Article

Looking backward, looking forward: race, corrective measures and the South African Constitutional Court

Pierre de Vos
pierre.devos@uct.ac.za

Is kleur die allesbepalende faktor ek kan hoe
liefhê hoe hoort wit-wit wit-wit klop my hart?[1]

Abstract
The Constitutional Court has dealt with racially based corrective measures against the background of the Court's understanding of South Africa's apartheid past and the lingering effects and consequences of this past on post-apartheid society. While the Court has not always demonstrated a sufficient degree of care when deploying racial categories, its jurisprudence also gestures at the need for a contingent and critical approach to race when engaging with the problem of race-based corrective measures. The Constitutional Court's jurisprudence on constitutionally permissible (or required) race-based corrective measures is discussed and I point out that the way the Court deals with this question opens up space for a constructive engagement with legally mandated race-based corrective measures to avoid some of the pitfalls highlighted in the article.

Introduction

In contemporary South Africa, the issue of race continues to permeate every aspect of public life. Citizens are regularly required to indicate their race when filling out government or other official forms; race often plays a role in decisions on whether job applications or applications for admission to certain university programmes are successful;[2] in political debates, the race of various protagonists is often noted when evaluating the merits of their contributions; and when judges are appointed to positions on the High

Court, Supreme Court of Appeal, or Constitutional Court, race is taken into account when considering their suitability.[3] But race also hovers not far from the surface in private and other everyday settings: as an unspoken presence, a (wrongly) perceived absence or as a painful, confusing, liberating or oppressive reality in social, economic or other more intimate interactions between individuals or groups of individuals. In South Africa we cannot escape race. We cannot escape being viewed in racial terms by others and we 'perform' our racial identities, whether we wish to or not.[4] Even when we claim that we have escaped the perceived shackles of race, we are merely confirming its presence by our stated yearning for its absence.[5] This is the paradox: South Africa has emerged from a period in its history in which race played a decisive role in determining individuals' life chances, allocating social status and economic and political benefits in terms of a rigid hierarchical system according to which every person was classified by the apartheid state as either 'white', 'Indian', 'coloured' or 'black'.[6] Yet in the post-apartheid era, the potency of race as a factor in the allocation of social status and economic benefit has not fundamentally diminished in our daily lives, despite a professed commitment to non-racialism in the South African Constitution,[7] the founding document of our democracy.

Ironically, some commentators blame the Constitution for the continued potency of racial identity in everyday life. The Constitution states that legislative and other measures may be taken (by the state and private institutions) to protect or advance categories of persons disadvantaged by unfair discrimination.[8] Legislation subsequently adopted to address the effects of past discrimination in order to achieve the realization of equality[9] pointedly mentions race as a category to be relied on when dealing with and correcting such effects. The racial categories of 'black' and 'white' thus remain inscribed in law and this is sanctioned by the Constitution.[10] The Constitutional Court has also explicitly acknowledged that people who were unfairly discriminated against in the past – and hence would qualify as potential beneficiaries of corrective measures – include those who were discriminated against on the basis of being black.[11] Because the law is an instrument of power and because power is – in the Foucauldian sense – productive, the law contributes to the production of our lived reality. The law thus helps to construct the individual subject, his or her identity, the knowledge that it is possible to have about the individual, and the limits of our understanding of the place of the individual in society (see Foucault 1977). Because the law acts increasingly as a disciplining force, it contributes

to the way in which we understand ourselves and the world we live in, and the way we conceptualise our identities, the identities of others, as well as our relationships with others and the world around us (see De Vos 2000a). If this is true, so the argument goes, the way in which the law deals with race becomes important for any emancipatory project aimed at decentring race as a defining organising principle of society. This is required to overcome the subjugating and oppressive effects of race. Race is inextricably linked to power, racism and subordination. The question becomes: how does the law deal with racism and its effects? I contend that it cannot do so merely by assuming that race and racism are about biological determinants or that the consequences of race – including racism – can be addressed by attending to the material conditions of inequality (Green et al 2007, Sefa-Dei 1996). Something else is needed. Questioning the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony is a starting point. But when the law is deployed to address the effects of past unfair discrimination and the ongoing dominance of an ideology of white superiority, how can this be done without merely perpetuating the very apartheid-era racial categories and the positions of privilege and hierarchical dominance of whiteness implied by them?

The problem is complex. On the one hand, the danger is that deploying racial categories in the law can perpetuate and legitimise apartheid-era racial categories (and the assumed dominance of whiteness inherent in them). By recognising these categories and dealing with them as if they are a given – normal, essentialist, unchanging and unchangeable – and by failing to challenge the hierarchical assumptions underlying them, the law can do immense harm – even in the name of wanting to do good; even when the law is aimed at addressing the effects of past and ongoing racial discrimination and racism. Instead of helping us to move away from a hierarchically racialised society in which racial categories continue to exert a powerful pull on how we perceive and understand the way in which the world is organised, how we perceive and understand ourselves and our relationships with those around us, the deployment of racial categories in law can perpetuate the very race-based hierarchy that is the cause of the 'problem of race' in our society. On the other hand, if racial categories are not deployed in legal discourse and in the legal provisions aimed at addressing the effects of past racial discrimination and the continued ideology of white dominance, the law may well fail to address the effects of such discrimination and the ongoing problem of racism and racial oppression. If the law insists that race is (or

should be) absolutely irrelevant and superfluous, and that racial categories should therefore not be relied upon by the law – even when the law is aimed at achieving a society that truly moves beyond race and treats individuals as human beings of equal moral worth regardless of any constructed differences – how can the powerful effects of past and ongoing racial discrimination and racism be addressed? If we insisted that race was irrelevant and superfluous, would we not be endorsing and perpetuating the fiction that the characteristics, cultural beliefs and (often unexamined and silent) norms of the dominant white group are universal and neutral? Would such 'race blindness' in the law not impose white dominance by erasing awareness of racial identity or cultural distinctiveness, given that many white South Africans still experience whiteness and white cultural practices as normative, natural and universal, and therefore invisible (Frankenberg 2001, Nakayama and Krizek 1999)? Would this not negate any understanding of racial domination in terms of cultural or symbolic practices? And if one insisted on this fiction that race as a lived reality did not exist in South Africa or that it did not matter, would one not be denying the powerful effects of a pervasive racial ideology that continues to oppress and marginalise black South Africans? Because the norm according to which decisions about inclusion and exclusion are made – and the awarding of social status and goods and opportunities – is part of the world view of the dominant white group, a legal system that remains neutral and eschews any reference to race may ignore the exclusionary effect race might have on those who happen not to share that world view.[12]

In this paper I explore the ways in which the South African Constitutional Court deals with this problem in the context of programmes aimed at addressing the effects of past racial discrimination. The Court has embraced the view that the South African Constitution is historically self-conscious in order to assist it in its interpretation of the various provisions of the Constitution and to signal the contingent nature of its interpretation. I explore how the Constitutional Court has dealt with racially based corrective measures against the background of the Court's understanding of South Africa's apartheid past and the lingering effects and consequences of this past on post-apartheid society. I argue that although the Court has not always demonstrated a sufficient degree of care when deploying racial categories, and hence that its jurisprudence could be read as endorsing a rather essentialist view of race, it also gestures at the need for a contingent and critical approach to race when engaging with the problem of race-based

corrective measures and their limits. I discuss the Constitutional Court's jurisprudence on constitutionally permissible (or required) race-based corrective measures and point out that the way the Court deals with this question – most notably in the way it situates its jurisprudence within the context of a specific historical event (the transformation from an apartheid state to an egalitarian non-racial state) – opens up space for a constructive engagement with legally mandated race-based corrective measures to avoid some of the pitfalls highlighted above.

Interpreting the South African Constitution: a historical self-consciousness

The South African Constitution acknowledges that the achievement of equality cannot be attained unless legislative and other measures 'designed to protect or advance persons, or categories of persons, disadvantaged by past discrimination' is taken.[13] The question is whether this provision should be interpreted to require both the legislature and other private bodies to implement corrective measures that explicitly recognise and make use of apartheid race categories. The language of the Constitution does not necessarily yield one 'objective' and 'true' meaning that courts must merely 'discover'.[14] This is also true when the courts interpret the equality provision set out in section 9 of the Constitution. Because the Constitution does not yield one objective meaning and because judges are anxious to maintain the (highly contested) distinction between 'legitimate' legal interpretation and so-called 'judicial divination',[15] our courts recognise the need to refer to extra-textual factors – such as the South African context and history and comparable foreign case law – when interpreting the provisions of the Constitution. Because Constitutional Court judges are anxious to distinguish interpretations of the Constitution based on 'legal', 'objective' or other external sources from interpretations based on their personal beliefs or feelings in order to safeguard the (symbolic) boundary between law and politics, judges maintain that the provisions of the Constitution must be interpreted with reference to these external sources rather than their personal beliefs, likes and dislikes or ideologies. To do this, the Court has resorted to an array of traditional devices such as references to common law, its own precedent, the history of the drafting of the Constitution, international law or foreign case law, and canons of constitutional interpretation. At times it has also resorted to less traditional factors such as the surrounding circumstances of a case, the social context of the case or the general history

of the country.[16] In general, it has been argued, the Court has relied on the context to assist it with the interpretive task.[17] Part of this context I have elsewhere called the 'grand narrative' (see de Vos 2001). This grand narrative has been, and continues to be, constructed by the jurisprudence of the Constitutional Court and in turn plays an important role in the construction of the scope and content of the provisions of the Constitution.[18] The creation, maintenance and deployment of this grand narrative, I contend, constitutes an ambitious attempt to situate (almost) any understanding of the constitutional text within the context of a universally accepted structuring, meaning-giving story about the origins and purpose of the Constitution. The Court deploys this grand narrative in an attempt to limit the appearance of its own agency in the interpretation of the various provisions of the Constitution, and to assist it in 'discovering' what some judges seem to believe are relatively fixed and determinable meanings.

What is this grand narrative? At the heart of the Constitutional Court's narrative is a very specific – some might argue, narrow – understanding of the apartheid past. The 'past' is used here in two distinct but interrelated ways. First, it refers to the actions and events associated with the implementation of apartheid and the inhuman, unequal and repressive conditions that existed under the apartheid system. The past, in this sense, seems to refer to our *apartheid* past and the injustice, repression, discrimination and lack of democracy – linked to an ideology of white racial superiority – that existed during this period. Second, it refers to the *manner* in which South Africa has moved away from the apartheid system towards a new constitutional state. The past in this sense refers to recent past events in which the white minority government reached a negotiated settlement with the representatives of the black majority to facilitate the transition from an undemocratic apartheid state to a democratic state based on the supremacy of the Constitution. The Constitutional Court uses these references to the 'past' interchangeably, depending on the context of the case before it.

The Constitutional Court has provided its view of South Africa's history – in both senses in which it uses the term – in a number of judgments, relying heavily on the wording of the post-amble to the transitional Constitution in the process. In doing so, the Constitutional Court described South Africa's past as that of a 'deeply divided society characterised by strife, conflict, untold suffering and injustice' which 'generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.[19] The past institutionalised and

legitimised racism and assaulted the dignity of persons on the grounds of race, colour and gender. This recognition is of particular importance for the purposes of this paper. In *Brink v Kitshoff*, the Constitutional Court underlined this point:

> As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[20]

Much of this version of South Africa's history and the events that led up to the adoption of the first democratic Constitution is today generally viewed as uncontroversial, being a 'common sense' description of what came before and how we came to be where we are today. It represents the well-entrenched consensus among political elites, the same elites who were instrumental in bringing the new order into existence.[21] Of course, not everybody in South Africa agrees with the grand narrative of the country's recent past put forward by the Constitutional Court.[22] The problem with the Court using the grand narrative to interpret the Constitution – especially the provisions of section 9 – is that the Court seems to have endorsed a far too simplistic and narrow version of our history, one in which individuals with their own quirks and unique characteristics are inevitably erased. This version fails to reflect the full and nuanced experience of South Africans under apartheid and the complex and overlapping nature of individual identities produced by this history. Viewing the past strictly in terms of the history of racial oppression, which was formalised by the apartheid system, and ignoring (or at least minimising) the manner in which class, gender, sexual orientation, ethnic origin, language and the unique characteristics and life experiences of every South African have helped to shape the

identities of individuals, may well close down possibilities for a more nuanced engagement with race in the legal arena. It may inadvertently invite policy-makers and those who implement policy to fall back on apartheid-era race categories when they fashion ways of addressing the effects of past discrimination and ongoing racism in our society. In the pre-democracy era, many South Africans found resourceful ways of reclaiming their dignity despite the often draconian efforts of the apartheid state to ensure that black South Africans lived their lives as second-class citizens in the country of their birth. South Africans were affected differently by the system of racial classification and by the rule of a strict, Christian nationalist, patriarchal and hence socially conservative government. Race played a vital role in this experience, with white South Africans generally benefiting from the apartheid system and black South Africans being denied basic opportunities open to their white counterparts. But other factors also affected the manner in which the apartheid experience moulded South Africans and played a part in constructing identities: a person's class and social and economic status; their gender, sexual orientation and family ties; whether they grew up in a rural or urban setting; collaborated with the state or took part in the struggle to overthrow it; and whether they left the country and lived in exile or remained in South Africa.[23]

I believe that the Constitutional Court's engagement with race, and its interpretation and application of the provisions in the Constitution mandating the implementation of corrective measures to address the consequences of past and ongoing racial discrimination, could be enriched if the Court adopted a more open-ended and nuanced attitude towards our past. Taking a cue from the statement by Evita Bezuidenhout, 'the most famous white woman in Africa',[24] that the future is certain but the past is unpredictable, I contend that a more shaded understanding of our past, an acknowledgement that our understanding of the past might change as our present circumstances change, might help the Court to interpret the provisions of the equality clause in a less rigid and essentialist manner. If Constitutional Court judges show a willingness to continue excavating the multi-layered reality of life under apartheid for different people in different circumstances, this will assist the Court in dealing with extremely difficult questions about the limits of corrective measures and the use of apartheid race categories in addressing the effects of past racial discrimination and lingering racism. Such a context-sensitive approach will be more tentative, more open-ended, and less certain of the truth and fixity of apartheid race categories. It will thus acknowledge

the contingent nature of racial categories and their corrosive effect on our body politic and on individuals, while at the same time taking seriously the effects of racial oppression and continued racism in our society. The Constitutional Court has not yet engaged seriously and consistently with the complexities of racial identity and with what this may mean for affirmative action jurisprudence. Nor has it engaged seriously with the complexity of our past and the concomitant consequences of the explicit acknowledgement of the multifaceted nature of human experiences under apartheid for the interpretation of the equality provisions of the Constitution. However, despite these silences and (perhaps unintended) evasions, I argue that the current jurisprudence of the Court dealing with race-based corrective measures has not closed the door entirely on such a project. I now turn to this jurisprudence with the aim of highlighting those aspects that may leave room for a re-imagining of race-based affirmative action. I aim to show that beneath the rhetorical certainty and the invocation of the master narrative about our past that dominate this jurisprudence, lies hints of a more tentative and open-ended attitude towards these issues. This, I suggest, opens the door for a jurisprudence that does not ignore the serious consequences of past racial discrimination and the ongoing effects of racism – that thus acknowledges the need for corrective measures to address serious and often ongoing *racial* discrimination and its effects – but that is also acutely aware of the dangers inherent in a legal scheme that relies on apartheid race categories to achieve the goal of equality for all in South Africa, regardless of race.

The equality clause, corrective measures and the deployment of race

It has been argued that section 9 of the South African Constitution does not explicitly mention race as a factor to be taken into account when implementing measures to protect or advance persons or categories of persons disadvantaged by unfair discrimination in the past.[25] This argument suggests that it may be constitutionally impermissible to rely on racial categories when designing and implementing measures aimed at addressing the effects of past (and continuing) racial discrimination. As other criteria – such as class – could possibly be utilised as a proxy for race, it might be desirable or even constitutionally required to rely on such criteria when designing and implementing these measures.[26] However, the jurisprudence of the Constitutional Court makes such an argument implausible because the Court

has explicitly acknowledged that it is permissible to rely on racial categories when implementing corrective measures aimed at addressing the effects of past racial discrimination.

In the case of *Bato Star Fishing*, the Constitutional Court (in the judgment written by Justice Kate O'Regan) held that the broad goals of transformation of society (and hence, by implication, the goal of addressing the effects of past racial discrimination) could be achieved in a myriad of ways; there was not one simple formula for transformation.[27] The Constitution does not prescribe the methods to be used to address the effects of racial discrimination. But Justice Sandile Ngcobo (as he then was) emphasised in a separate judgment in the same case,[28] the 'Constitution recognises that decades of *systematic racial discrimination* entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result' and that the 'effects of discrimination may continue indefinitely unless there is a commitment to end it'.[29] The Constitution does not prescribe exactly how this is to be done or, indeed, that it needs to be done by relying on apartheid race categories. However, the Constitution has not been interpreted to prohibit a reliance on apartheid race categories either. As the Constitutional Court has pointed out, profound difficulties will be confronted in giving effect to the constitutional commitment of achieving equality, which can only be done if the effects of past and ongoing racial discrimination and racism are addressed. The measures that bring about transformation will inevitably affect some members of society adversely, particularly those coming from communities that may have benefited from apartheid. What is required, though, is that the process of transformation be carried out in accordance with the Constitution.[30] The question to be answered in each case, according to the Constitutional Court, is what exactly is required by the Constitution? It is to this question that I now turn.

Substantive equality and the need for (race-based) corrective measures

The Constitutional Court has declined to interpret the equality clause in a formalistic manner. Given the Court's insistence on interpreting the Constitution contextually, most notably with reference to South Africa's apartheid history, and given the text of section 9 of the Constitution, the Court has interpreted it as endorsing a substantive notion of equality.[31] It has thus rejected the notion that equality could be premised on the assumption that all South Africans were born free and equal and could therefore demand

to be treated in exactly the same manner, regardless of race. A formal conception of equality would not address the effects of past racial discrimination and would fail to take account of the structural inequality produced by past and ongoing racial discrimination and racism. It would freeze the status quo and would not take account of the existing (largely) racially determined social and economic imbalances and the differences in power between white and black South Africans – the result of the ideology of race. Instead, the Constitutional Court has emphasised that equality is something that does not yet exist in South Africa. Hence the Constitution permits – or even requires – that measures be taken to help overcome the effects of past discrimination in order progressively to realise the achievement of equality. Because our society was deeply divided at the time that the Constitution was adopted and remains vastly unequal, and because many of these stark social and economic disparities will persist for a long time to come, corrective measures were mandated by section 9.[32] In the words of Deputy Chief Justice Moseneke:

> Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.[33]

This substantive notion of equality recognises that besides the uneven race, class and gender attributes of our society, other levels and forms of social differentiation and systematic underprivilege still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real-life contexts, in order to determine its fairness or otherwise in light of the values of the Constitution. In the assessment of fairness or otherwise, a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of discrimination and stereotypical response in our evolving democratic society.[34]

The effect of this commitment to redress is that restitutionary measures are mandated by the Constitution. Unlike the American anti-discrimination

approach, which requires that differentiation on the grounds of race be demonstrated as necessary to promote a compelling or overriding state interest, the South African equality jurisprudence does not view such measures as a deviation from, or invasive of, the right to equality guaranteed by the Constitution. These measures are not 'reverse discrimination' or 'positive discrimination'.[35] Instead, corrective or restitutionary measures are integral to the reach of our equality protection. In other words, the provisions of sections 9(1) and 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. An oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.[36] Because the Constitutional Court interprets section 9 in the context of South Africa's particular history, it views the provisions of section 9(1), which guarantees equality before the law, and section 9(2), which insists that measures to promote equality are required to achieve equality in the long term, as 'both necessary and mutually reinforcing'. Without a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of South Africa, ring hollow.[37]

The limits of corrective measures

The fact that the Constitutional Court has embraced a substantive notion of equality and emphasised that corrective measures are both constitutionally permissible and sometimes mandated in order to achieve this equality, does not mean that the Constitution places no limits on the measures that may be taken by the state or by other institutions to achieve equality in the long run. According to the Court, any programme or policy aimed at addressing the effects of past (and continuing) racial discrimination has to meet at least three requirements before it can be considered constitutionally permissible. Although all three requirements have to be met, at present it would be difficult – but not impossible – to convince a court that a programme aimed at redressing past unfair discrimination did *not* comply with the requirements of the Constitution. It is to these requirements that I now turn.

The first requirement is that the programme of redress must be designed to protect and advance a disadvantaged class. The measures of redress chosen must favour a group or category designated in section 9(2). The

beneficiaries must be shown to be disadvantaged by unfair discrimination. Because the Court interprets this section in light of South Africa's apartheid past, it assumes that any programme aimed at addressing the effects of past racial discrimination may potentially comply with this first requirement.[38] The Court acknowledges that it would be difficult, impractical or undesirable to devise a legislative scheme or programme with 'pure' differentiation demarcating precisely the affected classes: 'Within each class, favoured or otherwise, there may indeed be exceptional or "hard cases" or windfall beneficiaries'.[39] The Court thus acknowledges that not all the members of a class targeted to benefit from restitutionary measures might themselves have suffered from past discrimination or been disadvantaged because of its effects.[40] In the context of a section 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class (for the purposes of this paper, members who are black) are persons designated as disadvantaged by unfair exclusion.[41] Thus, where a programme is aimed at addressing the effects of past racial discrimination and it can be shown that some of the beneficiaries of that programme no longer suffer from those effects, this will not torpedo the programme as long as most beneficiaries can be shown to suffer from the effects of past discrimination.

Two preliminary observations may be made about the way in which the Constitutional Court has interpreted this first requirement for a constitutionally valid restitutionary programme. First, if one assumes (as I do) that the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony are still all pervasive in South Africa, and hence that racism affects all black South Africans (to some degree or another) regardless of their economic status and social and political power and success, it would be difficult to conceive of any restitutionary programme that targets black South Africans not meeting this first requirement. Because corrective measures are aimed not only at addressing economic disadvantage but also the ongoing effects of racism and racial discrimination, any restitutionary programme that overwhelmingly benefits black South Africans would meet this first requirement. Second, because the Constitutional Court has endorsed all programmes that overwhelmingly target a designated group, constitutionally valid restitutionary programmes may well be devised that do not take race as their starting point and that may also benefit individuals who have not suffered from past discrimination. The programme in the *Van Heerden* case illustrates

this point. This programme made a distinction between individuals who were members of Parliament (MPs) before 1994 and continued to be members after 1994, and those who only became MPs after 1994. From 1994 to 1999, the latter group received a larger pension contribution than the former group to address the effects of apartheid discrimination, which precluded black South Africans from becoming MPs. Of course, some white citizens (for example, Joe Slovo and Ronnie Kasrils) only became MPs after 1994; they also benefited from the restitutionary scheme. The fact that white members benefited from the scheme too did not mean that the scheme did not comply with the requirements of section 9(2). On the one hand, this means that restitutionary programmes may validly be designed to redress the effects of past racial discrimination without mentioning race. On the other, a failure to implement racially targeted programmes may run the risk of failing to deal with the effects of the ideology of white superiority and hegemony, and may mask the effects of ongoing racism and racial discrimination and domination.

The second requirement for a valid restitutionary programme is that the measure must be 'designed to protect or advance' those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. As the Constitutional Court rather whimsically stated: 'The future is hard to predict'. What is required, however, is that the measures 'must be reasonably capable of attaining the desired outcome' of addressing the effects of past and ongoing racial discrimination and racism. 'If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end'.[42] If it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2). It is not necessary to show that the remedial measures disfavour one class in order to uplift another:

> They are not predicated on a necessity or purpose to prejudice or penalise others, and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved. The prejudice that may arise is incidental to but certainly not the target of remedial legislative choice.[43]

Given the historical self-consciousness of the Constitutional Court's interpretation, a valid purpose of a remedial programme would be to address the effects of past racial discrimination. Given the lingering effects of racism and racial discrimination, it would also be valid for a programme to be aimed

at addressing those effects. But where measures are completely arbitrary or where they are a smokescreen for advancing the interests of a specific person or group – for example, by benefiting the members of a well-connected political family or individuals who have paid a bribe to the official or body devising the programme in order to benefit from it – the remedial measures would not meet this second requirement. The Constitutional Court thus makes clear that the abuse of remedial measures would not be constitutionally valid, as such measures abused for narrow self-interest or political ends would not have any reasonable chance of addressing the effects of past or ongoing racial discrimination and racism.

The third requirement for a valid remedial programme is probably the most difficult and complex. It requires a value judgment, which would have to be made in the light of all the circumstances, including the apartheid history of the country. According to the Court, a remedial measure can only be constitutionally valid if such a measure 'promotes the achievement of equality'. This is a rather difficult concept, so it may be useful to quote the Constitutional Court extensively in this regard:

> Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. […] However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, 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.[44]

One must therefore look at the negative effects that the remedial measures may have on certain groups or individuals. However, such measures would not be invalidated merely if it could be shown that the excluded group had been negatively affected in some way. For example, a programme aimed at

addressing the effects of past racial discrimination may negatively affect white South Africans. The admissions policy of a university which reserves certain places for black South Africans or does not require black applicants to meet exactly the same requirements as white applicants may result in some white applicants being denied a place to study at the university because of the remedial programme. This in itself will not invalidate the programme. But where the measures taken are so extreme that they send a signal that the equal dignity of white applicants is not respected, the programme may be invalidated. Thus, where an admissions policy takes race into account and the effect of that policy is to exclude the vast majority (or all) of the white applicants, the programme would probably not pass constitutional muster. In effect, this is a value judgment which the court will exercise with reference to the apartheid history of the country, the extent to which the effects of past or continuing racial discrimination linger on in society and other factors that might impact on the full enjoyment of rights and privileges for all South Africans.

At this point it is important to reiterate that this jurisprudence stems from the Court's understanding that section 9 had to be interpreted in the context of South Africa's specific history of racial exclusion, marginalisation and oppression (the 'grand narrative' discussed above). But the Court leaves the door open for a re-evaluation of its present permissive view on racially based corrective measures. As noted in the discussion about the Court's endorsement of a substantive notion of equality, the Court recognises, first, that – apart from race – other levels and forms of social differentiation and systematic underprivilege still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. Second, the Court insists that it has a duty to scrutinise various aspects in each equality claim in order to determine the fairness or otherwise of the discriminatory practice in light of the values of the Constitution.[45] This means that while the Court recognises that currently section 9(2) must be interpreted with specific reference to the apartheid past, and while it has to take into account the effects of past and continued unfair racial discrimination and racism when it evaluates the constitutionality of corrective measures, it also recognises that this context may change. If power shifts decidedly in our society and if the dominance of whiteness as the norm subsides, the Court might therefore evaluate remedial measures differently from the way it does now. In other words, the grand narrative of South African history is not static. In future, a court might not look at the apartheid history when

evaluating the constitutionality of race-based remedial measures but – if this is required – might begin to look at the post-apartheid history to provide the context within which it interprets and applies section 9(2). Third, if it ever emerges that a reliance on apartheid race categories is thwarting, rather than advancing, the achievement of equality, such measures may become constitutionally invalid. If race-based corrective measures, instead of addressing the effects of racism, appear to perpetuate the racial hierarchy in a different guise the corrective measures will not be viewed as promoting the achievement of equality.

Conclusion

It is clear that the South African Constitutional Court endorses the notion of racially based corrective measures to address the effects of past and continuing racial discrimination and racism. Indeed, the Court argues that such programmes might sometimes be required to achieve the vision of an equal and just society. In the light of the complex problem regarding the legal deployment of race, highlighted in the introduction, it must be asked whether the Constitutional Court is sufficiently attuned to the dangers of legally mandated and endorsed race-based remedial programmes. If there is indeed a danger that the deployment of racial categories in the law can perpetuate and legitimise those categories (and the assumed dominance of whiteness inherent in their deployment), is the Constitutional Court not endorsing a legalised perpetuation of a particular racial hierarchy? In recognising and dealing with racial categories, is the Court sufficiently attuned to the fact that racial categories themselves are the product of a particular history and the effects of the power relations in society? Or does the Court deal with racial categories as if they are a given – normal, essentialist, unchanging and unchangeable? Is the Court failing to challenge the hierarchical assumptions underlying the deployment of these categories and, in doing so, is the Court not endorsing a particular harmful racial hegemony?

I would argue that the Constitutional Court's jurisprudence dealing with the constitutionality of remedial measures aimed at addressing the effects of past and ongoing racial discrimination and racism is far less formalistic than its critics believe, and that the Court has not explicitly endorsed the notion of race as something essential and fixed. Neither has it endorsed the notion that race-based remedial measures will remain permissible or required indefinitely. It can, of course, be argued that the Court has a rather simplistic view of South Africa's history and that many of its assumptions about race

in South Africa remain unexamined and unstated. It is not clear whether the Court views race as the product of an ideological system of racial domination and oppression, thus whether it views race as something that is contingent and constructed, or whether it sees race in essentialist terms as something that is given and that can easily be determined with reference to biological factors such as skin colour. The Court's jurisprudence hardly touches on the issue, merely assuming that given our history of racial oppression, race-based remedial measures are not only constitutionally permissible but also sometimes required.

However, the jurisprudence of the Court is also perhaps more complex than many would admit. First, it recognises that constitutionally valid remedial measures aimed at addressing the effects of past racial discrimination need not always focus on the category of race. Where other factors could be used (and where these factors would be effective to address the past and ongoing effects of racial discrimination and racism), this would be constitutionally permissible because the group targeted need not be drawn with absolute precision. As long as the overwhelming majority of beneficiaries targeted by a remedial programme have been disadvantaged by unfair discrimination, the programme would meet the constitutional requirement that it must be aimed at addressing past discrimination. This leaves the door open for fashioning innovative programmes which manage to address the effects of past racial discrimination – taking into account the lingering effects of racism – without explicitly relying on the difficult categories of race. Second, because the Court has signalled that the context in which a programme is evaluated is all important and that the context may change as society changes, the jurisprudence also gestures at the contingent nature of present racial categories and power relations. Although the Court has not said so explicitly, the jurisprudence leaves the door open for future contestation of race-based remedial measures. This will be possible if it becomes apparent that the deployment of racial categories in the law has the effect of perpetuating and legitimising these categories by dealing with them as if they are a given, and by failing to challenge the hierarchical assumptions underlying them.

Notes

1. Krog (2000:55).
2. See for example 'University of Cape Town undergraduate admissions policy and

selection criteria for the 2011 academic year', accessed on 26 September 2010 at http://www.uct.ac.za/downloads/uct.ac.za/about/policies/admissions_policy_2011.pdf. For a critique of race-based criteria in the university setting, see Benatar (2008).

3. See Constitution of the Republic of South Africa Act No. 106 of 1996, section 174(2), which states: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.' See also Judicial Service Commission (2010).
4. Butler (1991:24), in speaking about gender, says that identity is 'performative in the sense that it constitutes as an effect the very subject it appears to express'.
5. I am not claiming that we all engage with race in the same manner, that we all understand race and live race in terms of apartheid-era racial categories. I am merely claiming that in South Africa in 2011 the spectre of race as an ideology and as an identity marker cannot be erased by sheer will power or by turning away from the spectacle of race.
6. See Population Registration Act No. 30 of 1950.
7. See section 1(b) of the Constitution of the Republic of South Africa, which states: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: (b) Non-racialism and non-sexism'.
8. Section 9(2) states: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by past discrimination may be taken'.
9. See Employment Equity Act No. 55 of 1998.
10. See definition section 13 of the Employment Equity Act, which states that all designated employers must, in order to achieve employment equity, implement affirmative action measures for designated people, which includes 'black people' – defined as 'a generic term which means Africans, Coloureds and Indians'.
11. *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at par. 40. See also *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) par. 74.
12. Botha (2009:1) argues that it is one of the 'great paradoxes' of the South African reality that the Constitution commits us to a non-racial society, yet recognises that we can eradicate discrimination and redress disadvantage caused by racial discrimination only 'if we remain conscious of the deep racial…fault lines characterising our society'.
13. See note 8.
14. All legal academics and commentators in South Africa have not embraced this view (see Fagan 1995:545).

15. See *S v Zuma* 1995 (4) BCLR 410 (SA) (CC), par. 33, where Kentridge reiterated that this lack of one objective meaning of the words of the Constitution does not mean that the language of the Constitution should not be respected and that this language can be ignored in favour of a general resort to 'values'. This, the Court asserts rather contradictorily, would constitute not interpretation but 'divination'.
16. See generally *S v Makwanyane* 1995 (6) BCLR 665 (CC) par. 266, in a judgment authored by then Deputy President of the Constitutional Court, Ishmael Mahomed ,[Deputy President of the Constitutional Court] for a summary of the Court's approach:

> What the Constitutional Court is required to do in order to resolve an issue, is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and potentially conflicting considerations reflected in the text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.

17. See *S v Zuma* (note 15) par. 15 (reference to *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) at 321); *The President of the RSA v Hugo* 1997 (6) BCLR 708 (CC) par. 41 and *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) par. 32 (quoting from *Egan v Canada* (1995) 29 CRR (2d) 79 at 104–05).
18. This concept of the grand narrative borrows from the work of Jean Francois Lyotard. Lyotard has argued that meaning in modern society (as opposed to postmodern society) is predicated on so called meta-narratives. Such narratives operate as great structuring (metaphysical) stories that are supposed to give meaning and make us understand all other events and interpretations. For example, the rule of consensus between the sender and the addressee of a statement with truth-value is deemed acceptable if it is cast in terms of a possible unanimity between rational minds: this is the Enlightenment narrative in 'which the hero of knowledge works towards a good ethico-political end – universal peace' Lyotard (1984: xxiv). Post-structuralists such as Lyotard are generally sceptical of such meta-narratives and point out that the loss of this legitimating function creates a crisis in metaphysical philosophy. See generally Lyotard (1984); see also Jenkins (1991). What I refer to as a grand narrative is an attempt to apply Lyotard's work to a micro level.
19. In re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) 1267 par. 5, quoting from the post-amble to the Constitution of the Republic of South Africa Act No. 200 of 1993.

20. 1996 (6) BCLR 752 (CC) par. 40. See also *Hugo* (note 17) par. 41.
21. These elites also include many of the judges now sitting on the Constitutional Court. Arthur Chaskalson and Albie Sachs, for example, assisted the African National Congress during constitutional negotiations.
22. For example, some professional historians dispute this version from various ideological vantage points. See Worden (2000), Pampallis (1991), Jaffe (1994) and Foner (1995).
23. For a fascinating and nuanced account of one such life under apartheid, see Dlamini (2010).
24. Evita Bezuidenhout is the alter ego of dramatist and actor Pieter Dirk Uys and was the ambassador to the imaginary 'homeland' of Bapetikosweti, before becoming an avid supporter of Nelson Mandela and pretending that she had never supported the apartheid policies of the pre-democracy government.
25. See for example 'Regstellende aksie ongrondwetlik? Onderhoude met FW de Klerk, Marinus Wiechers, Paul Hofmann, Leon Louw', accessed on 30 August 2010 at http://www.solidariteitinstituut.co.za/docs/transkripsie.pdf.
26. For a subtle exploration of the interrelationship between race, class and corrective measures, see Dupper (2008).
27. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) par. 35.
28. *Bato Star Fishing* par. 73.
29. *Bato Star Fishing* par. 74 Ngcobo further stated that:

> It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

30. *Bato Star Fishing* par. 76. See also *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* 2002 (9) BCLR 891 (CC) at par. 7, where the Constitutional Court held:

> The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.

31. On substantive equality, see Fredman (2005), De Vos (2000b) and Botha (2004).

32. *Van Heerden* par. 23.
33. *Van Heerden* par. 25.
34. *Van Heerden* par. 27.
35. See debate on the nature of these measures in De Waal et al. (2001) and Gutto (2001). See also Du Plessis and Corder (1994), Kentridge (1999), Cachalia et al. (1994), Pretorius (2001), and Van Reenen (1997).
36. *Van Heerden* par. 30.
37. *Van Heerden* par. 31.
38. *Van Heerden* par. 38.
39. *Van Heerden* par. 39.
40. In the Indian context, where corrective measures were first instituted shortly after that country gained its independence and continue today, this is often referred to as the problem of the 'creamy layer'. Where those individuals who belong to a previously disadvantaged group no longer suffer from the effects of past discrimination, the question is then posed in India whether those members of the so-called creamy layer can also benefit from restitutionary measures.
41. *Van Heerden* par. 40.
42. *Van Heerden* par. 41. See also *Prinsloo v Van der Linde* (note 17) at paras 24–6 and 36; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) at par. 16.
43. *Van Heerden* par. 43.
44. *Van Heerden* par. 44.
45. *Van Heerden* par. 27.

References

Benatar, David (2008) 'Justice, diversity and racial preference: a critique of affirmative action', *South African Law Journal* 125.

Botha, Henk (2004) 'Equality, dignity and the politics of interpretation', *South African Public Law* 19.

—————— (2009) 'Equality, plurality and structural power', *South African Journal on Human Rights* 25.

Butler, Judith (1991) 'Imitation and gender insubordination', in Diana Fuss (ed) *Inside/Out: lesbian theories, gay theories*. New York: Routledge.

Cachalia, Azhar; Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna, Penuell and Gilbert Marcus (1994) *Fundamental Rights in the New Constitution*. Cape Town: Juta.

De Vos, Pierre (2000a) 'The Constitution made us queer: the sexual orientation clause in the South African Constitution and the emergence of gay and lesbian identity', in Carl Stychin and Didi Herman (eds) *Sexuality in the Legal Arena*. London: Continuum International Publishing Group.

———— (2000b) 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 62

———— (2001) 'A bridge too far? History as context in the interpretation of the South African Constitution', *South African Journal on Human Rights* 1.

De Waal, Johann, Iain Currie and Gerhard Erasmus (2001) *The Bill of Rights Handbook* (4th edition). Cape Town: Juta and Co.

Dlamini, Jacob (2010) *Native Nostalgia*. Cape Town: Jacana.

Du Plessis, Lourens and Hugh Corder (1994) *Understanding South Africa's Transitional Bill of Rights*. Cape Town: Juta.

Dupper, Ockert (2008) 'Affirmative action: who, how and how long?', *South African Journal on Human Rights* 24.

Fagan, Anton (1995) 'In defence of the obvious: ordinary meaning and the identification of constitutional rules', *South African Journal on Human Rights* 11.

Foner, Eric (1995) '"We must forget the past": history in the new South Africa', *South African Historical Journal* 163.

Foucault, Michel (1977) *Discipline and Punish: the birth of the prison* (Translated by Alan Sheridan). New York: Vintage/Random House.

Frankenberg, Ruth (2001) 'The mirage of an unmarked whiteness', in Birgit Bander Rasmussen, Eric Klinenberg, Irene J Nexica and Matt Wray (eds) *The Making and Unmaking of Whiteness*. Durham: Duke University Press.

Fredman, Sandra (2005) 'Providing equality: substantive equality and the positive duty to provide', *South African Journal on Human Rights* 21.

Green, Meredith J, Christopher C Sonn and Jabulane Matsebula (2007) 'Reviewing whiteness: theory, research, and possibilities', *South African Journal of Psychology* 37(3).

Gutto, Shadrack (2001) *Equality and Non-discrimination in South Africa: the political economy of law and law making*. Cape Town: New Africa Books.

Jaffe, Hosea (1994) *European Colonial Despotism: a history of oppression and resistance in South Africa*. London: Kamak House.

Jenkins, Keith (1991) *Re-thinking History*. London and New York: Routledge Classics.

Judicial Service Commission (2010) 'Summary of criteria used by the Judicial Service Commission when considering candidates for judicial appointment', accessed on 30 September 2010 at http://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments.

Kentridge, Janet (1999) 'Equality', in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, Stuart Woolman *Constitutional Law of South Africa*. Cape Town: Juta and Co.

Krog, Antjie (2000) 'Na grond-invasions in Zimbabwe', in Antjie Krog *Kleur Kom Nooit Alleen Nie*. Cape Town: Kwela Books.

Lyotard, Jean-François (1984) *The Post-modern Condition*. Manchester: Manchester University Press.

Nakayama, Thomas and Robert Krizek (1999) 'Whiteness as a strategic rhetoric', in Thomas Nakayama and Judith Martin (eds) *Whiteness: the communication of social identity*. Thousand Oaks CA: Sage.

Pampallis, John (1991) *Foundations of the New South Africa*. Cape Town and London: Maskew Miller Longman and Zed Books.

Pretorius, Jan (2001) 'Constitutional standards for affirmative action in South Africa: a comparative overview', *Heidelberg Journal of International Law* 61.

Rycroft, Alan (1999) 'Obstacles to employment equity? The role of judges and arbitrators in the interpretation and implementation of affirmative action policies', *Industrial Law Journal* 20.

Sefa Dei, George (1996) 'Critical perspectives in antiracism: an introduction', *The Canadian Review of Sociology and Anthropology* 33(3).

Van Reenen, Tobias (1997) 'Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa', *South African Public Law* 12.

Worden, Nigel (2000) *The Making of Modern South Africa*. Oxford: Blackwell Publishers.