At *Barnard* (CC) para 189: "[C]ourts should be wary of making evaluations about service delivery – in the context of affirmative measures – from a distance. Without proper evidence or specialist institutional knowledge, it may be difficult for a court to draw conclusions about the precise impact a policy, an appointment, or even a vacancy will have on service delivery. This is the reason for the National Commissioner's wide discretionary powers, particularly in the context of affirmative measures, to appoint a candidate or to keep a post vacant. In this case, there is not enough evidence for this Court to impugn the decision on the issue of service delivery. It cannot be said that it was disproportionate for the National Commissioner to rank representivity higher than the possible impact on service delivery in this case." Is it really too much to ask a court to consider the possibility (the strong probability) that leaving a post vacant would in some way negatively impact on delivery of the service that the incumbent of such a post would have been expected to provide?

<sup>59</sup> See, for example, the following observation: "Organisational culture, brain drain and resistance to change are some of the major challenges facing affirmative action [in the SAPS] ... It is clear that there is progress in the implementation of affirmative action and employment equity in the South African Police Service but some drastic steps need to be taken to prevent mass exodus of employees, especially those with special skills. A robust and extensive retention strategy is needed to address this mass exodus." (Montesh 2010 *SACJ* 77.)

brief *montage* of the few instances where the judges referred to representivity, and I will then briefly examine whether we can find any real guidance on the meaning and role of this concept within the continuing affirmative action debate.

One possible reason for the rather disappointing coverage of the concept of representivity in *Barnard* (CC) may be due to the complainant herself (or her legal team). Moseneke ACJ tells us that, in oral argument, Ms Barnard "jettisoned her detailed attack against the Employment Equity Plan and the Instruction as unjustifiable infringements of her equality protection because they amounted to racial quotas or racial norming or racial profiling".<sup>60</sup> However, in the light of the importance of the concept (and how the *Employment Equity Act* fits within the broader ideology of the demographic transformation of the public service and our other workplaces), I would suggest that the court was morally bound to consider this much more meaningfully and in more detail.

Be that as it may, the first real encounter we have with the role of representivity in *Barnard* (CC) is found in paragraph 66 of Moseneke ACJ's majority opinion, although the learned judge's views on its role are less than clear. He tells us that the employment equity plan in this case obliged the National Commissioner to take steps to achieve the targets set, and that the Commissioner was "within his right and indeed duty to take steps that would achieve the set targets".<sup>61</sup> While the judge tells us that "the implementation of a valid plan may amount to job reservation if applied too rigidly",<sup>62</sup> he was of the opinion that this was not the case here, for the following reason:

[O]ver-representation of white women at salary level 9 was indeed pronounced. That plainly meant that the Police Service had not pursued racial targets at the expense of other relevant considerations. It had appointed white female employees despite equity targets. Had the Police Service not done so, white female employees would not have been predominant in any of the levels including salary level 9 nor would they have been able to retain their posts.<sup>63</sup>

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<sup>60</sup> *Barnard* (CC) para 54.

<sup>61</sup> *Barnard* (CC) para 66.

<sup>62</sup> *Barnard* (CC) para 66.

<sup>63</sup> *Barnard* (CC) para 66.

This is interesting, in two ways. In the first place, Moseneke ACJ implicitly endorses demographic representivity in the context of target – setting (a specific group can only be "over-represented", and such "over-representation" can be "pronounced" only if measured against some standard – and demographic representation in terms of the population demographics was the express standard employed by the SAPS). In the second place, the judge's remarks appear to provide some distance between the "equity targets" (an affirmative action measure) and past unfair discrimination as a cause for any such "over-representation". He tells us that SAPS has appointed white female applicants despite such targets (ie he is not concerned that their over-representation is due to their past undue preference in employment, but rather he observes that *even after the implementation of an affirmative action measure they were still appointed*). On the role or importance of representivity, however, we find nothing more in the majority opinion in *Barnard* (CC).

Van der Westhuizen J came teasingly close to providing us with a clearer picture of the meaning and the proper role of representivity, but this also (I would submit) eventually came to nought:

Before focusing specifically on the facts of this case, it must be pointed out that equality can certainly mean more than representivity. Affirmative measures seek to address the fact that some candidates were not afforded the same opportunities as their peers, because of past unfair discrimination on various grounds. By focusing on representivity only, a measure's implementation may thwart other equality concerns. For example, if a population group makes up 2 or 3 percent of the national demographic, then, in an environment with few employees, the numerical target for the group would be very small or even non-existent. If a candidate from this group is not appointed because the small target has already been met, this may unjustly ignore the hardships and disadvantage faced by the candidate or category of persons, not to mention the candidate's possible qualifications, experience and ability.

And:

"Although equality can manifest in various forms, in the context of this case it takes the form of representivity. By appointing Ms Barnard, her designated group would have been significantly over-represented and her appointment would have aggravated racial inequality."<sup>64</sup>

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<sup>64</sup> *Barnard* (CC) paras 149-150.

It is hard to find anything of real value in these quoted sections of the judgment in order to assist our determination of the link, if any, between representivity and equality. More problematically, these thoughts are also ambiguous, and read rather confusingly.<sup>65</sup> The statement that "equality can certainly mean more than representivity" tells us that equality does not equal representivity, and that these two concepts are simply not the same thing. But then we are told that "equality can manifest in various forms, in the context of this case it takes the form of representivity". So, is representivity then actually a form of equality? Or isn't it?

Also, the judge's example highlights the clear disconnect between representivity based on population demographics and the recognition of past disadvantage as well as the pursuit of (substantive) equality. There is, as per his example, not necessarily any correlation between the two, and I will suggest that in a scenario such as that referred to in the example the equating of representivity and demographics to (assumptions of) disadvantage would not only serve to further disadvantage the relevant member of a designated group (the point the judge seems to be making), but it would also allow an employer to ignore true (even proven) disadvantage and to refrain from pursuing affirmative action as a constitutionally-mandated form of remedial or restitutionary action in favour of the relevant group/member of a group. Surely this kind of outcome – compare what happened in *Naidoo* - must be absurd (perverse) when considered against the backdrop of the provisions of the equality guarantee, and the necessity for the pursuit of substantive as opposed to formal equality prized so highly by our Constitutional Court. In paragraph 183 of the judgment, van der Westhuizen J again confuses the reader with the statement that "[t]he goal of equality is being promoted in this case through representivity". In the context of his (disappointing, as observed earlier) consideration of the potential impact of the measure on service delivery, the judge then also refers to "[w]hen a balance does have to be struck between efficient service delivery and *equality in the form of*

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<sup>65</sup> Which may not be surprising, considering the experience of the transformation agenda in the public service (at least). As Wessels observes, in his analysis of the policy documents used in this context (specifically the 1995 *White Paper on Transformation of the Public Service*): "[T]here is confusion in the application of related concepts such as 'equality', 'employment equity', 'equal employment opportunity', 'affirmative action' and representativeness in the public service because these words are sometimes used as if they were synonyms." (Wessels 2005 *Politeia* 126).

*representivity* ..."66 – again, is he saying that representivity is a form of equality? To just confuse things even more, it would seem, he then continues to note that in Ms Barnard's case "any possible negative impact on service delivery was overshadowed by the fact that her appointment would have significantly aggravated unequal representation at salary level 9".67 I will be generous and attribute this use of the word "unequal" to a typo; if not, what would this terminology imply? "Equal" representation would require all race groups (to just use race as an example) to be, well, *equally* represented in the workplace.68 This again would be something very different from what the EEA requires.

We also do not find much guidance in *Barnard* (CC) about the meaning, role and importance of representivity (or its interaction with equity and equality) amongst the other judgments of the court. Cameron J, Froneman J and Majiedt AJ, in their separate concurring judgment with that of Moseneke ACJ, had the following to say:

If a decision-maker does not justify how he or she balances *the important considerations of representivity* and service delivery, remedial measures will suffer an invidious gloss. A decision-maker could prize representivity over service delivery without sufficient regard to the specific facts of a case. This would suggest that representivity is always more important than the quality of service provided by a public body. But this is a false choice. There is no evidence that we must sacrifice the quality of our public bodies to achieve *the important goals of representivity and to redress past disadvantage*. [My emphasis]69

Apart from telling us that representivity is both an important "consideration" and "goal", what we find here is an indication that it is something different from redress. The learned judges are at pains to refer to the "important goals of representivity *and* to redress past disadvantage". So, upon my reading, these are two separate and different concepts. Of course, common sense and a dictionary also tell us that these are not one and the same thing (and, as mentioned, we see them also textually separated or distinguished in section 2 of the EEA). Finally, Cameron J *et al*/also seem

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66 *Barnard* (CC) para 186.

67 *Barnard* (CC) para 188.

68 Intriguingly, this same typo also turns up in the judgment of Moseneke ACJ in *Barnard* (CC), where he discusses the scheme of the EEA (in para 40): "Designated employers must ensure that suitably qualified employees from designated groups are equally represented in each working category of the designated employer."

69 *Barnard* (CC) para 110.

to imply that there is some link between representivity and the redress of past disadvantage, but just like so many others (including the drafters of plans and policies on public service transformation) they seem to base this on some unspoken assumption. I would suggest that this is evident in their following observation:

[The National Commissioner] was entitled to prefer racial representivity over gender representivity, *provided he had a justification* for that decision. In other words, it is not necessarily an injury to dignity to view a person only through the lens of one ground listed in section 9(3), *provided the reason for doing so is to redress historical inequality*.<sup>70</sup>

The underlying assumption (that preferring one form or manifestation of representivity over another requires justification, and that such justification would/must be the redress of past disadvantage) is clear; whether there is any real basis for it is less clear. And that is not really the point. The point is that these judges owe us (and Ms Barnard) more of an explanation, and less in the way of having to draw inferences. So, from all of this the most I can say is that *Barnard* (CC) tells us the following:

- 1) equality does not equal representivity, and these two concepts are simply not the same thing;
- 2) even though that may be the case, representivity *may* be a form of equality; and
- 3) while representivity is an important goal and consideration, it is something distinct from the redress of past disadvantage.<sup>71</sup>

At best then, from these rather opaque statements one can take the following: Considering that this same court in *Van Heerden* told us that a legitimate affirmative action measure is one that is aimed at and designed to redress past disadvantage in the interests of thus promoting (substantive) equality, the pursuit of representivity has something to do with this (*we're not exactly sure what that is*), but it does not, in fact, equate to this purpose. It is therefore, clearly, something that has been added by the EEA to the *Constitution's* conception of legitimate remedial measures in the pursuit of

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<sup>70</sup> *Barnard* (CC) para 116-117.

<sup>71</sup> The Supreme Court of Appeal has also indicated that representivity is not synonymous with fairness – see *Gordon v Department of Health, KwaZulu-Natal* 2008 6 SA 522 (SCA) para 28. Husain writes that representivity is not synonymous with transformation (but an aspect of it) – see Husain 2013 *De Rebus* 3.

equality, but something that the highest court in our land cannot (*or will not*) quantify for our elucidation. At best – and acknowledging by implication that representivity involves the pursuit of a numbers game – the CC tells us that rigid enforcement of quotas is illegitimate. Both the Supreme Court of Appeal<sup>72</sup> and the Labour Court<sup>73</sup> agree (even if the wording of the EEA on this issue is ambiguous at best<sup>74</sup>). But beyond that we are still left in the dark as to the constitutional role and legitimacy of this numbers game.

By now it must be abundantly clear that I have a rather large bee in my bonnet over representivity. Others may argue, however, that this lack of clarity (could it be dissembling) by judges is all fine and well; that the Constitutional Court was not called upon to provide us with any definitive guidance on the meaning, etc of (demographic) representation in the context of our equality discourse. They may argue that this is much the same as the issue of the meaning and role of quotas (which Moseneke ACJ told us, expressly, did not require examination in *Barnard* – of course, I do not agree). But they would miss the point. What was said about representivity by the various judges can hardly be classified as being *obiter*, if we consider how the separate concurring judgments all seemed to, ultimately, base their approval of SAPS's treatment of the complainant in this matter on its pursuit of (demographic) representivity in its workforce.

A case in point, and one issue that stands out for me, is that even van der Westhuizen J, who arguably (and as noted above) was the single member of this court most willing to consider the impact of the measure on those disadvantaged by it, relied on the promotion of representivity to justify the potential impact of the implementation of the measure on Ms Barnard's dignity. The judge formulated two questions (or factors) to assess the impact on the complainant within this context, and then tells us that neither

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<sup>72</sup> Navsa JA, in *Solidarity obo Barnard v SAPS* 2014 2 SA 1 (SCA) para 23 (hereinafter *Barnard* (SCA): "The most virulent opponents of [measures to overcome historical obstacles and disadvantages and providing equal opportunities for all] will be hard put to argue against its noble purpose. Likewise, the most ardent supporters of such measures, I venture, would find it difficult to argue with any conviction that the end result [of such measures] can be obtained by the mechanical application of formulae and numerical targets."

<sup>73</sup> See *Naidoo* para 209.

<sup>74</sup> See s 15(3) of the EEA.

of the two negative impacts hinted at by these questions had actually materialised – importantly, note that *the reasoning here relies almost exclusively on the promotion of representivity* and/or the role that the concept played in the design and implementation of the SAPS measure at issue in this case:

Was the impact on Ms Barnard's dignity reasonable and justifiable in light of the goal of substantive equality? I consider two factors. First, she treated [*sic*] as a mere means to achieve an end? Did the decision reduce her to a member of an underclass to the extent that her place in society and in the Constitution is denigrated? Even the perception of this may threaten the pursuit of our constitutional goal of a society in which everyone, regardless of their differences, is equally valued and at home. Second, does the measure's implementation amount to an absolute barrier to her advancement? If a measure is used to obliterate a person's chances at progressing in her chosen career, it would not pass constitutional muster. It would constitute an impermissible barrier to an individual's ability to "develop [her] humanity [and] 'humanness' to the full extent of its potential". The Act indicates a cognisance of the dangers of establishing "an absolute barrier to the prospective or continued employment or advancement of people".

Neither is present in this case. *Ms Barnard failed to secure appointment because there was over-representation of people from her designated group. Had this over-representation not been present, the policy would not be a bar – let alone an absolute one – to her (or any other similarly qualified white woman's) appointment.* Ms Barnard's career advancement within SAPS was not destroyed. *The Employment Equity Plan has specific targets for different occupational levels and is flexibly used to cater for over- and under-representation. This flexibility ensures that she can be promoted to a higher occupational level should representation targets allow.* By the time the case reached this Court, she had been promoted, albeit to a different department. *The goal of equality is being promoted in this case through representivity.*' [My emphasis]<sup>75</sup>

Is it just me, or is there something rather incongruous in this reasoning? Does this amount to saying the following: "*There is a measure here that is being challenged on the basis that it does not allow for the appointment of someone who is white. Ms X was not appointed because she was white. This is not a problem, however, because if she had been black she would have been appointed.*"? I am probably wrong; van der Westhuizen J is an eminent jurist, and one of the judges of our highest court. But surely we deserve more clarity than this.<sup>76</sup>

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<sup>75</sup> *Barnard* (CC) paras 180-183 (footnote references omitted).

<sup>76</sup> Thomas Sowell would, I believe, have responded as follows to these and other examples of the failure of the judges in *Barnard* (CC) to use clear language and explain what they mean so that others can understand: "Whatever definition - and accompanying set of policies - one believes in, a serious discussion of racial discrimination or of racial issues in general requires that we lay our cards face up on the table and not hide behind ambiguous and shifting words that render any

That being said, however, and without wanting to sound overly simplistic in the analysis of this judgment, van der Westhuizen J spent fifteen paragraphs discussing the role of dignity in this case, and then found that it was trumped by representivity. And yet, as said earlier, the learned judge does not spend even one paragraph explaining to us the meaning and relevance of representivity in the application of an affirmative action measure in order to promote substantive equality. And this, to me, is especially strange when one considers the central importance that he attached to the balancing exercise that is inherent in constitutional adjudication (and which, in fact, forms the basis for his suggested standard of the review of affirmative action measures which should include the consideration of proportionality):

No [constitutional] provisions may be interpreted in isolation and no right protected and enforced without regard to other rights. Especially the exercise of one constitutional right may often have to be balanced against another. Courts are regularly called upon to do so thoughtfully and candidly. To a considerable extent, this is what constitutional adjudication is about.<sup>77</sup>

Yet we do not find an explanation of the meaning, content and proper (constitutional) role of the central concept or interest which the judge feels trumped Ms Barnard's right to dignity in this case. As a reader of the judgment I do not find it more helpful than the extremely one-sided judgment of Mlambo J in *Barnard* (LAC), which, as already noted, Malan has characterised as "nothing but a dreadful miscarriage of justice".<sup>78</sup> The big difference, of course, is that even though we are no closer to discerning the meaning of representivity within the equality jurisprudence, the concept has apparently been given constitutional approval by the judges of our highest court. No future judge, outside of this court, who might feel more inclined to interrogate these issues, can now overturn this implicit approval of representivity as an apparent (although highly suspect) new constitutional goal. The drafters of the EEA (and the SAPS and doubtless a large number of other human resource managers in the public service) must be delighted. I am less so.

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attempt at dialog futile and ultimately poisonous." (Sowell "Discrimination, Economics and Culture" 168).

<sup>77</sup> *Barnard* (CC) para 161 (footnote references omitted).

<sup>78</sup> Malan 2014 *De Jure* 125.

The vagueness of the language and reasoning of these judges is sorely problematic, not only because of the lack of clarity that *Barnard* (CC) has provided us on all the above-mentioned issues and questions, but also because such uncertainty also leaves just too much room for dishonesty. We have seen that the Constitutional Court found that the SAPS measure did not constitute an absolute bar to the appointment of Ms Barnard or any other white female. It is interesting, considering this, that the reality seems to have been quite different. In a recent speech the CEO of Solidarity,<sup>79</sup> Dirk Hermann, recounted the following exchange that occurred in testimony before the Labour Court in *Barnard* (during the leading of evidence of a SAPS human resources professional, Superintendent Ramathoka):

According to Ramathoka, an interviewing panel was not allowed to recommend people from the non-designated group if that group happened to be overrepresented. People from that group could apply for a position, but they would not be recommended.

"What is the point in allowing them or inviting them to apply?" asked Advocate Grogan.

And then followed Ramathoka's astounding reply that, in terms of the Employment Equity Act, an absolute ban on applications was not allowed. Whites could therefore submit an application; however, strict enforcement of the SAPS's plan meant they would not be recommended.

"That's cynical," Grogan said.

The judge was also confused: "Sorry, I just need to clarify something. Superintendent, I am confused. Are you testifying that the policy and process of the SAPS, once a plan has been issued which shows an overrepresentation in a particular position, is an absolute rule? That the SAPS will not, and may not, appoint a person from a non-designated group to that position, as an absolute rule?"

"It is an absolute rule, my lord," Ramathoka replied.<sup>80</sup>

It appears – and this is worrying - that the judges of our Constitutional Court may be easily fooled. It might be apt to quote the words of American economist Thomas Sowell – referring to affirmative action for African-Americans as "the grand fraud". This was expressed, of course, in the American context, but see if you can spot its relevance closer to home:

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<sup>79</sup> The trade union that took Ms Barnard's matter to court (and has also led the litigation in other prominent affirmative action disputes).

<sup>80</sup> Hermann 2014  
<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639?oid=680718&sn=Detail&pid=71639>.

No issue has been more saturated with dishonesty than the issue of racial quotas and preferences ... Many defenders of affirmative action are not even honest enough to admit that they are talking about quotas and preferences, even though everyone knows that that is what affirmative action amounts to in practice ... When any policy can only be defended by lies and duplicity, there is something fundamentally wrong with that policy. Virtually every argument in favor of affirmative action is demonstrably false. It is the grand fraud of our time ... Affirmative action is great for black millionaires but it has done little or nothing for most people in the ghetto. Most minority business owners who get preferences in government contracts have net worth's of more than one million dollars. One of the big barriers to any rational discussion of affirmative action is that many of those who are for or against it are for or against the theory or the rationales behind group preferences and quotas. As for facts, the defenders simply lie.<sup>81</sup>

## 5 The recent amendments to the EEA

The *Employment Equity Act* was recently amended for the first time since its inception in 1998, by means of the *Employment Equity Amendment Act 47* of 2013 (which came into force on 1 August 2014 – nearly to the hour exactly one month before the handing down of the Constitutional Court's judgment in *Barnard*). The amendments brought changes to various important provisions of the Act, ranging from substantive matters (such as the definition of the designated groups under Chapter III and both the definition of prohibition on unfair discrimination and the burden of proof in claims of unfair discrimination in terms of section 6) to procedural ones (such as the assessment of compliance with the Act and the reporting requirements). For the present purposes, the most relevant of the amendments relate to the assessment of compliance with the provisions of the affirmative action chapter, specifically in respect of the contents of section 42 of the Act. Earlier in this piece I briefly recounted the (pre-amendment) provisions of this section, and I made the point that its scheme facilitated (and, indeed, gave definition to) the Act's concept of the pursuit of "equitable representation" with reference to the foremost compliance criterion in respect of affirmative action target-setting – demographics. The amendments to section 42 are, in this respect, extremely significant. For the present purposes I will focus only on these, very briefly and extremely superficially.<sup>82</sup>

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<sup>81</sup> Sowell 2003 <http://capitalismmagazine.com/2003/04/the-grand-fraud-affirmative-action-for-blacks/>.

<sup>82</sup> As contained in s 16 of *Employment Equity Amendment Act 47* of 2013.

I will not mention all of the amendments to this section but, judged holistically, the most important is that of the scrapping of most of the criteria previously listed for the assessment of compliance by a designated employer. It should – at this stage of reading this piece – come as no surprise that the legislature has opted to retain only one of the previous criteria (with the wording slightly altered) as contained in the section, namely the "extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to *the demographic profile of the national and regional economically active population*".<sup>83</sup> The Amendment Act has, thus, removed all of the workplace-related factors referred to earlier as contained in the section. Note, of course, that in the earlier discussion of quotas and the illegitimacy of the rigid pursuit of numerical targets, these were the only reality-based factors that a designated employer could raise in order to ensure flexibility and consideration of its actual requirements and circumstances (if it came to a failure to reach numerical targets). While including a number of new factors (all relating to "reasonable steps taken by a designated employer" to do certain things), as well as a catch-all ("any other prescribed factor"), the overwhelming and inevitable conclusion is that the legislature has clearly decided to tighten up the demographic representivity agenda pursued in terms of the Act by making it clear for everyone to see that demographics are, and will remain, first prize. Designated employers are now left with little doubt (if any remained) about the purpose of the Act and the objective of the legislature in its conception of the numbers game and what is expected in its implementation.

These amendments, obviously, did not feature in the litigation in *Barnard*. If we will see any future litigation under the Act - as we must - they will doubtless play a role in further cementing the illegitimate agenda of the Act and our apparent, inevitable, slide into a situation where the term "affirmative action" (as understood by ordinary South Africans) might, as more and more signs seem to suggest, equate to the pursuit and condonation of what may very well come down to little more than institutionalised racism under a gossamer veil of "transformation". To go old school for a moment: in the words of Johnny Mercer, when accentuating the positive and eliminating the

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<sup>83</sup> As contained in the new s 42(1)(a) of the EEA.

negative, we need to "latch on to the affirmative" - but "don't mess with mister in-between".<sup>84</sup> The judges of our Constitutional Court, it would seem - when casting their votes over the legitimacy of the *Employment Equity Act* in this whole scheme of things – may very well have briefly lost sight of this last warning. In our constitutional equality paradigm, I would characterise this Act as the very personification of a rather shifty-eyed Mr In-Between – caught somewhere between the constitutional principle of affirmative action and the governmental ideology of the numbers game. It is worthy, if nothing more, of constant and very critical watch; and someone should have the intestinal fortitude to mess with it, sooner rather than later.

## 6 Conclusion

What for me emerges quite clearly when one considers the subject matter of this piece is that we are dealing here with two quite distinct and probably irreconcilable concepts. The first is that of (substantive) equality, which is sanctioned, and, indeed, demanded by our *Constitution*. Our understanding of the role of affirmative action in this context is the redressing of disadvantage caused by past unfair discrimination through the means of remedial and restitutionary measures sanctioned under the Bill of Rights, in order to promote the achievement of the full and equal enjoyment of those hard-fought fundamental rights for all who share this beautiful country. The second is that of (demographic) representivity, which finds its only purported legitimacy in the transformational nature and objectives of our *Constitution*. If 'transformation' means to change things (possibly, cosmetically),<sup>85</sup> then yes, government's virulent pursuit of representivity will achieve this (if it has not done so yet). Whether this last is what the drafters of our *Constitution* had in mind (or whether the "transformed" South African society we are in the process of creating is the one envisaged by them<sup>86</sup> – although we should not lose sight of the long history of the ANC's National Democratic

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<sup>84</sup> Johnny Mercer and the Pied Pipers *Accentuate the Positive*, Capitol Records (© 1945).

<sup>85</sup> The Oxford dictionary defines "transformation" as "a marked change in form, nature, or appearance".

<sup>86</sup> As Dupper notes, some of the burning questions regarding affirmative action (although not necessarily the same questions I have tried to address here) raise "important questions about the society we wish to become, and it matters enormously which choices are made" – see Dupper 2008 *SAJHR* 443.

Revolution<sup>87</sup>) is a very different question. One thing that does stand out, however, is that *representivity has virtually nothing to do with equality* (just as it, probably, has

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<sup>87</sup> Some of the issues touched on in this piece are placed more clearly in context when one considers the analysis by Roger Southall regarding the development of the ruling party's National Democratic Revolution (or NDR). He explains (writing in 2008, prior to the start of the Zuma era): "[C]apture of the state and 'internal decolonisation' [by an ANC coming into power in a post-apartheid South Africa] would require, both in terms of social justice and the needs of the economy, the rapid growth of the black middle class – and indeed, the expansion of a class of black capitalists. After all, democratisation could not stop with the state: it also demanded popular control of the 'commanding heights of the economy'. It was not a huge step for this to be translated by influential forces within the party after 1994 into a call for 'demographic representivity', or for the 'blackening' of the corporate sector, a demand to which large scale capital was happy to accede (albeit within limits, and over time). In terms of the NDR, a black capitalist class is always suspect. Because its rise is dependent in part upon co-operation with established capital and upon opportunities provided by the state, it is likely to resort to corruption and to develop into a 'parasitic bureaucratic bourgeoisie'. To counter this, the NDR must cleave to the disciplines of 'patriotism'; that is, to remember its social obligations to the impoverished community from which it has come and remain guided by the ANC. However, while the notion of a 'patriotic bourgeoisie' has always sat uneasily with Marxian theories of class exploitation, its effective dilution since 1994 into the demand for 'representivity' has allowed for the upward mobility of blacks as individuals within the corporate sector to be presented as commensurate with the furtherance of the NDR. While the ANC's partners, the Congress of South African Trade Unions (COSATU) and the SACP may cling to more radical, activist interpretations of the NDR, the ANC leadership under Mbeki was to become increasingly bold in asserting that the ANC has never been a socialist organisation, and by implication, that the blackening of capitalism through BEE will be the revolution's end point. However, the problem facing an emergent black capitalist class was its lack of capital and capitalist expertise. The solutions were essentially twofold. First, from the moment it moved into office, the ANC viewed its control over the civil service and parastatals (which accounted for around 15 per cent of GDP) as the instrument for extending its control over 'the commanding heights of the economy'. This included the strategy of transferring state-owned enterprises on discounted terms to blacks via privatisation. In the event, this did not prove to be particularly successful simply because the amounts of capital required for the purchase of all but 'non-core' assets were too large for aspirant black capitalists to raise. In practice, therefore, the state sector served as the training ground in corporate management, knowledge and the expertise required by aspirant black capitalists for launching themselves into the private sector. Second, the ANC's demand for 'representivity' drew a response from large scale capital that was simultaneously creative and defensive. On the one hand, conglomerates proved responsive to the ANC's 'deployment' of influential senior personnel to the corporate sector, recognising that whilst they had the financial capital to fund BEE, they also needed the 'political capital' that only ANC loyalists could provide. On the other, when from around 2000, the ANC's BEE strategy became more assertive, large capital responded by pre-emptively negotiating 'transformation charters' which established targets for black share ownership, management, employment, and skills training by 2014. Today, most individual industrial sector charters are in the process of being subordinated to a generic code introduced by the Broad Based Black Economic Empowerment Act of 2003. This may result in a change in the face which corporates present over time. However, while this will be welcomed by the ANC, a possible accompaniment may be a weakening of the commitment of the black business class to the party as a force for transformation in favour of its reduction to a vehicle for promoting their material advance. It is clear that the NDR prioritizes control of the state as the essential instrument for transformation. However, in the context of South Africa's new democracy, this has posed the awkward necessities of funding the party and thrust it into a maw of controversy." (Southall 2008 *Rev Afr Polit Econ* 284-286.)

nothing to do with unfair discrimination<sup>88</sup>). I suggest that it is time for our politicians and legal textbooks, and even the judges of our highest court, to stop implying that it does.

I should like to call on the legal fraternity to take a more active interest in these developments, which affect us all<sup>89</sup> (and will doubtless affect many of our children – possibly a whole generation, at least<sup>90</sup> - for years to come). If there is something that, doubtless, all of us trained in the law inherently abhor, it is injustice. There is one thing, though, that I think we all abhor even more: a clear injustice clothed as justice. The apartheid state, after all, plodded along quite successfully for many years within a system of parliamentary sovereignty and dodgy but ostensibly legitimate laws. Apart from the issue of affirmative action, I did not really in the preceding discussion touch on some of the most controversial aspects of our current government's drive for demographic representivity and for the race-based transformation of society, public

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<sup>88</sup> American economics professor, Thomas Sowell (who has done more empirical research on this subject than I have), explains this well in this context: "Many people believe that differences in life chances or differences in socioeconomic results are unusual, suspicious, and probably indicative of biased or malign social processes that operate to the detriment of particular racial and other groups. While there have certainly been numerous examples of discrimination - in the traditional sense of applying different rules or standards to different groups - in the United States and in other countries around the world, that is very different from claiming the converse, that group differences in prospects or outcomes must derive from this source. Intergroup differences have been the rule, not the exception, in countries around the world and throughout centuries of history ... It would be no feat to fill a book with statistical disparities that have nothing to do with discrimination. What would be a real feat would be to get people to realize that correlation is not causation - especially when the numbers fit their preconceptions ... Some statistical disparities are of course caused by discrimination, just as some deaths are caused by cancer. But one cannot infer discrimination from statistics any more than one can infer cancer whenever someone dies. The absence of corroborating evidence of discrimination has forced some into claiming that the discrimination has been so 'subtle,' 'covert,' or 'unconscious' as to leave no tangible evidence. But this method of arguing - where both the presence and the absence of empirical evidence prove the same thing - would prove anything about anything, anywhere and any time." Sowell "Discrimination, Economics and Culture" 169-170.

<sup>89</sup> Especially seeing that, well, we as a fraternity must, of course, also be demographically representative. Former Justice Minister Jeff Radebe's answer to a question in Parliament on the then Legal Practice Bill (18 October 2011): "The legal profession is still not representative of the demographics of South Africa and entry into the profession is, in many instances, determined by outdated, unnecessary, and overly restrictive prescripts. Access to legal services, especially by the poor, is limited ... It might be said that the Bill democratizes the regulatory structures which, in turn, will pave the way in order to take the transformation agenda to its logical conclusion." (Radebe 2011 [http://www.politicsweb.co.za/news-and-analysis/legal-profession-must-be-demographically-represent.](http://www.politicsweb.co.za/news-and-analysis/legal-profession-must-be-demographically-represent))

<sup>90</sup> Compare a university admissions affirmative action policy in India, which was implemented expressly as a temporary measure in 1949 and is still in force today – see Sowell *Thomas Sowell Reader* 288-289.

institutions and the economy (including the much-maligned broad-based black economic empowerment policies).<sup>91</sup> I refrained from doing so in the firm conviction that the redress of past disadvantage, especially in a society so scarred by systemic unfair discrimination on the basis of race and other arbitrary grounds, is a valid (and admirable) constitutional objective *on its own*. Leaving aside the practical and other objections regarding implementation, policies relating to, for example, the redistribution of wealth, land reform and the like are all valid manifestations of this (which is why I think no thinking South African can seriously and validly ignore the political platform of Mr. Malema's Economic Freedom Fighters). What is more worrying, however, is that when it comes to the application of affirmative action in employment (and in other, even more problematic contexts, such as sport), the means chosen significantly impacts on the rights of those specifically excluded by such measures (the "previously advantaged"). Even this would not be overly troublesome, though, if it occurred under the flag of redress as a valid constitutional objective. In the matter of the affirmative action scheme of the *Employment Equity Act*, it does so by invoking that other very valid constitutional objective – the achievement of substantive equality – but it does so really only in name.<sup>92</sup>

We have seen how the Act by definition elevates demographic statistics to the status of an ultimate objective when it comes to affirmative action. Instead of identifying the redress of past disadvantage as a separate and independent constitutional objective,

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<sup>91</sup> As I write this, there are continuous reports in the media about government's drive for transformation of the South African economy towards demographic representivity. The deputy-president, Cyril Ramaphosa, was quoted following a speech at the annual conference of the Association of Black Securities and Investment Professionals: "Government needed to work towards radical economic transformation and the economy needed to reflect the country's demography. 'Broad-based black economic development, skills development, supplier development and preferential procurement are parts of the package of measures we've employed over the past two decades to achieve this objective'." (Sapa 2014 <http://www.timeslive.co.za/politics/2014/09/25/transformation-must-continue-ramaphosa>.)

<sup>92</sup> Which leads to some commentators seemingly losing sight of the constitutional framework for affirmative action in the face of the Act's obsession with the numbers: "It is apparent from the case law that some degree of consideration, planning and rationality must precede the implementation of affirmative action measures. It is not sufficient for an employer to merely assert that a measure amounts to an affirmative action measure. By the same token it is not necessary that affirmative action measures be part of an employment equity plan that complies with the provisions of the EEA. The fact that a measure is: (a) intended to contribute to the objective of equitable representation; and (b) capable of doing so; should be sufficient." (Partington and Van der Walt 2005 *Obiter* 602).

the Constitutional Court has told us repeatedly, and quite adamantly (in its interpretation of the text of the Bill of Rights), that affirmative action resorts squarely under the equality right; it is not an exception to the guarantee of equal protection for all, but part and parcel of the pursuit of substantive equality. This complicates matters somewhat when one considers the impact of some forms of affirmative action measures (notably those that are in line only with the stated purpose of the EEA) on those excluded from its benefits. While some judges of the CC reminded us in *Barnard* that "[f]requently the goals of transformation are more important" than the impairment of the dignity of these souls,<sup>93</sup> this seems to ignore the fact that our *Constitution* also pursues very important goals other than transformation. The promotion of dignity and equality (also in the sense of equal worth for all), non-racialism and non-sexism are all expressly written into our *Constitution* and comprise equally important fundamental values which underlie it.<sup>94</sup>

If the legislature intends to create a stratification of classes of citizens in the interests of redressing the disadvantage of those unfairly discriminated against in the past, they may do so by all means, but do so without subterfuge and with the realisation that ultimately this will promote a different (although possibly still valid) constitutional objective. [It will also, as mentioned, most probably create a quite different society to that envisioned by the drafters of our *Constitution*. We will, after all, very soon be able to fly the friendly skies assured that the ladies and gents in the cockpit are "fully transformed"<sup>95</sup> - I think George Orwell would have loved this!] But do not clothe

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<sup>93</sup> Per Cameron J, Froneman J and Majiedt AJ in *Barnard* (CC) para 89, note 93.

<sup>94</sup> I have not, in this piece, paid any real attention to the issue of the implications of the EEA's numbers game for non-racialism (and the fact that the EEA has been criticised for its re-introduction/continuation of racial classification). While the point has been made that it would probably be unrealistic and disingenuous to ignore the reality of South African society as still being extremely race-conscious (see, for example, Dupper 2008 *SAJHR*, and the authorities referred to there) it bears mentioning that the nature (and effects) of the ANC's pursuit of the ideology of demographic representivity is out of kilter with its own guidelines for the negotiation and eventual creation of a South African *Constitution* – compare the following, as expressed by a then member of the ANC's legal and constitutional committee in 1989: "[T]he [*Constitutional Guidelines for a Democratic South Africa*, published by the African National Congress in March 1988] seek to protect the individual human rights of all South Africans. They also seek to protect the individual's religion, language, and culture - all essentially 'group' rights - but without the poisonous sting of racism or exclusive ethnicity." (Masemola 1989-1990 *Colum Hum Rts L Rev* 53.) The scenario of the *Naidoo* case (which I referred to extensively earlier) again provides a poignant counterpoint here.

<sup>95</sup> A June 2013 posting on the FW de Klerk Foundation's website mentions that South African Airways has, reportedly, scrapped an absolute bar on the recruitment of white male cadet pilots. A

measures that directly and intentionally disadvantage certain classes or categories of persons (and may for all intents and purposes reduce them to little more than collateral damage) as actually promoting equality when they do so at the terrible expense of human dignity for some. This our Constitutional Court recognised well before it was first faced with affirmative action in *Van Heerden*:

*The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. [My emphasis]<sup>96</sup>*

Mlambo J (in the Labour Appeal Court in *Barnard*) – who, apparently (and intriguingly), could not see how the impact of an affirmative action measure on those excluded from its benefits could conceivably have an effect on the legitimacy of the measure<sup>97</sup> - declared that it is a misconstruction "to render the implementation of restitutionary measures subject to the right of an individual's right to equality (*sic*)". Interestingly, in the process (and in the course of a clear application of the *van Heerden* rationality approach), he admits that such restitutionary measures may potentially be unfair.<sup>98</sup>

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spokesperson for SAA stated that the Cadet Programme was advertised "as an initiative to bring the demographics of SAA's pilots in line with the demographics of South Africa". It explains: "SAA has now stated that the final 40 candidates for the 2013 intake fall under the category of previously disadvantaged individuals as defined in the Employment Equity Act - and that not a single white man has been selected for the cadet programme. The group reportedly consists of 10 black men, four black women, nine coloured men, one coloured woman, seven Indian men, two Indian women and seven white women. In essence, it would appear that the ban on the employment of white male trainee pilots has not been lifted in practice. According to SAA spokesman Tlali Tlali, 'it is important to note this in the context of the current reality and measures that need to be taken'. Tlali further stated that 'the cadet programme is the airline's effort to transform not only its own but also the country's flight deck community, which is nowhere close to reflecting the country's demographics'." From a posting for the FW de Klerk Foundation authored by Jacques du Preez (on file with the author).

<sup>96</sup> *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41.

<sup>97</sup> See *SAPS v Solidarity obo Barnard* 2013 1 BLLR 1 (LAC) (hereinafter *Barnard* (LAC)) para 20, where the learned judge declared: "Although extensive argument was also advanced by the parties in relation to affirmative action, the matter has, in my view, little to do with the legitimacy of affirmative action, but more with the implementation of such a programme in circumstances where persons from non-designated groups are adversely affected thereby."

<sup>98</sup> In *Barnard* (LAC) para 24 the judge refers to the fact that "our Constitution enshrines the right to equitable treatment yet sanctions inequitable conduct" (in the context of affirmative action).

On a general note, I think McGregor sums up at least one overarching problem with this last judgment well in declaring that "[e]quality did not find its place here; representivity was more important".<sup>99</sup> Any denial of the fact that even a legitimate restitutionary measure can be unfair in its application would be facetious. And surely the *Constitution* calls for us to always ensure a prominent place for fairness in the equation when evaluating any potential limitation of rights. After all, Cameron J *et al* in *Barnard* (CC) tell us that "fairness is a foundational constitutional value".<sup>100</sup> In the always-eloquent words of Sachs J:

It would, in my view, do a disservice to section 9(2) to treat it as a fantastical constitutional device for leaping over the gritty hurdles of hard social reality and escaping from basic equality analysis. It is not a magic analytical slipper which, if no toes protrude, converts the wearer into a sovereign princess unrestrained by any notions of fairness and beyond the bounds of ordinary constitutional scrutiny.<sup>101</sup>

This is really all I am calling for: *ordinary constitutional scrutiny* of affirmative action (as it is applied under the EEA).<sup>102</sup> Mlambo J's approach in *Barnard* (LAC) seems to

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<sup>99</sup> McGregor 2014 *SA Merc LJ* 88.

<sup>100</sup> *Barnard* (CC) para 98.

<sup>101</sup> Sachs J, in *Van Heerden* para 139.

<sup>102</sup> Of course, this would appear to be anathema to the approach proposed by the Constitutional Court – compare the unambiguous stance displayed by Mokgoro J in *Van Heerden* para 87: "Section 9(2) is a unique constitutional provision which has been enacted to respond decisively to the particular history of inequality and the impact of that history on our society. It makes clear that restitutionary measures are part of the scheme for the realisation of substantive equality. A measure which is part of the framework for the advancement of equality cannot ever be said to discriminate unfairly. That being the case, once a measure can properly be said to satisfy the internal test in section 9(2) and fall within the ambit of the section, the scrutiny that other measures are subjected to in terms of section 9(3) does not apply. Once the state successfully demonstrates that a measure falls within section 9(2), that measure is constitutionally compliant without any further justification. That being the case, section 9(2) must be used only in appropriate cases and with great circumspection. The vision of substantive equality and the need for transformation cannot be underestimated. For that reason section 9(2), as an instrument for transformation and the creation of a truly equal society, is powerful and unapologetic." Pretorius 2013 *SALJ* 42, however, provides a powerful argument against Mokgoro J's views: "Mokgoro J argued that the main focus in s 9(2) of the Constitution is on the group advanced and the mechanism used to advance it ... Therefore, measures enacted in terms of s 9(2) ought to be assessed from the perspective of 'the goal intended to be advanced'. Fairness review would be out of place, because it would mean that undue attention is paid to those disadvantaged by the measure ... This reasoning is perfectly aligned with a rationality paradigm. As the constitutional theorist Alexy pointed out in his criticism of the early equality jurisprudence of the German Federal Constitutional Court, rationality review is not about comparison as such and therefore does not provide a suitable normative yardstick to measure the legitimacy of differential treatment (Robert Alexy *A Theory of Constitutional Rights* (trans J Rivers) (2004) 265–6). If the contextual focus of judicial review is limited - as Mokgoro J in *Van Heerden* insists that it should be - to whether a measure is logically related to a given remedial goal, its differential impact as such is not addressed ... As argued elsewhere, this reduction of equality to rationality restricts the normative reach of the notion of substantive

treat potential unfairness as irrelevant, and it is submitted that such an approach is simply untenable when dealing with efforts at redress under the *Constitution*.<sup>103</sup> This brand of remedial action (or "transformation") is more appropriate – as the saying goes - when one is making omelettes, and less so when one is building a nation based on the fundamental principles of Ubuntu and non-racialism. In response to this approach one must ask whether the equality court's interpretation of the affirmative action provision of the *Promotion of Equality and Unfair Discrimination Act*<sup>104</sup> (or PEPUDA, the "sister statute" to the EEA, also enacted in terms of the dictate contained in section 9(4) of the Bill of Rights) in *Du Preez v Minister of Justice and Constitutional Development*<sup>105</sup> should not be seriously considered here.<sup>106</sup> In the course of his judgment, Erasmus J referred to section 9(2) of the Bill of Rights and had the following to say regarding the constitutional obligation to consider the potential negative impact of affirmative action on non-beneficiaries:

It is relevant to the interpretation of [PEPUDA's affirmative action provision] that although affirmative action measures do not necessarily disadvantage any other persons, inevitably some measures will have that effect such as when one person is preferred over another on the basis of race or gender in the appointment to a position for which both had applied. To escape constitutional invalidity such measures must come within the protection afforded affirmative action by s 9(2) of the Constitution. What is the nature and extent of that protection? *If the provisions of ss (2) of s 9 were to be interpreted as constituting an exception to the unfair discrimination proscribed by ss (3), then persons disadvantaged by affirmative action measures would have no protection under the equality rights guaranteed by the Constitution.* If the Constitution were an ordinary legislative measure, such a construction of s 9 would be permissible. But the Constitution is not an ordinary statute. It is the supreme law which defines and reveals the ethical principles which underlie all law.

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equality, since it is effectively deprived of the comparative contextual setting necessary to be able to function as an *inclusive* fairness-based standard for the assessment, evaluation and integration of competing equality claims."

<sup>103</sup> Surely this is apparent from the words of Cameron J, Froneman J and Majiedt AJ, in their concurring judgment in *Barnard* (CC) para 95: "[A]djudging Ms Barnard's challenge requires us to apply a less deferential standard than mere rationality. Her complaint was that she had been unfairly discriminated against, in contravention of the Act. In our view, that Act imposes a standard different from, and additional to, rationality. *The important constitutional values that can be in tension when a decision-maker implements remedial measures require a court to examine this implementation with a more exacting level of scrutiny.*" [My emphasis]

<sup>104</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA). S 14(1) of the Act provides as follows: "It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons."

<sup>105</sup> *Du Preez v Minister of Justice and Constitutional Development* 2006 27 ILJ 1811 (SE).

<sup>106</sup> After all, van der Westhuizen J in *Barnard* (CC) expressly referred to this judgment after declaring that "[i]f a measure is used to obliterate a person's chances at progressing in her chosen career, it would not pass constitutional muster" - *Barnard* (CC) para 180 (and fn 197).

Those principles are absorbed into and reflected in the values that inform the fundamental rights enshrined in the Bill of Rights. *When applying the Bill of Rights, a court must promote all those values, and will therefore not readily accept an exclusion or diminution of a fundamental right even by another constitutional right, and certainly not by any other statute. The Constitution is therefore not subject to the canons of construction that govern the interpretation of ordinary statutes. A flexible and comprehensive approach is called for, acutely sensitive to all constitutional values and objectives. An interpretation of s 9(2) of the Constitution that sees its implicit approval of affirmative action measures as excluding or negating the right to equality, will therefore offend constitutional principle.*<sup>107</sup> [My emphasis]

This approach echoes what the CC advised us in *Van Heerden*, namely that restitutionary measures within the meaning of section 9(2) are not an exception to equality. But it also reminds us that non-beneficiaries of affirmative action may also lay claim to a right of equality. By implication it also recognises that these same beneficiaries may also rightfully claim the constitutional protection of their inherent dignity.<sup>108</sup> Section 9(1) of the Bill of Rights, of course, also tells us this (as does the first sentence of section 9(2)). And, lo and behold, so does *Van Heerden*.<sup>109</sup> Such an approach is more balanced than that of Mlambo J, and it does not, inexplicably (and as an apparent knee jerk reaction) privilege equality over all other fundamental rights and foundational values of the *Constitution* (in the process, apparently, seeking to remove it from the broader scheme of the Bill of Rights – including the provisions of the limitations clause). And it does not constitute, as Malan reminds us, such an apparently unthinking endorsement of the ideological homogenisation of our society under a majoritarian democracy (in a notably obvious blurring of the separation of powers). Yes, the court in *Van Heerden* reminded us that, due to our past, "the achievement of equality preoccupies our constitutional thinking".<sup>110</sup> And yes, there are obvious and understandable tensions here<sup>111</sup> when we deal with potential conflict between individual rights and interests and constitutionally-mandated measures premised on the pursuit of the greater good at the potential expense of individuals. In this specific context of the application of affirmative action, "fighting fire with fire

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<sup>107</sup> *Du Preez v Minister of Justice and Constitutional Development* 2006 27 ILJ 1811 (SE) para 18.

<sup>108</sup> See *Barnard* (CC) para 32.

<sup>109</sup> See, for example, *Van Heerden* paras 27, 44 of Moseneke J's judgment; also see *Barnard* (CC) para 30 (per Moseneke ACJ); para 101 (per Cameron J *et al*); paras 143, 146 (per van der Westhuizen J).

<sup>110</sup> *Van Heerden* para 23 (per Moseneke J).

<sup>111</sup> Or "transformative tension", as it was called by Cameron J, Froneman J and Majiedt AJ in *Barnard* (CC) para 77.

gives rise to an inherent tension".<sup>112</sup> But this does not mean that the former must necessarily, automatically and unquestioningly, bow to the latter. Wiechers, in response to *Barnard* (CC), reminds us that while the pronouncements on upliftment and equality in this judgment are laudable, when the rights of the individual are sacrificed by such ideals the moral basis of those objectives are fundamentally undermined.<sup>113</sup>

Upliftment, equality and non-racialism start with the individual, and if the individual's entitlements and rights must be sacrificed to serve a claimed greater good of equality, we are on the verge of an orchestrated denial of human rights. The old aphorism that the individual does not exist for the state, but the state exists for the individual and his or her rights and interests, is the central tenet of a free state.<sup>114</sup>

This view also resonates in the words of Malan (relying on Dworkin), who points out that:

... the central focus of the judicial function and primary responsibility of courts, unlike that of the legislature and the executive, are not these general collective social policies and goals, but the protection of individual (constitutional) rights ... [Courts] must not primarily pursue policies deemed to advance or secure an economic, political or social situation for the benefit of all. That is the distinctive terrain of the legislature and the executive.<sup>115</sup>

The court in *Barnard* (CC) may very well have misconstrued its role or, at least, to an extent defaulted on the constitutional promise of the potential for justice in individual cases, which must still apply even to the previously advantaged. After all, to quote Sachs J again, "the rich too have rights".<sup>116</sup> Taken to its inevitable conclusion, the approach of the Labour Appeal Court, by way of Mlambo J, would inevitably deny the previously advantaged any such right to constitutional protection and, in effect, relegate them to an underclass to the extent that their place in society and in the *Constitution* is denigrated.<sup>117</sup> As van der Westhuizen J warned, even the perception of such a situation "may threaten the pursuit of our constitutional goal of a society in which everyone, regardless of their differences, is equally valued and at home".<sup>118</sup> It

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<sup>112</sup> *Barnard* (CC) para 93.

<sup>113</sup> *Wiechers* Rapport.

<sup>114</sup> *Wiechers* Rapport.

<sup>115</sup> Malan 2014 *De Jure* 134-135.

<sup>116</sup> Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 149.

<sup>117</sup> See Van der Westhuizen J in *Barnard* (CC) para 180.

<sup>118</sup> *Barnard* (CC) para 180 (and see the authorities referred to there).

would thus, in fact, threaten the pursuit and ultimate achievement of equality, not to mention other important constitutional rights and values that will always be in the firing line when faced with the insidious ideology of racial representivity pursued as a "programme of homogenisation", whereby not only the underclass of minority groups, but our very democracy is at threat.

Such homogenisation programmes that require individuals to change their cultural, linguistic and religious characteristics/identities in order to be absorbed into the so-called national identity constitute an *iniuria* to those against whom they are directed and they are thus an assault against their individual identity. Within a human rights paradigm they are an obvious offence against human dignity and freedom of expression and the right to freedom of association. If carried out wholesale against a whole cultural community, that is subjected to forced assimilation, such programmes would constitute attempted cultural genocide. This flies in the face of basic minority rights protection, which, apart from prohibiting discrimination against minorities, also seeks to guarantee the survival of the distinctive identities of minority cultural, religious, linguistic and national communities.<sup>119</sup>

I find it increasingly difficult to reconcile the disparate pronouncements of our highest court on these (and other) issues. As referred to earlier, we were told in *Barnard* (CC) that "[f]requently the goals of transformation are more important" than the impairment of the dignity of those who do not benefit from such measures<sup>120</sup> (ie especially the white minority). This same court, in *Minister of Homes Affairs v Fourie*,<sup>121</sup> however, said as follows:

Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.<sup>122</sup>

Which is it, exactly? Or is it enough simply to sweep the glaring inconsistency in these positions under the rug through the rather bald assertion (repeated by Moseneke ACJ in *Barnard*) that affirmative action measures that comply with the almost negligible

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<sup>119</sup> Malan 2010 *TSAR* 435.

<sup>120</sup> Per Cameron J, Froneman J and Majiedt AJ in *Barnard* (CC) para 89, note 93.

<sup>121</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

<sup>122</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 94 (as quoted in Malan 2010 *TSAR* 437-438).

rationality standard set in *Van Heerden* just cannot be unfair?<sup>123</sup> There are other examples of this disparity in the views of our Constitutional Court judges, one of which is very germane to the issues under discussion here. I have referred to the fact that Jafta J, surprisingly and quite disappointingly, appeared to endorse the practice of race-based job reservation in his concurring judgment.<sup>124</sup> Yet we find Moseneke ACJ expressly (in the context of his brief and rather disappointing discussion of the role of quotas) stating that "[q]uotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]".<sup>125</sup> Frankly, I am sometimes at a loss to explain how the judges of this court can agree on anything to the point of writing concurring judgments. And the problem is sometimes most starkly illustrated in comparing the judgments of the same jurist in different cases. Startling (for me) here, is the case of Justice Moseneke. We have seen that he did not take issue with the hegemony of demographics in the application of affirmative action under the *Employment Equity Act* in *Barnard* (CC). I referred earlier (only in passing) to the potential relevance of Ubuntu in this present debate. In *Everfresh Market Virginia v Shoprite Checkers*<sup>126</sup> (a contract law case) this same judge declared as follows in the context of the impact of

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<sup>123</sup> Pretorius has highlighted that *Van Heerden's* rationality test is insufficiently rigorous to provide the standard for the testing of affirmative action measures under the equality right: "[R]ationality as such is ill-suited to fulfil the basic function of an equality actualising norm, since it lacks the normative content to be able to determine whether a differentiating measure actually promotes the overall purpose of s 9, which the court in *Van Heerden* described as the realisation 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'. This is so because the rationality inquiry does not interrogate the comparative fairness of the impact of differentiating measures on the affected parties. A focus on impact has however been singled out by the Court itself as the hallmark of the promotion of substantive equality." In doing so, the author observes that other Constitutional Court judgments have required more in this context than this same court did in *Van Heerden* – see Pretorius 2010 *SAJHR* 565 (and the cases referred to there).

<sup>124</sup> *Barnard* (CC) para 227.

<sup>125</sup> *Barnard* (CC) para 54. And *vice versa* – the reservation of posts amounts to the application of a quota: "Some defenders of strong-preference affirmative action are clearly pursuing only goals and not quotas. However, other strong-preference affirmative action policies will most plausibly be understood as pursuing quotas rather than mere goals. The claim not to be defending quotas is least plausible when it emanates from defenders of set-asides. This is because a set-aside is a kind of quota. When one sets aside a specific number of positions or places for 'blacks' then, assuming these positions are all filled, one has met a quota. That quota may be only part of a broader goal if other forms of affirmative action are also employed. Nevertheless, the places set aside are reserved for 'blacks'. When some minimum number of places is reserved one has a quota." (Benatar 2008 *SALJ* 280.)

<sup>126</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

this foundational value system on the application of the principle of good faith in contracts:

Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness, and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.<sup>127</sup>

Yet, this same judge does not see that the EEA's numbers game may very well be the antithesis of Ubuntu in the context of affirmative action. Where is the fairness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity in this form of cold and insensitive numerical target-chasing? Unless, of course, "group solidarity" envisages only the interests of one predominant group. The ideology of demographic representivity, with its fundamental racial focus, privileges the most numerous racial group as constituting the norm, and group solidarity equates to conformity to this basic norm to the exclusion of other groups. This, I would suggest, runs counter to the principles of Ubuntu, unless Ubuntu is reduced to an "Afro-centric country club" ideal which would rubbish the underlying ethos of our democratic (and human rights-based) *Constitution*.

The judiciary, more generally (and including the Constitutional Court), if it aims to endorse the numbers-driven species of affirmative action promoted by the *Employment Equity Act*, should have the courage of its convictions while being honest with us all. It should then rather tell us that (in practice if not in the often elaborate rhetoric of Constitutional Court judges) **the form of affirmative action as conceived and applied under the EEA actually is an exception to the equality guarantee**. At least then such measures may eventually be realised as having a limited life-cycle.<sup>128</sup> As things currently stand, seeing that the equality right is a central

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<sup>127</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 73-74.  
<sup>128</sup> Some believe that the EEA's affirmative action provisions have this characteristic: "[C]aution should be taken against perceiving affirmative action as an inseverable aspect of equality. Affirmative action is a temporary measure that will outlive its purpose whereas equality is a value without a shelf-life. Affirmative action is a measure that will be cast from our jurisprudence upon the 'normalisation of our society' or when 'a state of generalised equality' is achieved." (Partington and Van der Walt 2005 *Obiter* 596.)

and hopefully permanent feature of our Bill of Rights, there simply can and never will be an end to affirmative action.<sup>129</sup> As respected Stanford economist Thomas Sowell, a staunch opponent of the idea that demographic representivity can ever be achieved (except by the means of highly artificial quotas), put it:

In short, the even representation of groups as a norm is difficult or impossible to find anywhere, while the uneven representation that is regarded as a special deviation to be corrected is pervasive across the most disparate societies. People differ – and have for centuries. It is hard to imagine how they could not differ, given the enormous range of differing historical, cultural, geographic, demographic, and other factors shaping the particular skills, habits and attitudes of different groups. Any "temporary" policy whose duration is defined by the goal of achieving something that has never been achieved before, anywhere in the world, could more fittingly be characterised as eternal.<sup>130</sup>

If we remove the application of (and disputes about) "affirmative action" under the *Employment Equity Act* from the paradigm of equality, at least then these provisions could be challenged on the basis of the constitutionally illegitimate representivity objective that they are designed to pursue (and their authors or defenders will not be able to hide behind the equality clause, as they invariably do).<sup>131</sup> In fact, if we think back we'll recall that the *Employment Equity Act* is actually quite honest about this in so brazenly declaring its purpose (in section 2) explicitly to be the pursuit of

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<sup>129</sup> Especially not in the light of the use of demographic representivity in this context. McGregor, writing on the question of when affirmative action will end, reminds us that "national demographics are not consistent and therefore targets may vary with time. It is submitted that it is not realistic to expect an end to affirmative action on this basis" - McGregor 2014 *SA Merc LJ* 75.

<sup>130</sup> Sowell *Thomas Sowell Reader* 292.

<sup>131</sup> I believe that, unfortunately, there is some truth in David Benatar's following observation regarding the apparent lack of a need for a rigorous defence of affirmative action (which is surely the case under *Van Heerde's* rationality test): "In the legal sphere, for example, affirmative action has been protected from questioning by a constitutional provision in the equality section of the Bill of Rights, which explicitly permits 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. Instead of allowing the courts to determine whether affirmative action laws and policies are compatible in principle with the right to equality, any judicial questioning of the matter is forestalled." (Benatar 2008 *SALJ* 275.) Pretorius *et al* also observe the following: "[The authorisation in section 9(2) of the equality right in the Bill of Rights] of the use of affirmative action for the purpose of protection and advancement of those disadvantaged by unfair discrimination does not preclude the possibility that affirmative action may be taken for other purposes. Should, however, affirmative action be taken for objectives other than that specified by section 9(2), such measures will be judged according to a stricter standard of review than are remedial measures. The onus will be on an employer to establish that a particular non-remedial objective is a compelling enough operational or institutional objective to justify preferential treatment." Pretorius, Klinck and Ngwena *Employment Equity Law* 9-25. In a footnote to this section, the authors explain how "racial or gender balancing" (the objective of achieving representivity for its own sake) has consistently been rejected in the United States of America as a legitimate affirmative action goal.

representivity.<sup>132</sup> So all we really need is for those defenders of measures pursued in terms of this policy, and our judges, it seems, to be more honest and to drop the pretence of the purported pursuit of substantive equality when it comes to defending this odious exercise of counting heads.<sup>133</sup>

Let me be controversial: The *Employment Equity Act* – or, at least, its provisions dealing with affirmative action - is little more than a mangy wolf in sheep's clothing.<sup>134</sup> The Act is a plebeian placebo enacted by an all-powerful majority party whose support base is overwhelmingly aligned along racial lines, largely for the benefit of the supporters of that party at the expense of just about all others (irrespective of their political affiliation, or any other attributes except race and sex, and to a lesser extent, disability). It is a shining example of the legislative advancement of majoritarian democracy,<sup>135</sup> and it makes perfect sense in the context of *any* democracy, as

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<sup>132</sup> Maybe we should also stop talking about "affirmative action" under the Act (even though the Act, of course, uses this terminology) in the light of the fact that this term is traditionally used within the equality paradigm. I would suggest that the term "positive action policy" might be an alternative (even though this should not be read to imply the "positivity" of the potential outcomes of such policies aimed at pursuing demographic representivity). Nolan uses this term in the context of gender equality (and, interestingly, includes the use of quotas in this concept with no apparent qualms about their constitutionality) – see Nolan 2004 *SAPL* 382.

<sup>133</sup> Pretorius 2013 *SALJ* 36, observes (in his discussion of the proper standard for the constitutional review of affirmative action measures) that the Labour Court judgment in *Barnard* only referred to *Van Heerden* in passing, in two footnotes. He finds this surprising and inconsistent with the importance of the constitutional equality jurisprudence for cases under the EEA: "*Van Heerden* is cited as authority for the proposition that 'the need for representivity must be weighed up against the affected individual's rights to equality and a fair decision made' ...This citation sits uncomfortably with the whole tenor of the Constitutional Court's ... reasoning regarding the standard of review." I would suggest that, in the light of the glaring inconsistency between the EEA and the equality right in the Bill of Rights, courts adjudicating future affirmative action cases under the Act should pay even less attention to *Van Heerden* (and now, *Barnard* (CC), and other equality cases).

<sup>134</sup> The following words, used to describe the relevant employment equity plan at issue in the case of *Naidoo*, do well to also describe the EEA (as the legislature's chosen instrument to promote the equality right in our workplaces) and the ways in which its provisions have been implemented, especially in public sector employment: "While posing as a measure that is constitutionally compliant, it in fact discriminates unfairly and unlawfully. It may not have been the intended result to create barriers and patterns of disadvantage, but it does in practice have such effect. These effects undermine equal opportunity and the pursuit of substantive equality. They undermine too the constitutional objective of creating a non-racial and non-sexist egalitarian society." *Naidoo* paras 189-190.

<sup>135</sup> Which Malan 2010 *TSAR* 436 describes as follows: "Majoritarian democracy gives full sway to the will and preferences of the majority, regardless of the impact that these might have on minorities. Seeing the views of the majority and those of the whole of the national population as one and the same thing, majoritarian democracy translates the will of the majority into official state policy, regardless of its harmful consequences for the minorities. Majoritarian democracy is premised on the crude utilitarian principle that state policy should be based on what behoves the strongest –

(presumably) reflecting an expression of the will of the majority, a fact which makes it especially unlikely to be repealed.<sup>136</sup> Apart from its provenance under a liberation government with such a large, racially-aligned support base, the form and nature of this legislation, and the fact that it is still with us even after a decade of torrid, race-based social engineering of our workplaces, makes even more sense when one considers its innocuous reception on the world stage. This, of course, is only truly understandable if that stage is lit from the perspective of Apartheid as a crime against humanity (and if one also understands the psychology behind the resultant hero's welcome to be expected for any 'restorative' policy authored by a populist liberation movement which has always billed itself as the saviour of millions by ridding the world of such a crime against humanity). But what shady villain waits in the wings?:

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on what pleases the majority – irrespective of how this might impact on the minority, who might suffer pain from that what pleases the majority, even though it does not concern any specific interest of the majority. Utilitarian democracy allows for the free reign of the strongest – the majority – in favour of whom all political power is monopolised. Conversely, it leaves the minority – delivered to the will of the majority – with no power at all, even in relation to questions that are of core interest to the minorities and of no interest to the majority. The majority is therefore the only sector of the *demos* with meaningful political and governing power – *kratos*. Majoritarian democracy premised on the utilitarian principle is at best democratic only in part, namely to the extent that the majority can govern their own interest, but it is glaringly undemocratic in that it leaves the minorities devoid of any *kratos*, and thus vulnerable to domination by the majority."

<sup>136</sup> As Martin Brassey observed in his critical piece on the Act (which was, at the time, not yet in force): "A political challenge to the proposed Employment Equity Act seems doomed to fail. It provides a benefit for the majority at the expense of a minority and such initiatives always make good politics. Whatever hope exists of defeating the Act, therefore, lies in a challenge under the Constitution." (Brassey 1998 *ILJ* 1361.) Farrell, in his brief analysis of the legitimacy of the EEA in the light of South Africa's international obligations under the *International Covenant on Civil and Political Rights* (1966) (or ICCPR) views the role of black political dominance in South Africa as "problematic": "The ICCPR is a document intended to protect individual rights from abuse by one's own government. Any attempt by a state to favour the majority of the population when that majority is politically dominant might be viewed as contrary to the Covenant. The potential for discrimination against the white minority by the [South African] government strengthens this argument. One of the recognised limitations on affirmative action is that it may not lead to discrimination. A government that enacts affirmative action legislation that is detrimental to a non-dominant minority is clearly suspect, and such an action could certainly be viewed as actually or potentially discriminatory. This concern is heightened by an attitude that whites simply cannot be the subjects of discrimination. This is evidenced by the [White Paper on Transformation of the Public Service, 1998's] definition of 'unfair discrimination' as 'measures, attitudes and behaviours that obstruct the enjoyment of equal rights and opportunities in employment for black people, women and people with disabilities'." The author answers his own concerns by pointing out that the EEA is all about economic as opposed to political inequality, and that the use of preferential measures to advance, economically, members of a politically dominant group are justified. While he finds that "limited preferential treatment" through the means of the EEA probably does not violate the provisions of the ICCPR, he does, however, conclude that "[o]f course, it is imperative, particularly in this situation, that preferential treatment be used temporarily and that great care is taken to avoid impermissible discrimination against South Africa's white minority". (Farrell 2002 *TCLR* 221-223.)

"Racism" is commonly understood as the doctrine of racial superiority of one race over the other. However ... some of the Nazi's most effective propaganda against the Jews appealed to the principle of "racial equality". (Equally, much anti-Semitic legislation adopted by European states in the 1930s and early 1940s was directed towards enforcing an "equality of outcomes" in the professions, economy, press and cultural life of their countries.) This helped open the door to widespread, and ultimately open-ended, societal acceptance of severe and escalating discrimination against individuals of Jewish descent. For, if society (or world opinion) accepts the principle, upfront, that 6 out of 7 individuals should be ejected from their occupation, in pursuit of the goal of racial proportionality, it is difficult to see at what point it will recover its sense of right and wrong. By the time the 5<sup>th</sup> or 6<sup>th</sup> individual is pushed aside society will be so compromised by what it has already acceded to, and so habituated to injustice, that it is hardly likely to lift a finger in protest when, as invariably happens, the 7<sup>th</sup> gets thrown out as well, and so on and on. The question is why this wind [of "demographic representivity"], which has brought with it to so much destruction and misery across Europe and Africa, is still not recognised by so much intellectual opinion as smelling deeply rotten?<sup>137</sup>

The bitter irony, of course, is that the *Employment Equity Act* – this purported saviour of the broken – offends some of the most fundamental underlying values and founding principles of our *Constitution*, not least non-racialism, non-sexism, the promotion of human dignity and freedom, and the rule of law. I am not stating this with the intention of arguing that affirmative action (generally) is anything approaching "reverse discrimination" or the like; I *know* that it is not. But the way that *this Act* designs and delineates the framework for affirmative action programmes is unconstitutional, and thus does not qualify for the benefits of a presumption of fairness under section 9(2) of the Bill of Rights (or section 6(2)(a) of the Act itself). And it is the EEA's particular sphere of application of the ANC government's demographic representivity ideology (which is, arguably, acceptable to some limited extent and in much more watered-down form in the public administration)<sup>138</sup> to the private sector and to private

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<sup>137</sup> Myburgh 2014 <http://www.politicsweb.co.za/news-and-analysis/race-quotas-the-terrible-power-of-demographic-repr>.

<sup>138</sup> Malan explains how (demographic) representivity may have a legitimate role in this context. He believes that this is the case where the state deals with certain interests that might be regarded as equal stake common interests of the entire national population, which interests "are not peculiar to a particular community (culturally, linguistically, religiously etc), in contradistinction with the rest, which have a discernibly higher stake than any other community". He explains: "[T]he application of the representivity principle in the case of equal stake common interests also reflects a communitarian perspective of society. This is so because it recognises communities (by requiring representation for them) not only in the case where specific community interests are being dealt with, but also in cases where interests are the same and do not run along community lines. From a communitarian point of view the principle of representivity can therefore be regarded as commendable when it is applied to equal stake common interests." (Malan 2010 *TSAR* 438-439).

individuals, that is mostly attributable to the problems experienced in practice in application of the Act. The perpetuation of this notion of demographic representivity would lead to the "re-racialisation of the economy and of our society, down to the second decimal place. It would disempower minorities by confining them to shrinking demographic pens in virtually every facet of their lives".<sup>139</sup>

The *Employment Equity Act* should be viewed as a significant blight on our progressive constitutional democracy, although it constitutes the manifestation (in the employment sphere) of a fundamental doctrinal pillar of our governing party's central ideology of transformation and its dearest held policies, and as such will remain largely sacrosanct unless a higher power (the judiciary, one would hope) intervenes. The Act's apparent immunity in academic and other circles results largely from a misplaced sense of political correctness, and from the fear that it invariably awakes in its opponents (of being labelled a racist, a colonialist, a "counter-revolutionary", or a "bloody agent" - or all of the above ...). Twenty years into our democracy we *must* be able to air such views as these, free from fear of persecution. We should also be allowed the space to attempt to convince those with different views that action needs to be taken. Yes, opposing this Act may be unpopular, but since when has popularity ever been a guarantee of good sense? *Both* my young nieces just love the music of that Bieber kid.

Our liberal-egalitarian constitutional project – and its avowed emphasis on accountability and on speaking truth to power - requires more than just kow-towing to the majority view. The rule of law is so much more than "this is the rule, and therefore it is law" (Just ask anyone who experienced the ludicrous but obscene practices of the erstwhile dispensation in this country about the trials and tribulations of the "dompas"). As has been observed (echoing Mureinik's views on our *Constitution's* insistence on a culture of justification rather than a culture of authority):<sup>140</sup>

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<sup>139</sup> Steward 2012 <http://www.politicsweb.co.za/opinion/the-arithmetic-of-racial-domination>.

<sup>140</sup> The author explained notion of a culture of justification as follows: "[A] culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion." (Mureinik

Constitutional legitimacy does not rest solely on equal voting rights. The idea of Socratic contestation underlying proportionality-based judicial review 'expresses the commitment that legitimate authority over any individual is limited by what can be demonstrably justified to the person burdened in terms of public reason. If a legislative act burdens an individual in a way that is not susceptible to a justification he might reasonably accept, then it does not deserve to be enforced as law.<sup>141</sup>

*'I am male, I am white, and I am physically able.'*

If this last sounds like some Alcoholics or Narcotics Anonymous confession, it is apt - I do have a problem, and a rather serious one at that: Yes, I will freely admit to being someone who was "previously advantaged". But for all that, I may very well currently be, for all intents and purposes, a second-class citizen in the country of my birth, which country, ironically, boasts a *Constitution* frequently hailed by the outside world as one of the most progressive in existence.<sup>142</sup> The Constitutional Court's judgment in *Barnard* has further paved the way for this, not because it was clearly or even inherently wrong (although it may very well be unjust), but because it was so tentative in its apparent unwillingness to deal with matters that affect thousands of South Africans on a daily basis. Following reports in the wake of the judgment it was interesting to consider the degree of unhappiness felt in certain quarters, and how this was expressed with a proverbial sigh of despair with reference to the fact that the claimant in this case had now exhausted all domestic legal remedies in South Africa (her legal team were, at the time, threatening an approach to the United Nations in

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1994 *SAJHR* 32.) Also see Pieterse 2005 *SAPL* 161: "[One should not] deny the potentially destructive impact of public power on the achievement of substantive equality, social justice or private law justice, nor to say that societal transformation is possible without rethinking the manner in which public power is kept in check. Given the virtually untested (and uncontested) manner in which the organs of the apartheid state could encroach upon even the most basic freedoms of the majority of the population, it is necessary to ensure that every exercise of public power may properly be scrutinised for compliance with human rights standards."

<sup>141</sup> Pretorius 2013 *SALJ* 40 (with reference to Kumm 2010 *Law and Ethics of Human Rights* 171).

<sup>142</sup> One should at least question whether the new, democratic South Africa's treatment of minorities through "recognition without empowerment" might be in a process of flux (partly through the application of the ideology of demographic representivity) towards the disempowerment of the white minority and minority "designated" groups, and whether the following observations of Murray and Simeon, expressed as recently as 2007, are still or will remain accurate for long if such processes remain untested by our judiciary (and specifically by the Constitutional Court): "There is no suggestion that the African majority is riven by internal linguistic and ethnic differences. There is no suggestion of systematic exclusion or repression of minorities by the majority. The debates we have noted are no greater than one might expect in any other society as diverse as South Africa. Thus, the predictions ... that, once apartheid rule was ended, new ethnic conflicts would polarize the country have proven unfounded." (Murray and Simeon 2007 *ICON* 726.)

order to assess whether South African law complies with international best practice regarding the prohibition of all forms of racism). I was reminded of the words of Nicholson JA (as he then was in the Labour Appeal Court), as expressed in an unfair dismissal case (and in respect of the review of administrative action, rather than that of judicial decisions):

In a perfect society with unlimited resources full rights of appeal should be allowed from every administrative decision. Society has an inbred distaste for the spectre of a remediless recipient of administrative injustice.<sup>143</sup>

Is Ms Barnard the now remediless recipient of judicial injustice? Even though Mokgoro J in *Van Heerden* declared that section 9(2) of the Bill of Rights "as an instrument for transformation and the creation of a truly equal society, is powerful and unapologetic",<sup>144</sup> does *someone* (apart, maybe, from her legal team) owe Ms Barnard an apology? As already said, I am not convinced that the judges of the CC were (all) clearly wrong, just that they (for the most part) were inappropriately tentative in their approach to a case that – by their own admission<sup>145</sup> - carried much broader societal implications beyond what had happened to the claimant and what had been decided by the National Commissioner of Police in respect of the filling of a specific vacant post. Their oath of office requires the judges of this court to do more. Wiechers observes that the CC in *Barnard* (and other recent judgments) appears to have shifted from its bold and no nonsense approach in those earlier ground-breaking cases that law students still study today, which dealt with the certification of the *Constitution*, which abolished the death penalty, which ordered the provision of antiretrovirals to those in need, and which changed the law's treatment of gay relationships (amongst other things). He feels that the CC has increasingly come to function like a highest court of appeal, taking minor procedural points and raising technicalities in order to wash its hands of weighty matters that come before it. As Wiechers points out, while

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<sup>143</sup> *Toyota South Africa Motors (Pty) Ltd v Radebe* 2000 3 BLLR 243 (LAC) para 35.

<sup>144</sup> *Van Heerden* para 87.

<sup>145</sup> See, for example, Moseneke ACJ in *Barnard* (CC) para 4: "We are seized with a dispute over pressing constitutional concerns of equality and non-discrimination – matters of considerable personal and public importance. Moreover, the divergent reasoning and outcomes of the two appellate courts impel us to resolve the dispute." Also see Cameron J, Froneman J and Majiedt AJ in para 75: "This is the first case before this Court that deals with the standard to be applied in assessing the lawfulness of the individual implementation of constitutionally compliant restitutionary measures. It is important to give guidance on this difficult issue."

the CC is not merely an ordinary court of appeal with the power to review judgments of lower courts, the majority of the judges in *Barnard* were of the opinion that the claimant should rather have attacked the decision of the Commissioner of Police rather than the promotions policy of the employer. *Should a court charged with protecting our Constitution and giving deeper meaning to its provisions not have done more?* I would say yes, not necessarily in order to assist an ill-advised claimant, but in order to provide the rest of us with guidance as to what the *Constitution* actually requires.<sup>146</sup>

In the light of the still quite pristine reputation of our *Constitution*, what may sometimes be forgotten is that, even so, it is still and should always remain a work in progress. If this *Constitution* is not a living document it will lose most if not all of both its continued relevance and its legitimacy. Does *Barnard* (CC) reflect this? Does this judgment highlight a shameful failure by these judges to recognise their pivotal role as "constitution-makers"?<sup>147</sup> Or does it reflect little more than a court showing an abundance of caution and a fear of rocking the boat in respect of a fundamentally important issue that came before it only for the second time in two decades of democracy? In respect of the court's failure to deal, in a real and convincing manner, with the role of representivity in this debate, is this just nothing less than one should expect from an institution that has itself been so aggressively targeted to reflect representivity?<sup>148</sup> I have been controversial enough already, so I may as well really step out on a limb and wonder aloud whether the discrepancies in the Constitutional Court judgments regarding such fundamental aspects of our *Constitution* and its transformational agenda (and between such judgments and the lived reality of the ideology of demographic representivity in action in current-day South Africa) may be due to something that should leave all in the legal fraternity (and beyond it) cold.

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<sup>146</sup> Wiechers *Rapport*.

<sup>147</sup> See Davis 2010 *SAJHR*.

<sup>148</sup> Malan 2010 *TSAR* 432 points to this issue, as highlighted by an esteemed former South African jurist: "On 18 August 2009 [in a public lecture at the University of the Witwatersrand] a former justice of the constitutional court, [Johann] Kriegler, noted that representivity has become the overriding principle applied in the selection of judges by the Judicial Service Commission, in spite of the fact that it flies in the face of the constitution. Kriegler observed: 'But, from where I look at the judiciary today, and the way I have been watching the Judicial Service Commission, this ethnic/gender balance in section 174 of the Constitution has become the be-all and the end-all when the JSC makes its selections. And if it is not the be-all and end-all, at the very least it has been elevated to the overriding fundamental requirement.'"

Malan quotes the then Deputy Minister of Justice and Constitutional Development, who told Parliament in a 2003 speech on transformation of the judiciary that this concept comprises two elements:

[F]irst, the realisation of the objective equitable representation of blacks and women, described as "diversity, personnel or symbolism transformation"; and, second, *transformation relating to the intellectual or ideological approach adopted by judges and magistrates, which he referred to as "intellectual content or substantive transformation"*. [My emphasis]<sup>149</sup>

Wessels<sup>150</sup> refers to a 2000 report by the Public Service Commission which explained the "action dimension" of transformation of the service as comprising the following two elements; namely to:

(a) create a genuinely representative public service which reflects the major characteristics of South African demography, without eroding efficiency and competence'; and '(b) facilitate the transformation of the attitudes and behaviour of public servants towards a democratic ethos underlined by the overriding importance of human rights ...'<sup>151</sup>

The author observes that "[t]he reshaping of the public service accordingly seems to comprise two elements, namely the reshaping of the characteristic of the public service in terms of its representativeness, and the reshaping of its orientations or attitudes in terms of its democratic ethos".<sup>152</sup> Would that democratic ethos be a majoritarian one, hell-bent on transforming our society in the image of one (majority racial) group, never mind what the *Constitution* might have to say about this? Is the ideology of demographic representivity (in the transformation of the public service) ultimately aimed at changing the thinking of those in official positions?<sup>153</sup> If so, has our judiciary

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<sup>149</sup> Malan explains: "Speaking in the national assembly [Minister] De Lange explained that transformation of the judiciary comprised two elements: first, the realisation of the objective equitable representation of blacks and women, described as 'diversity, personnel or symbolism transformation'; and, second, transformation relating to the intellectual or ideological approach adopted by judges and magistrates, which he referred to as 'intellectual content or substantive transformation'. Transformation therefore requires that the profile of the national population be reflected in the composition of the judiciary and, on the other hand, that judges must have particular convictions, namely to think in a particular way." (Malan 2010 *TSAR* 432.)

<sup>150</sup> Wessels 2008 *Politeia*.

<sup>151</sup> Wessels 2008 *Politeia* 23.

<sup>152</sup> Wessels 2008 *Politeia* 23.

<sup>153</sup> Which, of course, would not necessarily be a bad thing: "[I]n South Africa's current dispensation, there is a need for judicial transformation to embrace changes in judicial attitudes. Judges must embrace and enforce the principles of a fundamentally new legal order. Furthermore, the transformative nature of South Africa's Constitution means that judges can no longer cast

started to show signs of this? Or is the air just too rare on Constitution Hill? All of this might indicate that someone has misread the text of the *Constitution* and has opted to treat the judiciary as just another part of the public service which, according to section 197, "must loyally execute the lawful policies of the government of the day".<sup>154</sup> Leaving aside the implications of that word "lawful" in our current context, this would, of course, be completely anathema to the separation of powers and the independence of the judiciary from the executive and legislative arms of the state. (As section 165 tells us, the "courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.")<sup>155</sup> It would also, of course, be morally bankrupt. This being said, however, at least one commentator would appear to endorse something a little different from our courts when it comes to fulfilling their part in the process of transformative constitutionalism – and this appears to endorse the furtherance of the political goals of the day in the decisions of our judges:

[I]t has been pointed out time and time again that both constitutionalism and adjudication are distinctly political – "the issue is not *whether*, but *what type of*, political values should enter into adjudication". The South African Constitution, as is common for constitutions in transitional societies, unashamedly dictates the political vision required from its interpretative community by articulating unequivocally the political goals to which those tasked with its interpretation and concrete application must aspire. It enjoins them to "uphold and advance its transformative design" and hence to participate actively in the political project of transformation. This means firstly that South African judges must aim in their judgments to further (or at least not to hinder) the achievement of substantive equality and social justice. This would often require that judges (in interpreting rights in the Bill of Rights, measuring state compliance with the duties these impose and remedying non-compliance with such duties) transcend traditional conceptions of their role under a liberal model of separation of powers – a transition for which the provisions of the Constitution discussed above well equip them.<sup>156</sup>

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themselves as defenders of the status quo. The judiciary must instead facilitate the creation of the new society that the Constitution envisages." (Wesson and Du Plessis 2008 *SAJHR*.) Of course, much of the legitimacy of this view depends on the meaning placed on "transformation" under our *Constitution*, and the hegemony of the governmental agenda of the pursuit of demographic representation, it is submitted, might cast such transformative ambitions in respect of what is expected in terms of judicial attitudes in a different (and less flattering) light.

<sup>154</sup> S 197(1) of the *Constitution*.

<sup>155</sup> S 165(2) of the *Constitution*.

<sup>156</sup> Pieterse 2005 *SAPL* 166.

While some might read this as apparent constitutional licence for *Van Heerden's* rationality test (especially, in the context of its application to such a manifestation of the governmental representivity ideology as presented in *Barnard*), they should reconsider. This same author continues:

[J]udges must demand, in every constitutional matter, that the other branches of government present adequate justification for all their actions that impact on the constitutional rights of the citizenry. Where justifications advanced do not reverberate with the tenets of constitutional transformation, they should not pass constitutional muster. Insisting consistently on justification which reverberates with the spirit, purport and objects of the Constitution requires not only that these are expressly articulated in judgments but also that the judiciary abandons the remnants of a culture of extreme deference to the executive which it has cultivated over years of adjudicating the actions of the sovereign apartheid state.<sup>157</sup>

Whatever the reason(s) for the apparent lack of commitment in our highest court to facing up to what I view to be such a blatant and abhorrent distortion of the underlying values and, indeed, the provenance, of our Bill of Rights, one can only hope that someone else will be willing to rock the boat, and soon. Give it a vigorous shaking, please. We *all* need to be shot of the affirmative action provisions of the *Employment Equity Act* and of the nonsensical, grossly irrational and what I would suggest to be a criminally unfair ideology of demographic representivity (as a rather poxy proxy for equality). If I may be crude for a moment: having spent some time in Durban in recent years I am proud to say that I have some delightful Indian friends. If any of them were to seek my advice about the future prospects for their children to find employment in democratic South Africa, should I advise them to stop using birth control (and to spread the word amongst their (Indian) friends)?<sup>158</sup> When one considers the "immutability" of some of those arbitrary, listed grounds of unfair discrimination in section 9(3) of our Bill of Rights - and the fact that the nonsensical pursuit of demographic representivity in all our workplaces is just as arbitrary, if not more so - this really is the only way that I can see to ensure that those of us who are "numerically challenged" in the new South Africa will ever get a fair shake.

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<sup>157</sup> Pieterse 2005 *SAPL* 166.

<sup>158</sup> Although doing something along these lines may justifiably be viewed as promoting "perverse race rivalry", and "inter-group contestation, conflict and protests amongst the designated groups" - see Shaik AJ in *Naidoo* paras 177, 188.

If anyone will ever end up reading this piece, I fully expect some vociferous criticism. Some of it, no doubt, will come from those very learned and respected intellectuals who have written, exhaustively, on equality and redress under our *Constitution* (they know who they are, and I have immense respect for their contributions to the constitutional debate). But we need to scale things down quite a bit, not least because we *must* find a way to explain these complicated principles to many ordinary South Africans who are faced on a daily basis with the pernicious effects of the implementation of policies (and ideology) that affect them very directly, and which they simply cannot grasp with reference only to impressive intellectual arguments. Who can blame them? I am convinced that (sadly) very few South African living rooms contain the collected works of Immanuel Kant,<sup>159</sup> Michele Foucault and Jean Francois Lyotard,<sup>160</sup> John Stuart Mill<sup>161</sup> or Amartya Sen.<sup>162</sup> Very few ordinary South Africans apply for jobs or for promotion, or ply their trade, in those lofty but often obscure and other-worldly, ivory towers. As an academic who has discussed these burning issues that are festering in our society in classes and seminars with both undergraduate and postgraduate students (note: an environment made up mostly of the privileged), I am convinced that the informed (not rhetoric-loaded and invective-filled) debate must be broadened beyond our classrooms and law journals. If the subject matter of this piece is characterised by any one thing it is that the efforts to pursue true equality in our country currently is not a process that takes place on the pages of law books and statutes; it takes place in our workplaces and amongst ordinary people.

We need to find some common sense, and we must find it fast.<sup>163</sup> The clock is ticking. Let's hope we are not yet at five minutes to midnight in respect of the future of what is, if we are perfectly honest, our still quite fragile constitutional project. It deserves so much better than this. As do we all, including - let me just grab my calculator - at

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<sup>159</sup> See *Barnard* (CC) para 172 (per van der Westhuizen J).

<sup>160</sup> See De Vos 2012 *SALJ*.

<sup>161</sup> See Benatar 2008 *SALJ*.

<sup>162</sup> See Dupper 2008 *SAJHR*.

<sup>163</sup> At the time of writing, there are some encouraging signs in this regard. Acting chair of the Public Service Commission, Richard Sizani, in addressing a Developmental State Conference in Pretoria, on 11 November 2014, suggested that the time has come for government to reconsider the application of affirmative action (and cadre deployment) in the public service – see Mbanjwa 2014 <http://www.citypress.co.za/news/isnt-time-rethink-sas-transformation-policies/>.

least 100% of the beneficiaries of "affirmative action" under the *Employment (In)Equity Act*.

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**LIST OF ABBREVIATIONS**

ANC	African National Congress
BEE	Black economic empowerment
Colum Hum Rts L Rev	Columbia Human Rights Law Review
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act
ICCPR	International Covenant on Civil and Political Rights
ICON	International Journal of Constitutional Law
ILJ	Industrial Law Journal
JBL	Journal of Business Law
NDR	National Democratic Revolution
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
Rev Afr Polit Econ	Review of African Political Economy
SA Merc LJ	South African Mercantile Law Journal
SACJ	South African Journal of Criminal Justice
SACP	South African Communist Party
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	SA Public Law
TCLR	Trinity College Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg