

**CONSTRUCTING A FUTURE BASED ON RACE:  
'RACIAL REPRESENTIVITY' THROUGH AFFIRMATIVE ACTION  
AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT IN  
SOUTH AFRICA**

**Response to the Fourth to Eighth Periodic Reports of the Republic of South Africa to the  
Committee on the Elimination of Racial Discrimination under article 9 of the Convention  
on the Elimination of All Forms of Racial Discrimination**

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Throughout its report to the Committee, the South African government proclaims its commitment to the development of a society that is non-racial and non-sexist. It says that:

‘The elimination of all forms of racial discrimination remains high on the agenda of the Government. South Africa’s history brings into particular prominence the importance of eliminating all forms of racial discrimination. The Government continues to dedicate considerable financial, organisational and human resources to the fight against racial discrimination.’

Summarizing its position, it states that the ‘Government is dedicated to the development of ... a non-racial society.’

By means of such pronouncements it hopes to bring itself within the legitimate scope of the Convention on the Elimination of All Forms of Racial Discrimination, which includes race-based discrimination among its prohibitions. Whether the South African government appreciates it or not, however, the stance being adopted is false. In fact, the South African government pursues policies that are overtly race-based in order to produce a society that is ‘demographically representative’. In short, its policies are not non-racial; at best they are neo-racial and at worst blatantly racist: society is structured in silos based on race and gender, with baneful results (*see box*).<sup>1</sup> The system is not concerned with affirmative action, but with race.

The problem permeates every facet of the regulatory framework of South Africa. No statute governing the distribution of societal benefits or privileges is without a structure designed to give preferment to black people, and the executive branch of government uniformly grants licences and permits on the same basis. This is nothing less than institutionalised racism. In the face of entrenched rights to equality in the Constitution, these policies are pursued

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<sup>1</sup> Demographic statistics constitute a movable target, and the ideology is divorced from the reality of available skills. The attention is on demographic outcomes, rather than empowerment through education and training.

with impunity since the courts, whose powers have repeatedly been invoked, are either unable or unwilling to take a stand that would give proper effect to the rhetoric they so boldly employ.

Of the statutes, the most profoundly racist is the Broad Based Black Economic Empowerment Act (BEE). It creates a structure that makes government procurement dependent upon the extent to which a prospective supplier is, in racial terms, ‘transformed’.<sup>2</sup> Points are awarded for black equity and property ownership, black representation within the managerial and staff hierarchy, and the distribution of patronage to black contractors. In her comprehensive and compelling book *BEE: Helping or Hurting* (2014) chapter 10, renowned political commentator Dr Anthea Jeffery considers the woeful consequences of this policy on liberty and race relations; on integrity, efficiency, investment, and small business; and on the poor, who arguably suffer most from its effect. In the course of describing the social costs of BEE, she recites<sup>3</sup> an impassioned plea from a 2014 article by Jonathan Jansen, a so-called coloured person who heads up the University of the Free State:

‘I hope that race-obsessed policies can come to an end as we continue on the critical path of nation-building in the long shadows of apartheid .... The hated race categories conjured up by apartheid [that is, White, Coloured, Indian and Black] cannot be instruments for transforming a new country .... In our obsession with demographic correctness, we privilege crude numbers over transformed minds; we re-inscribe offensive apartheid categories on post-apartheid mentalities; and we risk social cohesion by generating alienation, division and bitterness.’

The quote describes every bit as aptly the consequences of the State’s policies in the workplace, where race norming rather than race-preferencing is pursued. In supposed pursuit of the Employment Equity Act, enacted to give effect to the constitutional imperative of substantive equality, plans are devised by government departments that universally determine matters of employment and promotion by reference to race. Applicants for employment or promotion are

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<sup>2</sup> For the government, ‘transformed’ means that the employees of every firm reflect the national racial demographics at every level.

<sup>3</sup> At 367.

placed into one of the racial categories devised by the apartheid State (to repeat: White, Coloured, Indian and African] and then distributed by gender. The current distribution of staff in each of the resulting eight categories per grade is then assessed against demographic statistics, typically national, that are regarded as apposite to determine degrees of so-called under- and over-representivity. Candidates who are over-represented in the category to which they have been assigned by reason of their race and gender are treated as ineligible for appointment unless that department's operational requirements emphatically dictate otherwise. Manifestly this is not a system of affirmative action; rather it is a system of neo-racialism (overlain by gender considerations) that has been allowed to run rampant. Disadvantage is completely ignored in this mathematical system.

The consequences of this policy are starkly illustrated by the undisputed facts in *Solidarity & 10 others v Department of Correctional Services*,<sup>4</sup> one of the many cases in which the trade union Solidarity has gone to court on behalf of members belonging to various 'race groups' to stem the tide of race norming within the public service. Applications for promotion by ten members of the prison staff, recommended on merit by a non-racial selection committee, were rejected by the head of the department on the basis that the race and gender grouping into which they fell were over-represented at the levels in question.

In an interlocutory application concerning the position of Mr Christo February, the State argued that he should be displaced from the Western Cape to pursue his ambitions, since so-called 'Coloureds' were 'over-represented' in that province.<sup>5</sup>

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<sup>4</sup> (2014) 35 ILJ 504 (LC).

<sup>5</sup> The argument was reminiscent of the views of Mr Jimmy Manyi, former Director-General of Labour: 'This overconcentration of coloureds in the Western Cape is not working for them. They should spread in the rest of the country. There is a requirement of coloureds in Limpopo and all over the country. They should stop this overconcentration. Because they are in oversupply where they are. So you must look into the country and see where you can meet the supply'.

In the ensuing main litigation, the Labour Court judge declared that the refusal to promote the nine applicants who are coloured (and so ‘previously disadvantaged’) was unfair on the grounds that the grid utilized by the Department was based exclusively on national demographics and therefore did not at all take into account the preponderance of coloured people in the region, the Western Cape, in which they lived and, naturally, wished to work. With the *principle* that a system based on race norming was objectionable, however, the court could find nothing objectionable: Solidarity’s arguments based on the unlawfulness of race and gender based quotas in SA’s constitutional dispensation were brushed aside as facile. That judgment has been upheld on appeal to the Labour Appeal Court.

Modest though the court’s conclusions were, they taught the Department nothing. In the face of the order, whose enforceability has been decreed despite the noting of an appeal, the Department of Correctional Services proceeds as before. Its obduracy is, no doubt, encouraged by the fact that staffing by race and gender is the norm within every branch of the public service. In the South African Police Service, for instance, a comparable race-norming plan was, by common consent, used to deny promotion to an Indian woman who was recommended by the selection panel as best suited for the post in question, that of Cluster Commander. Her fate was determined by the application of a demographic grid that showed that the number of posts at such a senior level are so few that Indians, who comprise less than three per cent of the country’s population, can *never* meet the threshold for appointment. The SAPS witness explained that the ‘ideal’ number of Indian females to be appointed at a particular level was zero. The judge roundly condemned the plan as unfair<sup>6</sup> but the SAPS, unrepentant, continues to apply its policy of neo-racialism while pursuing a drawn-out appeal against the decision.

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<sup>6</sup> *Naidoo v SAPS* (2013) 34 ILJ 2279 (LC).

In the case of *Naidoo v SAPS*, the reasoning of the South African Police Service was recorded as follows:

*‘The calculation used to determine the race and gender allocation was explained as follows: 19 positions on level 14 are multiplied by the national demographic figure for a specific race group, e.g. 19 positions x 79% Africans = 15 of 19 posts must be filled by Africans, then 15 x 70% = 11 positions to be filled by African males minus the current status of seven, meaning there is a shortage of four African males. For Indian females the calculation is 19 x 2, 5% = 0, 5 positions to be filled by Indians, then 0, 5 x 30% = 0, 1 Indian females and that is rounded off to zero. Of the five available positions 0,125 could go to Indians x 30% gender allocation means 0,037 could be allocated to Indian females and that is rounded to zero’.*

The latitude to take up this position is created by the uncertainties and ambiguities of the governing law. When, twenty years ago, South Africa became a democratic state, the framers of the new constitutional order were confronted with a country beset by the divisions caused by patriarchy, colonialism and apartheid. In deciding how best to resolve the terrible problems caused by these hegemonic systems, they rejected a solution in which race and gender would cease to play a structural role in the governance of the State and transformation would be realized by welfare and other neutral measures. The pursuit of formal equality, they concluded, would undermine the achievement of substantive equality, which could be attained only by the countervailing use of precisely the criteria that had served to create the discrimination in the first place. Likewise rejected was a multiracial model in which the groupings would be separately conceived, developed and regulated in an effort to create parity between them. Resistance to this model was scarcely surprising: being nothing but an expression of the ‘separate but equal’ doctrine, it is a variant of the very policy - separate development – that the drafters were rightly determined to overturn. What they eventually chose, perhaps unsurprisingly, was the *via media* of a non-racial dispensation in which provision was made for reparation through affirmative action. In the process, however, they employed language

that, while apparently clear on its face, provided scope for the process of social engineering through race norming that has become endemic in the country.

Section 9 of the Constitution begins promisingly enough by stating that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’. Elaborating on this proposition, it stipulates, equally un-contentiously, that no one ‘may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’. But then, in making provision for affirmative action, it countenances measures designed to protect or advance not just individuals but also ‘categories of persons disadvantaged by unfair discrimination.’<sup>7</sup> In a thoughtful and measured commentary on the section, Laurie Ackermann, one of the founding judges of the SA Constitutional Court, has valiantly argued that

“‘Categories’ of persons are not ‘groups’ (endowed with legal personality) but individuals with a common denominator as far as their identities or experiences are concerned; [and the] policy is ‘directed towards individuals actually discriminated against as opposed to one directed towards groups as such’. [Were it otherwise] ‘individuals that are not ‘needy’ will in fact receive benefits at the expense of those who have been handicapped most by the effects of discrimination and thus are in most need of ‘advancement’’. To this one must add that an individual, though suffering no disadvantage because of discrimination, could perversely be entitled to restitution.’<sup>8</sup>

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<sup>7</sup> The provision reads:

‘(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

<sup>8</sup> L Ackermann *Human Dignity* Juta 357.

Regrettably, this is not the way the legislature has construed the provision. Instead, using the reference to categories as a cloak, it has enacted a raft of legislation that sanctions the implementation and evaluation of affirmative action initiatives by reference to race and gender criteria. Of these, the most important for present purposes is the Employment Equity Act. While prohibiting discrimination, it mandates ‘affirmative action measures designed to ensure that suitably qualified people from designated groups [i.e., everyone except white males] have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer’. Echoing the ambiguities of the Constitution, it requires employers beyond a certain size to formulate employment equity plans that, by employing numerical targets to eliminate race and gender under-representation, will create equity in the workplace. The numerical targets, it goes out of its way to emphasize, should not amount to quotas.

The Act’s rejection of quotas reveals an acceptance that race and gender based social engineering is constitutionally impermissible. So is its use of the modifier ‘equitable’ in the expression ‘equitable representation’ – the word, which is obviously more nuanced and absolute than ‘equal’, implicitly recognizes that current race or gender disparities are not axiomatically the consequence of past discrimination. But the benign aspects of the project are undermined by making race and gender parity the determinative goal, and this provides just the platform that state officials, now overwhelmingly black African, need to deal with choices mechanically. Force of numbers provide the scope for promoting kith and kin almost at will, and the opportunity, and the majority, far from exercising the ‘particular care in formulating and applying remedial measures’<sup>9</sup> that is its proper lot, embraces with abandon the opportunities so produced. Representation, not reparation, is the object, and quotas, not targets

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<sup>9</sup> L Ackermann, above, 344.

provide the means. Therefore, although South Africa is in an electricity crisis adversely affecting all, Eskom, the State-owned electricity supplier, has announced a system of appointments and promotions dependent on a strict race formula, and the achievement of race quotas that can only result from the departure of significant numbers of skilled engineers and technicians who are classified as ‘white’.

Efforts to invoke the protections of the courts are, to say the least, very mixed. To be sure, they generally demonstrate an understanding of the basic principles and employ the right rhetoric. In the leading case of *Barnard v SAPS*, for instance, the judges of the Constitutional Court stressed the importance of striking appropriate balances between group and individual interests,<sup>10</sup> cautioned against the implementation of remedial measures that unduly invade human dignity,<sup>11</sup> and made it plain that ‘beneficiaries of affirmative action must be equal to the task at hand’ so as ‘not to sacrifice efficiency and competence at the altar of remedial employment’<sup>12</sup> and let affirmative action measures become a ‘refuge for the mediocre or incompetent’.<sup>13</sup> Yet, when they turn to the facts of the instant case, the courts use a range of devices for wriggling off the hook.

In the *Correctional Services* case, for instance, the Labour Court felt that a declaratory order was all that the case merited. Without explaining herself, the judge simply treated the grant of consequential relief as unnecessary. Accepting that the individuals had been hurt and harmed in their dignity, she saw no reason why the remedy employed as the customary salve, compensation, should be necessary in the case.

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<sup>10</sup> *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (‘*Barnard*’).

<sup>11</sup> *Barnard* at para 32.

<sup>12</sup> *Barnard* para 41.

<sup>13</sup> *Barnard* para 41.

Cases so crudely decided are not the norm, however. Instead, the courts use judicial legerdemain of a subtler sort in upholding the dominant ethos of race based social engineering. The decisions in the Constitutional Court in *Barnard*, carefully studied, reveal a panoply of such intricately worked devices by which support for the prevailing ethos of race norming might be demonstrated: reversal of the onus of proof in the face of language of the plainest sort; vesting the decision-maker with a discretion (a margin of appreciation) that preserves the discriminatory act from comprehensive judicial reconsideration; recourse to hoary legal distinctions and shibboleths in an effort to show that the case is juristically miscast; reframing the issues so that the decision-maker's case becomes winnable; and stopping up deficiencies in the record by means of suppositions and assumptions of the most tendentious sort.

Using these techniques, the court was able to conclude in *Barnard* that, though a woman and so a member of the designated group, she was not the victim of discrimination when the SAPS Commissioner decided that, though she had been recognized by the selection committee as a quite outstanding candidate, the post in question was better left unfilled until a suitable black person might one day emerge. The fact that she had previously been turned down in comparable circumstances was regarded as relevant, not to show that the discrimination was egregious, but to demonstrate that nothing would prevent her from applying for promotion when the post was advertised once more.

The decisions in the Constitutional Court pale into insignificance, however, when compared with the unanimous decision of the three judges of the Labour Appeal Court who presided over an earlier iteration of the self-same litigation. The gravamen of the judgment, whose reasoning found no favour even in the Constitutional Court, was that decisions by employers in the pursuit of employment equity are all but immune from judicial scrutiny. In examining the equities of the decision, the judges seemed to forget that, as a woman, she is a member of a designated

group and so deserves preference in her own right. But the *piece de resistance* is the following statement, gratuitously injected by the LAC Judge President into the unanimous judgment:

‘On the facts of the case before us, there is no evidence of such differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred. The discriminatory conduct accepted by the Labour Court is not the conventional type .... of preferring someone over another(s). It is the omission, *per se*, to appoint Barnard on the basis that she is a white person. It is not necessary to decide this particular issue and I express no firm view either way.’

The Employment Equity Act on which this memorandum has so far focused is close to the heart of Solidarity since, as a trade union, it is principally concerned with labour and employment relations. In fairness to the drafters of the Act, it should be reiterated that they manifestly tried to give effect to the imperatives of the equality clause in the Constitution. The same can scarcely be said of the Broad-Based Black Economic Empowerment Act, fleetingly referred to above, that now deserves a little more elaboration. Its racist object is spelt out in no uncertain terms in its opening clauses: it is to ‘establish a legislative framework for the promotion of black economic empowerment’<sup>14</sup> by fostering black ownership of business enterprises. Proponents of the statute naturally justify it by referring to the exclusion of blacks from the economy under apartheid. To remedy the problem, the statute seeks to effect a more equitable distribution of economic wealth by denying state patronage to suppliers whose ‘scorecards’ reveal too low a level of black participation in the firm.<sup>15</sup>

The so-called BEE Commission, which helped formulate thinking on black empowerment, defined the policy as ‘an integrated and coherent socio-economic process ... which aims to address past imbalances by transferring and conferring ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens and ensure

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<sup>14</sup> BBBEE Act Long Title.

<sup>15</sup> T Balshaw & J Goldberg *Broad-Based Black Economic Empowerment Final Codes and Scorecard* 2008 p 16.

broader participation of Black people in the economy in order to achieve sustainable development and prosperity'.<sup>16</sup> Its true rationale, described as driving 'transformation from all levels as opposed to waiting for it to happen on a purely free-market basis, which would need more time than is politically available'.<sup>17</sup>

In short, its concern is not with past disadvantage as such, but with the inclusion of class blacks in the economic framework of the country. Its beneficiaries comprise a handful of favoured members of the black bourgeoisie, not a few of whom have over the period since 1994 become fabulously wealthy. Its justification is redress, but this is a pious. Its recipients are scarcely 'disadvantaged' and a cursory examination of the policy shows that it was implemented in order to aggrandize select individuals. This being its object, it would have been adopted and implemented whether or not its beneficiaries were the victims of past discrimination.

The re-racialization of the post-apartheid state by these means – legislative, executive and judicial – might be justified on grounds of expediency if it were creating a more inclusive society. Tragically, the very opposite is true. Old divisions are being perpetuated and, indeed, aggravated as the struggle for resources becomes more acute in this woefully misgoverned country. The instances of racial friction, which are a daily source of concern, are deftly woven into themes in the book by Anthea Jeffrey to which we have already referred. To try even to summarize them in this memorandum would be an exercise of futility and we must content ourselves by saying, simply, that no good can possibly come from policies so riven by division and fraught with racial hostility.

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<sup>16</sup> See V Jack *Broad-Based BEE – The Complete Guide* 2007 p 21.

<sup>17</sup> V Jack *Broad-Based BEE – The Complete Guide* 2007 p 22.

South Africa, as a member state of the United Nations, is part of the broader international community. Recognizing as much, the SA Constitution requires that, when interpreting the Bill of Rights, a court must consider international law,<sup>18</sup> and, when construing statutes, must heed the country's international law obligations.

The United Nations Charter ('the Charter'), which codifies the major principles of international relations, exacts a pledge from member states to promote 'respect for, and universal observance of, human rights and fundamental freedoms'.<sup>19</sup> It reaffirms faith in human rights, in the dignity and worth of human beings and in the equal rights of men and women.<sup>20</sup> Its aim is to promote formal equality by prohibiting discrimination but substantive equality of outcome through affirmative action is not envisaged. The UN's Universal Declaration of Human Rights ('the Declaration') picks up the theme. Pledging to promote universal respect for and observance of human rights as 'fundamental freedoms',<sup>21</sup> it sets out three main principles of human rights, namely freedom, equality and dignity. These rights are regarded as 'inalienable' and must be respected without distinction of any kind.<sup>22</sup>

These principles have been developed in international instruments that emphasize the principles of dignity and equality and contain non-discrimination clauses. At their forefront is this Convention.<sup>23</sup> In clause 4 it pertinently states that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed

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<sup>18</sup> Constitution s 39(1)(b).

<sup>19</sup> Charter Article 55(c).

<sup>20</sup> Charter Chapter 1 Article 1(1).

<sup>21</sup> Declaration Preamble.

<sup>22</sup> A Chaskalson 'The third Bram Fischer lecture human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 197.

<sup>23</sup> Article 2(1).

racial discrimination.’ The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination.

In deciding what this entails, recourse can be had to the guidelines framed by UNESCO in order to evaluate affirmative action policies.<sup>24</sup> As a point of departure, they accept that differentiation on the basis of sex, race, colour, language, religion, political or other opinion, membership of a racial minority, or birth or other status is illegitimate. Measures based on such criteria can, however, become legitimate if their object is to redress past systemic discrimination practised over many years on the selfsame grounds provided they do not disadvantage any person arbitrarily. The proviso is important. Affirmative action programmes, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed.<sup>25</sup> Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group<sup>26</sup> - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.<sup>27</sup>

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<sup>24</sup> UNESCO ‘Prevention of discrimination: the concept and practice of affirmative action’ Final Report submitted by Mr Marc Bossuyt, special rapporteur in accordance with Sub-Commission Resolution 1998/5 17 June 2002 (‘UNESCO Final Report’) at paras 81 to 100 and 112.

<sup>25</sup> UNESCO ‘Prevention of discrimination and protection of indigenous peoples and minorities’ progress report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 26 June 2001 at para 91(a).

<sup>26</sup> UNESCO ‘Comprehensive examination of thematic issues relating to racial discrimination: the concept and practice of affirmative action’ preliminary report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 19 June 2002 at para 62.

<sup>27</sup> UNESCO Final Report para 112.

Crucial to ICERD's conception of affirmative action, however, is the proviso to clause 4. It states that affirmative action 'measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'<sup>28</sup> It is this proviso that, Solidarity contends, is being disregarded by the SA State in all three of its branches. In promoting neo-racialism and black advancement irrespective of past discrimination the State is, in the words of the proviso, pursuing policies that lead to the maintenance of separate rights for different racial groups and that potentially will continue after the objectives for which they were taken have been achieved.

In the light of this contention, Solidarity invites the Committee to interrogate the report of the government submitted pursuant to the Convention. If it concludes that Solidarity's objections have merit, it asks the Committee to recommend the appropriate steps to remedy the problem. Solidarity believes that Judge Ackerman provides, with his customary eloquence and lucidity, a context for the investigation and recommendation when he states:<sup>29</sup>

'... [N]o country where serious and systemic discrimination has occurred can – for administrative and other financial reasons – be expected to devise and administer a remedial system that has, in all cases, to consider the awarding of a remedy on a case-by-case, individual-by-individual basis. The logistics and costs might make this impossible. No legislation or comprehensive administrative measure can always operate with the surgeon's scalpel, given the vast number of cases involved. It is, in appropriate circumstances, compelled to use a broader sword, but *where an individualised remedy is reasonably possible it should be employed.*' The greatest challenge facing the remedial challenge of s (92) [i.e. the affirmative action provision] is finding the appropriate balance in this regard. In trying to determine what this is, a number of features should be borne in mind. The overarching goal is not limited to establishing, progressively, a society in which the consequences of past discrimination are

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<sup>28</sup> Emphasis supplied.

<sup>29</sup> At 358, emphasis supplied.

eliminated, but a society in which the dignity of all is equally respected. Remedies are not justified which would turn the white 'category of persons' into an underclass.'

### NON-RACIALISM V. NEO-RACIALISM

Dividing people up into races and deciding how they should consequentially be treated may look similar in form but it is very different in substance:

- Neo-racialism, seeing races as separate, creates silos in which races are expected to be representative. Affirmative action within a non-racial society, in contrast, creates no silos, employs class-based considerations wherever possible, and uses race only where absolutely necessary.
- Neo-racialism institutionalizes race norming and heralds a socially engineered future. Affirmative action within a non-racial society, seeking to redress discrimination in the past, is wholly compensatory in nature.
- Inherited from apartheid, neo-racialism uses race divisions as the basis for decision-making. Affirmative action within a non-racial society is chary of invoking such debased distinctions and particularly wary of distinguishing between races who were the victims of apartheid.
- Neo-racialism is wholly insensitive to past disadvantage affirmative action within a non-racial society; concerned exclusively with past disadvantage; and gives the privileged no preference.
- Neo-racialism has no sunset but keeps redistributing whenever disparities arise. Affirmative action foresees a time when redress will be completed and longs for the moment when individuals will finally be judged on merit.
- Neo-racialism, typically if not axiomatically, makes representativeness a threshold precondition for advancement. Affirmative action within a non-racial society postulates a consideration of the triad of imperatives: equity, individual merit, and institutional need.
- Neo-racialism focuses on mathematical outcomes. Affirmative action focuses on training and development.

- Neo-racialism employs race quotas irrespective of effects on service delivery. Non-racial affirmative action aims to improve service delivery to all, but particularly the poor and disadvantaged.