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THE PAST IS UNPREDICTABLE: RACE, REDRESS AND REMEMBRANCE IN THE SOUTH AFRICAN CONSTITUTION*

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The notion of race continues to permeate every aspect of both public and private life in South Africa. Race insinuates itself into our responses to situations and people and 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. Against this background, and given the constitutional commitment to non-racialism, some academics and commentators argue against the use of race-based corrective measures on the basis that such measures perpetuate racial thinking and entrench racial identities, instead of helping us to move away from them. In the article the author takes issue with this view, contending that the effects of past and on-going racism and racial discrimination cannot be addressed merely by assuming that the consequences of race — including racism — can be addressed by attending to the material conditions of inequality and by ignoring race. What is required is to question the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony and to engage more critically and in a nuanced manner with the power of race and the effects of ongoing racism and racial discrimination.

I INTRODUCTION

‘Race is not an element of human biology (like breathing oxygen or reproducing sexually); nor is it even an idea (like the speed of light or the value of π) that can be plausibly imagined to live an eternal life of its own. Race is not an idea but an ideology. It came into existence at a discernible historical moment for rationally understandable historical reasons and is subject to change for similar reasons.’¹

‘It did not take me long to understand that I knew and spoke more Afrikaans than I cared to admit. How could it be otherwise? Afrikaans was all around me when I was growing up. It was the language of power; the language that gave words such as *swartes* (blacks), *kleurling* (coloured), *net blankes* (whites only) and *geen ingang* (no entry) their menace. Afrikaans was also the language that gave the world “apartheid”: a word that has so seared itself into the global imagination that it requires no translation. But that is not all there was to Afrikaans. It was also the grammar for the *tsotsitaal* I heard spoken by older boys on the street; the syntax at the heart of adult conversation from which children in my house were excluded. What’s more, Afrikaans was the language of Gerhardus Christiaan Coetzee, the boxing hero whose very name was as Afrikaans as a name could ever be.’²

* This is an edited version of an inaugural lecture presented at the University of Cape Town on 14 September 2011. I would like to thank Professor Hugh Corder and Professor Jaco Barnard-Naudé for comments provided on a first draft of this article.

¹ Barbara Jean Fields ‘Slavery, race and ideology in the United States of America’ (1990) 181 *New Left Review* 95 at 101.

² Jacob Dlamini *Native Nostalgia* (2010). Jacob Dlamini is a 2009 Ruth First Fellow.

Much ink has been spilt about the criteria used by the University of Cape Town (UCT) to make decisions about the admission of students to its various academic programmes. Several UCT academics,³ political leaders,⁴ opinion-makers⁵ and members of the public⁶ have objected to this policy, calling it 'racist' and a form of 'reverse-discrimination'. In one instance a commentator, perhaps having been overcome by a momentary amnesia about South Africa's recent past and getting slightly carried away by his own indignation, describing it as similar to the 'policy applied to Jews at German universities by an edict signed in 1933 by Adolf Hitler'.⁷ Opposition to the UCT admissions policy is based on the fact that it divides South African applicants into categories: those judged to have been affected by inequality and disadvantage (the 'redress category'), and those who have not (the 'open category'). The policy further subdivides the former category into sub-categories based on whether the applicant is deemed to be 'black', 'indian', 'coloured' or 'chinese'⁸ and sets different criteria for admitting members of each of these

³ See for example David Benatar 'Justice, diversity and racial preference: A critique of affirmative action' (2008) 125 *SALJ* 274 and Neville Alexander 'We'll pay the price for race cowardice' *Cape Times*, 15 June 2010 available at http://www.uct.ac.za/downloads/uct.ac.za/news/media/oped/Neville.Alexander06_2010.pdf, accessed on 3 September 2011.

⁴ See for example Dr Gavin Lewis, Democratic Alliance MPL 'Great insight, Amanda' in *Business Day*, 7 June 2011 available at http://www.uct.ac.za/downloads/uct.ac.za/news/media/oped/gavin_lewis_7June.pdf, accessed on 3 September 2011.

⁵ James Myburgh 'Racial quotas at UCT' *Politicsweb*, 12 May 2011 available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=235701&sn=Detail&pid=71616>, accessed on 3 September 2011.

⁶ See for example Amanda Ngwenya 'UCT admission policy perpetuates a perverse idea of fairness' *Business Day*, 6 June 2011 available at <http://www.businessday.co.za/articles/Content.aspx?id=144848>, accessed on 3 September 2011; and Celia W Dugger 'Campus that apartheid ruled faces a policy rift' *The New York Times*, 22 November 2010 available at http://www.uct.ac.za/usr/about/intro/transformation/new_york_times.pdf, accessed on 3 September 2011 and many other contributions. See generally <http://www.uct.ac.za/print/news/talkingpoints/admissions/archive/>.

⁷ See Ken Owen 'Hitler's policy at UCT' *Business Day*, 24 June 2011 available at <http://www.businessday.co.za/articles/Content.aspx?id=146718>, accessed on 3 September 2011.

⁸ Throughout this article I place these racial denominators in quotation marks to signal my belief that these identity categories are constructed and contingent. While race is experienced as very real by all of us and while we often assume that a person's race indicates something true and profound about that individual person's beliefs, attitudes or characteristics, I wish to question the stability and normality of the use of these racial categories, while — at the same time — wishing to acknowledge the power these categories still exert over all of us. By doing so I am not wishing to ask questions about the 'truth of race' — whether race as a concept is problematic because it falsely represents 'reality'. Instead, I wish to pose questions about whose truth and what truth is being served by the deployment of racial categories within a traditional racial hierarchy. I contend that race is a position within a broad social network: different societies might conceptualise and engage with race in different ways, depending on the particular history of that society and the way in which the discourse

sub-categories competing for places in the redress part of the admission's process.⁹ Opponents of this admissions policy often invoke the founding values of the South African Constitution, which include 'human dignity, the achievement of equality and the advancement of human rights and freedoms' as well as 'non-racialism and non-sexism',¹⁰ arguing that it is constitutionally impermissible to rely on race as a criteria for admitting students to university (or as a criteria for any other form of redress) and that such a reliance perpetuates race-based thinking.¹¹ In order to get beyond race and leave our

of race has developed and has been and continues to be deployed in that society. However, in this article, my engagement with race is decidedly from a *South African* perspective. This South African perspective requires us to engage with racial categories in a particular manner. And as Deborah Posel explains, after 'decades of racial reasoning, the idea that South African society comprises four distinct races — 'whites', 'coloureds', 'indians' and 'Africans' — has become a habit of thought and experience, a facet of popular common sense still widely in evidence.' As a result of this, Posel argues, it remains the norm to designate social actors in terms of their race in public media and in conversation. Accordingly, there is a tendency to think of race as an essence, as something fixed, concrete and objective (Deborah Posel 'What's in a name?: Racial categorisation under apartheid and their afterlife' (2001) 47 *Transformation* 50). See generally James Donald & Ali Rattansi 'Introduction' in James Donald & Ali Rattansi (eds) *Race, Culture, and Difference* (1992) 3; Sally Haslanger 'Gender and race: (What) are they? (What) do we want them to be?' (2000) 34 *Noûs* 31 at 43; Margareth Shih, Courtney Bonam, Diana Sanchez & Courtney Peck 'The social construction of race: Biracial identity and vulnerability to stereotypes' (2007) 12 *Cultural Diversity and Ethnic Minority Psychology* 125 at 125; P Gaskins *What are You? Voices of Mixed-Race Young People* (1999); D R Harris & J J Sim 'Who is multiracial? Assessing the complexity of lived race' (2002) 67 *American Sociological Review* 614; K K Prah 'Race and culture: Myth and reality' in N Duncan, P Gqola, M Hofmeyr, T Shefer, F Malunga & M Mashige (eds) *Discourses on Difference: Discourses on Oppression* (2002); and P R Spickard 'The illogic of American racial categories' in M P P Root (ed) *Racially Mixed People in America* (1992) 12.

⁹ Competition for places in the 'open category' is based exclusively on purported academic considerations, such as the marks obtained by an applicant in the final year high school exam. For a full version of the policy see University of Cape Town Admissions Policy, 2012 available at http://www.uct.ac.za/downloads/uct.ac.za/about/policies/admissions_policy_2012.pdf, accessed on 3 September 2011.

¹⁰ Section 1 of the Constitution of the Republic of South Africa, 1996 states:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

¹¹ See Neville Alexander 'Affirmative action and the perpetuation of racial identities in post-apartheid South Africa' (January 2007) available at http://findarticles.com/p/articles/mi_7080/is_63/ai_n28464761/?tag=content;col1, accessed on 10 September 2011 for a sensitive and thoughtful presentation of this argument. Race-based affirmative action, Alexander contends, unavoidably perpetuates racial identities and requires indi-

apartheid past behind us, so the argument goes, we need to stop classifying people in racial terms and we need to stop using apartheid era racial classifications to make decisions about the future of individual citizens — even when these racial classifications are relied upon to address the effects of past and ongoing racial discrimination. Although redress might be permissible, and may even be required, using race as a criterion to effect redress is not. In the words of US Chief Justice John Roberts: ‘The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.’¹²

In this article I contend that many of the participants in this debate about UCT’s admissions policy (and in broader debates about the wisdom of race-based corrective measures) ignore the fact that in contemporary South Africa, the issue of race continues to permeate every aspect of both public and private life in our society.¹³ Despite some changes, apartheid-created ‘black’, ‘coloured’ and ‘indian’ (and to a lesser extent: ‘white’) residential areas remain overwhelmingly segregated. South Africans largely arrange their social interactions in terms of their racial identities: by 2010 a survey by the Institute for Justice and Reconciliation revealed that only one-fifth (21 per cent) of South Africans indicated that they socialise with people of other race groups ‘often’ or ‘always’, while a further 18 per cent do so ‘sometimes’; while 60 per cent ‘rarely’ or ‘never’ do so. The survey also found that 62 per cent of South Africans find it difficult to understand the ‘customs and ways’ of people of other race groups. A further 35 per cent of South Africans viewed people of other race groups as untrustworthy, while 43 per cent of South

viduals to buy in to the socially constructed racial identities by self-classifying or by accepting the classifications imposed on them by state officials.

¹² See *Parents Involved in Community Schools v Seattle School District No 1* 551 US 701 (2007).

¹³ See for example J Gibson & H MacDonald *Truth — Yes, Reconciliation — Maybe. South Africans Judge the Truth and Reconciliation Process* (2001). As Posel remarks, the results of the 2001 survey by Institute for Justice and Reconciliation gives some indication of the lingering power of racial reasoning in the everyday lives of South African citizens. ‘Disturbing proportions of respondents make lifestyle choices and judgements about others that reiterate and entrench existing norms of racial separateness. While it might be unsurprising that 51 per cent of whites surveyed agreed that “despite abuses, apartheid ideas were good ones”, it is striking that 35.5 per cent of Africans, 34 per cent of Coloureds and 42 per cent of Indians thought likewise. According to the survey, several of the markers of a strong sense of racial distance are more prominent among Africans than whites. For example, 56 per cent of Africans, 33.4 per cent of whites, 26.6 per cent of Coloureds and 41.6 per cent of Indians perceived people of other races to be ‘untrustworthy’. And 52.7 per cent of Africans found it “hard to imagine ever being friends” with people of other races, along with 18.5 per cent of whites, 12.8 per cent of Coloureds and 19.2 per cent of Indians. 46.8 per cent of Africans said that they felt “uncomfortable around people of other races”, as did 34.7 per cent of whites, 24.3 per cent of Coloureds and 36.7 per cent of Indians.’ (Op cit note 8 at 50.)

Africans indicated they could never imagine themselves being part of a political party made up predominantly of people of another race group.¹⁴

The attitudes and life experiences about race revealed in such surveys are also reflected in the public discourse. For example, in debates about the merits of an appointment of a particular candidate as a judge, the race of a person who speaks and the race of the candidate about whom is spoken affects the tenor of the discussion. Thus, criticism of a 'black' candidate by a 'white' lawyer, journalist or academic will often be perceived by other 'black' lawyers or by 'black' members of the Judicial Service Commission (JSC) as being based on negative racial stereotypes and assumptions. The implicit (often unexamined and prejudicial) assumptions some people — who are mostly, but not exclusively, viewed as 'white' — make about individuals based on their race (or that others believe that they make) are also often superimposed on such discussions. Such assumptions can often be identified with reference to code words such as 'standards' and 'merit' and find their most problematic manifestation in cases where assumptions are made by individuals (who might well be unaware that they are making such assumptions) about the 'merit' inherently reflected in a person's race.¹⁵ Thus, in discussions on affirmative actions, some 'white' participants will argue that affirmative action always lower standards, implying (or being perceived to imply) that 'black' candidates who benefit from corrective measures are always inferior to 'white' candidates who do not. Moreover, the race of various players also has an impact on the way in which their statements are perceived, and what effect these statements might have on others.¹⁶

But race hovers not far from the surface in private or other everyday settings: as an unspoken presence, a (wrongly) perceived absence or as a

¹⁴ Kate Lefko-Everett, Rorisang Lekalake, Erica Penfold & Sana Rais *2010 Reconciliation Barometer Survey Report* (2011) at 34–6, published by the Institute for Justice and Reconciliation and available at http://www.ijr.org.za/uploads/SA_Reconciliation_Barometer_10th_Round_Report_web_FINAL.pdf, accessed on 2 December 2011. The survey found that levels of interracial contact and socialisation are lowest among the poorest households, and increase dramatically with higher household income and better living standards. Less than 10 per cent of households with the lowest LSM scores regularly talk or socialise with South Africans of race groups other than their own. Comparatively, close to 80 per cent of those with the highest LSM scores talk regularly to others, and about 40 per cent socialise with South Africans of other races in more intimate settings.

¹⁵ See Steven Friedman 'Judge's ruling code for keeping minority on top', *Business Day* available at <http://www.businessday.co.za/articles/Content.aspx?id=153912>, accessed on 21 September 2011.

¹⁶ This was again revealed during the heated debate about the 'nomination' by President Jacob Zuma of Justice Mogoeng Mogoeng as Chief Justice of South Africa, with some commentators arguing that the criticism of Justice Mogoeng's views and values constituted a vicious onslaught against a black judge. See Fiona Snyckers 'The media witchhunt of Justice Mogoeng cannot be justified' *Thought Leader*, 3 September 2011 available at <http://www.thoughtleader.co.za/readerblog/2011/09/03/a-conscientious-man-why-the-media-witch-hunt-of-justice-mogoeng-cannot-be-justified>, accessed on 7 September 2011.

painful, confusing, liberating or oppressive reality in social, economic or other — more intimate — interactions between individuals or between groups of individuals. In South Africa we cannot escape the fact that — despite the best efforts of many — race insinuates itself into our responses to situations and people. 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. And escaping poverty and joining the middle class does not — as some have argued¹⁷ — free ‘black’ South Africans from the effects of racial identity and race-based thinking. When I sit at a restaurant with my companion and the waiter presents me, and not him, with the wine list or the bill, should I not assume that this is done because I am ‘white’ and he is ‘black’? (I hasten to add that this has happened to me on many occasions, regardless of the race of the waiter or, it must be said, regardless of whether my companion is an actuary earning at least double my academic salary, or a relatively impecunious graduate student.) When I see a young man walking a dog through the streets of the posh, overwhelmingly ‘white’, and affluent suburb of Bantry Bay in Cape Town (as often happens in the morning when I drive to work), will the story I make up about that man not differ depending on whether he is ‘white’ or ‘black’ — even if, after a second or two, I will be startled by the deeply problematic racial assumptions to which I might have fallen prey, and will try to correct myself?

This is the paradox:¹⁸ while South Africa has emerged from a period in its history in which the race of every individual played a decisive role in determining their life chances, allocating social status and economic benefits on the basis of race 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’¹⁹ and allocated a social status and economic and political benefits in accordance with that person’s race,²⁰ in the post-apartheid era the

¹⁷ See for example Benatar *op cit* note 3.

¹⁸ Henk Botha argues that it is one of the ‘great paradoxes’ of the South African reality that the Constitution commits us to a non-racial society and 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.’ See Henk Botha ‘Equality, plurality and structural power’ (2009) 25 *SAJHR* 1 at 1. See also Ockert Dupper ‘Who, how and how long’ (2008) 24 *SAJHR* 425.

¹⁹ See the Population Registration Act 30 of 1950.

²⁰ See Posel *op cit* note 8 at 54–63. As Posel notes (*ibid* at 60–2), the architects of apartheid did not all embrace a science of race based on biological determinist notions of race. For many ‘race was a judgment about “social standing” made on the strength of prevailing social conventions about difference’. Because the Population Registration Act determined two cites of evidence for the race of an individual: ‘appearance’ and ‘general acceptance’, racial classifiers were invited to rely on their own ‘common sense’ beliefs about race. The system thus assisted in establishing a system in which race and the hierarchy implicit in racial classifications) would become self-evident: ‘In all of these instances of racial adjudication, the invitation from the legislature to treat race as a social construct as well as a biological condition had a crucial and decisive bearing on the process of racial classification. It allowed — indeed encouraged — classifiers spared of any pretence at scientific rigour, to read race as a symptom of

potency of race as a factor in the allocation of social status and economic benefit has not fundamentally been diminished in our daily lives — despite a professed commitment to non-racialism contained in the South African Constitution, the founding document of our democracy. Problematic racial categories such as ‘black’, ‘coloured’, ‘indian’ and ‘white’ have also remained inscribed in our law and in official policies — including the admission policy at UCT — in an attempt by the law to deal with the effects of past and ongoing racial discrimination and racism.²¹ While race previously was the locus of ‘white’ privilege, race has now become the site of redress. And by relying on racial categories to effect redress, the law is perpetuating the very racial hierarchy which ideally should be eradicated to achieve the non-racial society promised in the founding provision of the South African Constitution.²²

Opponents of the use of these racial categories object to their use in legal rules, policies and regulations for what appear to be salient reasons. Because the legal rules and policies are instruments of power, and because power is — in the Foucauldian sense — productive (it produces, said Foucault, domains of objects and rituals of truth; it produces the individual and the knowledge that may be gained of her);²³ legal rules, policies and regulations contribute to the way in which we understand ourselves, the world we live in and our place in it. If we accept this notion about the productive nature of law, it implies that the law itself, in all its manifestations, potentially has a disciplinary and normalising effect on individuals. As I have argued elsewhere,²⁴ the law is coming more and more to act as a norm and legal institutions are increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are mostly regulatory.²⁵ When racial categories are thus employed in legal discourse to effect redress, it helps to ‘normalise’ such racial categories; to normalise the racial hierarchy associated with it; and to ‘discipline’ individual subjects into accepting that they belong to a designated racial category which is ‘normal’ or ‘natural’ and speaks to something ‘true’ and ‘essential’ about each individual who belongs

prevailing hierarchies of privilege and opportunity, and thereby make racial classifications that perpetuated and justified these common sense “conventions” of difference. And this was exactly in line with the primary purpose of the apartheid system of racial classification — namely, to buttress and stabilise the edifice of white supremacy.’

²¹ I use the term racism in this article in an extended way to cover both belief and practice. See generally Patrick Fitzpatrick ‘Racism and the innocence of law’ (1987) 14 *Journal of Law and Society* 119 at 121.

²² Posel op cit note 8 at 68. See section 1(b) of the Constitution, which states: ‘The Republic of South Africa is one, sovereign, democratic state founded on the values [of] non-racialism and non-sexism.’

²³ See Michel Foucault *Discipline and Punish: The Birth of the Prison* translated by Alan Sheridan (1977) 194.

²⁴ Pierre de Vos ‘Refusing human rights: A Foucauldian account’ in Karin van Marle *Refusal, Transition and Post-Apartheid Law* (2009) 121 at 127.

²⁵ Michel Foucault *The History of Sexuality: Volume 1, An Introduction* translated by Robert Hurley (1978) 144.

to that racial category.²⁶ Because the use of racial categories in law contributes to the construction of the individual (racial) subject, the knowledge that it is possible to have about the individual subject, and the limits of our understanding of the place of the individual in society,²⁷ this deployment of racial categories threatens the non-racial project itself. Instead of moving away from a world in which racial identities (and the destructive racial hierarchy associated with it) appear determinate of an individual's character and inherent attributes (something that seems necessary in order to achieve a non-racial society), the use of racial categories in law would result in a preservation of racial identities which will remain important (or will even increase in importance), thus condemning us to live forever in a race-obsessed and ultimately racist world. If this is true, so the argument goes, the way in which laws and policies deal with race becomes extremely important for any emancipatory project aimed at decentering race as a defining organising principle of society (which is required to overcome the subjugating and oppressive effects of race).

In this article I contend that the legal rules cannot do so merely by assuming that race and racism is about biological determinants or that the consequences of race — including racism — can be addressed by attending to the material conditions of inequality.²⁸ 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 legal rules, policies and regulations are 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 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 the deployment of racial categories in legal rules, policies and regulations can have the effect of perpetuating and legitimising racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories). By recognising these categories and by dealing with them as if they are a given — normal, essentialist, unchanging and unchangeable — and by failing to challenge the hierarchical assumptions

²⁶ See Pierre de Vos '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 & Didi Herman (eds) *Sexuality in the Legal Arena* (2000) 195 at 199.

²⁷ See Foucault op cit note 23 at 194; Michel Foucault 'Two lectures' in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (1980) at 107; Alan Hunt & Gary Wickham *Foucault and the Law: Towards a Sociology of Law as Governance* (1994) 60–1; and Jerry D Leonard 'Foucault: Genealogy, Law, Praxis' (1990) 14 *Legal Studies Forum* 11.

²⁸ Meredith J Green, Christopher C Sonn & Jabulane Matsebula 'Reviewing whiteness: Theory, research, and possibilities' (2007) 37 *South African Journal of Psychology* 389. See generally G J Sefa-Dei 'Critical perspectives in antiracism: An introduction' (1996) 33 *The Canadian Review of Sociology and Anthropology* 247.

underlying the deployment of these categories of 'white' and 'black', we can do immense harm — even in the name of wanting to do good. Instead of helping us to move away from a hierarchically racialised society — a society in which racial categories continue to exert a powerful pull on the way in which we perceive and understand how the world is organised and how we see and understand ourselves and our relationships with those around us — the deployment of racial categories in law can contribute to the perpetuation of 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 rules, policies and regulations aimed at addressing the effects of past racial discrimination and the continued dominance of an ideology of 'whiteness',²⁹ the law may well fail to address the effects of past racial discrimination and the ongoing effects of racism and racial oppression. This is so, I contend, because 'disadvantage' flows not only from an individual person's material conditions, but also from a person's social status associated with his or her race, something determined (to some degree at least) by the effects of past and ongoing racism and racial discrimination. If we insist that race is (or should be) absolutely irrelevant and superfluous, and that we should never rely on racial categories when we make decision about how the world should be organised or regulated, how can the powerful effects of past and ongoing racial discrimination and racism be addressed? Would it not be true that if we insisted that race was irrelevant and superfluous, we would be endorsing and perpetuating the fiction that the characteristics, cultural beliefs and (often unexamined and silent) norms of an often dominant 'white' group (dominant culturally and economically) are universal and neutral? Would such a 'race-blindness' in the legal rules, policies and regulations not impose 'white' dominance by erasing awareness of racial identity or cultural distinctiveness, given the fact that many 'white' South Africans still experience whiteness and 'white' cultural practices as normative, natural, and universal, and therefore close to invisible or at least as irrelevant.³⁰ 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 (on the basis that we do not want it to matter or that it is not in the interest of the still dominant racial minority

²⁹ See Samantha Vice 'How do I live in this strange place?' (2010) 41 *Journal of Social Philosophy* 310 at 324. 'Whiteness' is a term used to gesture towards the habits and assumptions of white people and tends to involve a commitment to the centrality of white people and their perspectives. It attempts to describe the phenomenon that some white people see the world as if the world just is that way; that the way they get around in the world just is the right way to get around.

³⁰ R. Frankenberg 'The mirage of an unmarked whiteness' in B Bander Rasmussen, E Klinenberg, I J Nexica & M Wray (eds) *The Making and Unmaking of Whiteness* (2001) 72–96; T K Nakayama & R L Krizek 'Whiteness as a strategic rhetoric' in T K Nakayama & J N Martin (eds) *Whiteness: The Communication of Social Identity* (1999) 87.

group that it should matter), would one not be denying the powerful effects of a pervasive racial ideology that continues — in different ways — to oppress and marginalise black South Africans regardless of their economic status? Does this stance not require one to ignore the lived reality of a majority of South Africans who experience race as real and, often, as oppressive? Because the dominant norm according to which decisions about inclusion and exclusion — and the awarding of social status and goods and opportunities — are made is so part of the world view of the economically and culturally dominant group, a legal system that pretends to remain neutral and avoids any reference to race may ignore the exclusionary effect race might have on those who happen not to share the dominant world view. Is it not the case that, by virtue of this very pretense to neutrality, the system would re-enforce the ideology of racial superiority upon which it was founded in the first place? Is the claim to neutrality, then, not the zero point of ideology, the point at which ideology encounters its purest expression?

In this article, 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, programmes such as the UCT admissions policy. Although I focus on the UCT admissions policy, my argument is meant to apply more broadly to other programmes that rely on racial categories in order to effect redress. I point out that the court has embraced the view that the South African Constitution is historically self-conscious in order to assist it with its interpretation of the various provisions of the Constitution and to signal the contingent nature of its interpretation. I explore the manner in which the Constitutional Court has dealt with racially-based corrective measures against the background of the court's understanding of the South African apartheid past and the lingering effects and consequences of this apartheid past on the 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, its jurisprudence of historical self-consciousness also gestures at the need for a contingent and critical approach to race when engaging with the issue of race-based corrective measures and its limits. I furthermore argue that in order to embrace a more critical approach to race, what is needed is a more nuanced understanding of our past. As Evita Bezuidenhout pointed out during the Truth and Reconciliation Commission process when she commented on the apparent amnesia of many 'white' South Africans about the apartheid past: 'The future is certain, it is the past that is unpredictable.'³¹ Who we are and what position we speak from will influence our conception of the past. An awareness of our different conceptions of the past and a move towards a more

³¹ Evita Bezuidenhout is the self-described 'most famous white women in Africa' and the alter-ego of comedian Pieter Dirk Uys. These words have also been attributed to an old joke that did the rounds in the former Soviet Union. See Lawrence W Levine *The Unpredictable Past: Explorations in American Cultural History* (1993).

nanced and complex engagement with our past might therefore help our courts to deal with the paradox of race and redress set out above.

II RACE, REDRESS AND THE SOUTH AFRICAN CONSTITUTION

Section 9(1) of the South African Constitution states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. Section 9(3) prohibits unfair discrimination — whether direct or indirect — 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 s 9(2) of the Constitution also 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.³² Legislation subsequently adopted in the light of this injunction to address the effects of past discrimination in order to *achieve* the realisation of equality³³ pointedly mentions race as one of the categories to be relied upon when dealing with, and correcting the effects of, past unfair discrimination, and this is sanctioned by the Constitution itself.³⁴ The Constitutional Court has also explicitly acknowledged that people who have been unfairly discriminated against in the past — and hence would qualify as the potential beneficiaries of corrective measures — include those who have been discriminated against on the basis of their race.³⁵ It is true that in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* the Constitutional

³² 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.'

³³ See the Public Services Act 103 of 1994; the Employment Equity Act 55 of 1998; the Skills Development Act 97 of 1998; the Skills Development Levies Act 9 of 1999; and the Broad Based Black Economic Empowerment Act 53 of 2003.

³⁴ See the definition s 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'.

³⁵ In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40 the Constitutional Court remarked: '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

Court (per O'Regan J) 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.³⁶ However, this does not mean that the Constitution prohibits institutions like UCT from relying on racial categories when addressing the effects of past unfair discrimination or when addressing the lingering effects of racial discrimination and racism. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution and this means the constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races. As Ngcobo J (as he then was) stated in the *Bato Star* judgment:

'In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our 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. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.'³⁷

Ngcobo J admitted that there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the 'white' community whose members benefited directly or indirectly from the system of apartheid. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.³⁸ The question to be answered is what exactly is required by the Constitution. It is to this question that I now turn.

enduring legacy that it bequeathed that the equality clause needs to be interpreted.' See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 74.

³⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC) para 35.

³⁷ *Ibid* para 74 (emphasis supplied). Ngcobo J further stated: '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.'

³⁸ *Ibid* para 76. See also *Bel Porto School Governing Body & others v Premier of the Province, Western Cape & another* 2002 (3) SA 265 (CC) para 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.'

(a) 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 its insistence on interpreting the Constitution contextually, most notably with reference to the South African apartheid history,³⁹ and given the text of s 9 of the Constitution it has rather interpreted s 9 as endorsing a substantive notion of equality.⁴⁰ It thus rejected the notion that equality could be premised on the assumption that all South Africans were born free and equal and that all South Africans 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 racially determined social and economic imbalances and the differences in power between 'white' and 'black' South Africans — which is 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 and hence that the Constitution permits — or even requires — measures to be taken to help address the effects of past discrimination in order progressively to realise the achievement of equality.⁴¹ Because the South African society was deeply divided at the time when the

³⁹ See *Brink v Kitshoff NO* supra note 35 para 40; *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 41; *Prinsloo v Van der Linde & others* 1997 (3) SA 1012 (CC) para 31; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 26; *Satchwell v President of the Republic of South Africa & another* 2002 (6) SA 1 (CC) para 17. See also *Minister of Finance v Van Heerden* supra note 35 para 26 where Moseneke J stated: 'The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution.'

⁴⁰ On equality see generally C Albertyn 'Equality' in M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of Rights* (2002); C Albertyn & B Goldblatt 'Equality' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2007) ch 35; H Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1; C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *SAJHR* 214; H Botha 'Equality, dignity and the politics of interpretation' (2004) 19 *SA Public Law* 724; S Fredman 'Providing equality: Substantive equality and the positive duty to provide' vol. (2005) 21 *SAJHR* 163; J L Pretorius, M E Klinck & C G Ngwena *Employment Equity Law* (2001, service issue 2009) 2–29.

⁴¹ See *Hugo* supra note 39 para 41, where the majority stated that: 'The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.'

Constitution was adopted, remains vastly unequal and uncaring of the human worth of some, and because many of these stark social and economic disparities will persist for a long time to come, corrective measures were permitted and even, in some cases, mandated by s 9 of the Constitution.⁴² In the words of Moseneke J (as he then was):

‘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.’⁴³

Race is not the only attribute which has contributed to and continues to perpetuate inequality, marginalisation and oppression in South Africa. The substantive notion of equality recognises that besides race, class, gender, sexual orientation and other attributes contribute in different ways and to different degrees to systematic under-privilege and marginalisation in society. Addressing the effects of marginalisation, misrecognition and under-privilege on the basis of categories other than race in any effort to work towards the achievement of equality is thus also important.⁴⁴ The Constitution requires the state to take positive steps to eradicate group-based social and economic disadvantage — whether the disadvantage resulted from past or ongoing discrimination based on race, gender, sexual orientation or other characteristics. In short, it is not sufficient for the state merely to refrain from discriminating against individuals: they need to dismantle the patterns of disadvantage and harm that remain entrenched in society⁴⁵ and to prevent the creation of new patterns of disadvantage.⁴⁶ When evaluating equality

⁴² *Van Heerden* supra note 35 para 23.

⁴³ *Ibid* para 25.

⁴⁴ The Constitutional Court has thus acknowledged that disadvantage not only follows the axis of race, but that racial cleavages are cross-cut with rural-urban, gender, class, regional and cultural divides which complicate the nature of disadvantage and discrimination. See *Van Heerden* supra note 35 para 27. But, as Dupper has warned, in South Africa there is a tendency to focus almost exclusively on race-based corrective measures, something which leads to a denial of the complexity of redress and may potentially exclude some of the most deserving beneficiaries of measures of redress. See Ockert Dupper op cit note 18 at 428. By focusing on race-based redress in this article, I in no way wish to minimise the importance of this point and, as I shall argue in the last section of this article, a more nuanced engagement with the past may well lead to a better understanding of the complex requirements for redress that cuts across race, class, gender, sexual orientation, and disability.

⁴⁵ *Brink v Kitshoff NO* supra note 35 para 44; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

⁴⁶ One way in which the state can meet this obligation is through the adoption of legislation like the Employment Equity Act and other legislation listed in note 33 above. For a discussion on the debates about whether affirmative action in the employment contract also places a positive duty on private individuals like employers and thus whether it can be used as both a shield and a sword, see Neil Coetzer ‘Affirmative action: The sword versus shield debate continues’ (2009) 21 *SA Merc LJ*

claims courts must ask what the impact of a particular rule, regulation or measure might be on those affected.⁴⁷ The court needs to scrutinise in each equality claim the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage; 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 context, in order to determine its fairness or otherwise in the light of the values of our Constitution.⁴⁸ According to the court, in the assessment of the fairness or otherwise of a seemingly discriminatory measure a flexible but ‘situation-sensitive’ approach is indispensable.⁴⁹ Because of shifting patterns of hurtful discrimination and stereotyping in the evolving democratic society new patterns of disadvantage and harm may emerge which may require the courts to view allegations of discrimination against a specific group differently — either being more, or less, predisposed to a finding that unfair discrimination indeed occurred.⁵⁰

It is therefore clear that the effect of this commitment to redress is that restitutionary measures — also measures which rely on racial categories — are explicitly mandated by the Constitution itself. Unlike the US anti-discrimination approach — rather unhelpfully referred to in that context as ‘affirmative action’ — which views corrective measures as an exception to the general requirement that people should be treated similarly regardless of their race, the South African equality jurisprudence must be understood as rejecting the notion that corrective measures are a deviation from, or invasive of, the right to equality guaranteed by the Constitution.⁵¹ They are not ‘reverse discrimination’ or ‘positive discrimination’ but rather integral to the reach of equality protection under the South African Constitution. In other words, the provisions of s 9(1) and s 9(2) are complementary as both contribute to the constitutional goal of achieving equality to ensure ‘full and equal enjoyment of all rights’. In the *Van Heerden* case, Justice Moseneke emphasised that a disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.⁵² Thus, because the Constitutional Court interprets s 9 in the context of South Africa’s particular history, it views

92; C Garbers ‘Is there a right to affirmative action appointment?’ (2004) 13 *Contemporary Labour Law* 61.

⁴⁷ *Hugo* supra note 39 para 43; *Harksen v Lane* 1998 (1) SA 300 (CC) para 50.

⁴⁸ *Hugo* ibid para 51.

⁴⁹ *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 126 and *Van Heerden* supra note 35 para 27.

⁵⁰ *Van Heerden* supra note 35 para 27.

⁵¹ For a helpful discussion of the differences between the South African and US approaches to ‘affirmative action’ see Katherine C Naff & Ockert Dupper ‘Footprints through the courts: Comparing judicial responses to affirmative action litigation in South Africa and the United States’ (2009) 25 *International Journal of Comparative Labour Law and Industrial Relations* 157.

⁵² *Van Heerden* supra note 35 para 30.

the provision of s 9(1), which guarantees equality before the law, and s 9(2), which insists that measures to promote equality are required to achieve equality in the long term, as 'both necessary and mutually reinforcing'. The court pointed out that in the absence of a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit would ring hollow.⁵³

(b) *The limits of corrective measures*

The fact that the Constitutional Court has embraced a substantive notion of equality and has emphasised that corrective measures were both constitutionally permissible and sometimes mandated in order to achieve this substantive equality, does not mean that the Constitution places no limits on the measures that may be taken, either by the state or by other institutions, to achieve equality in the long run. Although it has been suggested that the court's judgment is largely deferential to government measures aimed at correcting the effects of past or ongoing racial discrimination,⁵⁴ and that the court might require little more than an application of a rationality standard when measuring whether such programmes comply with the Constitution,⁵⁵ I would contend that a careful reading of the majority judgment of Moseneke J in the *Van Heerden* case indicates that the Constitutional Court understands s 9(2) of the Constitution as imposing substantial constitutional limits on redress programmes. Thus, according to the Constitutional Court, any programme or policy aimed at addressing the effects of past (and continuing) racial discrimination has to meet at least three requirements contained in s 9(2) before it would be considered to be constitutionally permissible. Once it has been established that the measures comply with the three requirements set out in s 9(2), that would be the end of the matter and no resort to the application of s 9(3) and the question whether the discrimination is fair or unfair, may be undertaken.⁵⁶ It may be argued that s 9(2) of the Bill of Rights must be read in conjunction with s 9(3) and that questions about the fairness of any corrective measures (central to a section

⁵³ Ibid para 31.

⁵⁴ See Albertyn & Goldblatt in Woolman et al op cit note 40 at 35–29 to 35–40; Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 256; J L Pretorius 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 536 at 549–57.

⁵⁵ Pretorius op cit note 54 at 561–6. Pretorius argues that the judgment is ambivalent but concedes that a more expansive reading of the Moseneke judgment would indeed require a far more stringent test than mere rationality.

⁵⁶ *Van Heerden* supra note 35 para 36: 'The pivotal enquiry in this matter is not whether the Minister and the Fund discharged the presumption of unfairness under section 9(5), but whether the measure in issue passes muster under section 9(2). If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination.'

9(3) inquiry) should also form an integral part of this inquiry into the constitutionality of redress programmes. Thus, Pretorius argues that the court's exclusive focus on s 9(2) when dealing with corrective measures 'seems curious', as it has warned in the past that it could be problematic to read specific constitutional provisions in isolation.⁵⁷ However, in the light of my interpretation of the three requirements which any valid programme of corrective measures must meet (and especially the scope of the third requirement discussed below) nothing turns on this criticism. Hence, because the primary focus of this article is on the use of racial categories when effecting redress, I shall not address the criticism here. It is important to note, however, that all three requirements have to be met but, as we shall see, these requirements cast the net rather wide. Nevertheless, I am prepared to concede that at present it would be difficult — but not impossible — to convince a court that a programme which relies on racial categories and is 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 two legs of the *Van Heerden* test clearly cover aspects of a rational relationship inquiry in line with the court's standard rational relationship test in terms of s 9(1).⁵⁸ Thus, the first question is whether the programme of redress is designed to protect and advance a disadvantaged group. The measures of redress chosen must favour a group or category of people designated to be in need of corrective measures by s 9(2). To this end, the beneficiaries must be shown to belong to a group which has been disadvantaged by unfair discrimination in the past. Because of the fact that the court interprets this section in the light of South Africa's apartheid past, it assumes (at present, at least) that any programme aimed at addressing the effects of past racial discrimination may potentially comply with this first requirement.⁵⁹ The court acknowledges the fact that it would be difficult, impractical or undesirable always to devise a legislative scheme or programme with 'pure' differentiation demarcating precisely the affected classes or groups. 'Within each class, favoured or otherwise, there may indeed be exceptional or 'hard cases' or 'windfall beneficiaries'.⁶⁰ The court thus acknowledges that not all the members of a class targeted to benefit from restitutionary measures might themselves have suffered from unfair discrimination or might have been disadvantaged because of the effects of past discrimination.⁶¹ In the context

⁵⁷ Pretorius op cit note 54 at 558. See also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) para 35:

⁵⁸ Pretorius ibid at 561. Thus the court referred, inter alia, to *Prinsloo v Van der Linde* supra note 39 paras 24–6 and 36; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 16.

⁵⁹ *Van Heerden* supra note 35 para 38.

⁶⁰ Ibid para 39.

⁶¹ In the Indian context, where corrective measures were first instituted shortly after that country gained its independence but 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 discrimina-

of a s 9(2) measure, the remedial scheme should be judged by asking whether an overwhelming majority of members of the favoured class (for the purposes of this article, members who are 'black') are persons designated as disadvantaged by unfair exclusion.⁶² 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 the effects of past discrimination, this will not torpedo the programme — as long as the overwhelming majority of beneficiaries can be shown to suffer from the effects of past discrimination. This is important to note, as it dispenses with an argument often advanced by opponents of race-based corrective measures; namely that corrective measures will be unconstitutional and unfair if they also benefit some black South Africans who are economically privileged. For example, in the context of the UCT admissions policy, questions have been raised about the fact that black pupils attending private schools also benefit from the race-based corrective measures employed by the University when it decides who to admit as students. The first leg of the test set out by the Constitutional Court would mean that as a matter of constitutional law, this argument would fail. However, there is a second reason why this argument should fail; that is, that even black pupils who receive the best standard of education in South Africa remain black. In a society dominated by 'whiteness', by social and economic structures that privilege whiteness, their race would remain relevant — regardless of their relative privileged schooling — and would negatively affect their performance at white-dominated (albeit privileged) schools. They are thus negatively affected because of their race, even if they are economically privileged, because they are not free from the effects of ongoing racism and racial discrimination which still lingers in our society.

The manner in which the Constitutional Court has dealt with the requirement that corrective measures must target an overwhelming majority of a group disadvantaged by past discrimination has significant implications for any discussion on the constitutional validity of racial redress measures. 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 pervasive in the South African society, 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 material success, it would be difficult, for the time being, to conceive of any restitutory programme that targets black South Africans as a group (including 'africans', 'indians' and 'coloureds') that would not meet this first requirement for constitutionally valid corrective measures. Because corrective measures are aimed not only at

tion, the question is then posed in India whether these members of the so called creamy layer can also benefit from restitutionary measures. See *Jagdish Saran v Union of India*, (1976) 3 SCC 730; *Indira Sawhney v Union of India*, AIR 1993 SC 477; *Ashoka Kumar Thakur v State of Bihar* 1996 AIR 75, 1995 SCC 403.

⁶² *Van Heerden* supra note 35 para 40.

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. However, it must be noted that the Constitutional Court's approach also leaves some leeway for policy makers to devise corrective measures primarily aimed at addressing the effects of past and ongoing racism and racial discrimination. Measures which rely on other factors as proxies for the targeted racial categories — even when these measures would not target black South Africans with absolute precision — may therefore well pass constitutional muster. The programme in the *Van Heerden* case illustrates this point well. This programme drew a distinction between individuals who were members of Parliament before 1994 and continued to be members of Parliament after 1994 on the one hand, and individuals who only became members of Parliament after 1994. For the period from 1994 to 1999 the latter group received a larger pension fund contribution than the former group in order to address the effects of apartheid discrimination which precluded 'black' African citizens from becoming members of Parliament. Of course, some 'white' citizens (ANC leaders Joe Slovo and Ronnie Kasrils, to mention only two examples) only became members of Parliament after 1994, but also benefited from the restitutionary scheme. The mere fact that white members also benefited from the scheme did not mean that the scheme did not comply with the requirements of s 9(2). This means that restitutionary programmes may validly be designed to redress the effects of past racial discrimination without explicitly relying on racial categories. Nevertheless, a failure to implement corrective measures that rely directly on racial categories 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 Moseneke J 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 permissible goal.⁶³ If it is clear that they are not reasonably likely to achieve the end of correcting the effects of past and ongoing racial discrimination and racism, they would not constitute measures contemplated by s 9(2). It is not necessary to show — as the High Court had stated — that the remedial measures were a 'necessity' or that it was necessary to disfavour one class in

⁶³ Ibid para 41. See also *Prinsloo v Van der Linde* supra note 39 paras 24–6 and 36; *Jooste v Score Supermarket Trading (Pty) Ltd* supra note 58 para 16.

order to uplift another.⁶⁴ Given the historical self-consciousness of the Constitutional Court's interpretation, a valid purpose of a remedial programme would include the purpose of addressing the effects of past racial discrimination. I would contend that given the lingering effects of racism and racial discrimination, it would also be valid for a programme to be aimed at addressing continuing racial discrimination and the effects of continued racism and the racial hierarchy embedded in our society. But where measures are completely arbitrary or where they are a mere smokescreen for the advancement of the interests of a specific person or group (for example, if they benefit the members of a well-connected political family or benefit individuals who had paid a bribe to the official or body who had devised the programme in order to benefit from such a programme) the remedial measures would not be found to meet this second requirement of the test.

The third requirement for a valid remedial programme is probably the most difficult and complex to comprehend and apply. It requires a value judgement on the part of the presiding officer, a judgement that would have to be made in the light of all the circumstances, including the apartheid history of the country. According to the court, remedial measures can only be constitutionally valid if, thirdly, such a measure 'promotes the achievement of equality' in the long term. Justice Moseneke's judgment emphasises that two factors seemingly in tension with one another will come into play at this juncture. On the one hand, it 'must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged'.⁶⁵ In other words, race-based corrective measures may often place some direct or indirect burden on 'white' South Africans, and the mere fact that the measures do so will not automatically render the measures in conflict with s 9 of the Constitution. For example, 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 affect some 'white' applicants who may be denied a place to study at the

⁶⁴ *Van Heerden* ibid para 43. Pretorius argues that the court criticised the High Court for requiring a stricter standard and asking whether the measures were 'necessary' for achieving the stated redress goal because it feared that this would, in effect, have subjected any corrective measures programme to a 'strict scrutiny' test. It did so in the context of justifying its exclusive reliance on s 9(2) (and not on the fairness test developed in terms of s 9(3)) when it evaluated the constitutionality of corrective measures. He points out, correctly in my view, that the fairness test developed by the court in terms of s 9(3), would not have required 'strict scrutiny' at all as that test 'generously accommodates remedial objectives'. See Pretorius op cit note 54 at 550–1. As the main focus of this article is on the wisdom of relying on race-based corrective measures when dealing with the effects of past and ongoing racial discrimination and not on the technical correctness of Moseneke J's majority judgment in *Van Heerden*, it is beyond the scope of this article to engage with this criticism here.

⁶⁵ *Van Heerden* ibid para 44. Moseneke J also quoted from the judgment of Ncgobo J in *Bato Star Fishing (Pty) Ltd* supra note 36 para 76, where he stated: 'The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities.'

university because of the remedial programme. This in itself will not invalidate the programme. On the other hand,

‘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 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’.⁶⁶

In my reading of this passage, it clearly imports considerations that go beyond mere rationality testing into the s 9(2) inquiry. As is the case with the test for s 9(3) analysis,⁶⁷ it calls for some form of ‘balancing’ of interest.⁶⁸ Proportionality considerations play a role in the sense that the need for, and importance of, particular corrective measures must be measured against the possible effect that the remedial measures will have on the group or groups that might be negatively affected by the measures. One is then called upon to make a judgement call on whether the measures — although potentially burdensome to the group not benefitting from the measures — nevertheless do not pose a danger to the achievement of the long term goal of creating a society in which all individuals, regardless of their differences, would be equally respected.⁶⁹ Where race-based admissions policies of a university place such an onerous burden on ‘white’ South Africans that it would send a signal that the equal dignity of ‘white’ applicants are not respected at all, 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 deserving ‘white’ applicants, the programme would probably not

⁶⁶ Ibid.

⁶⁷ To what extent the outcome would differ if s 9(3) analysis is used instead of s 9(2) analysis is not clear and I do not venture an opinion on this vexed question here. Obviously, there are clear differences between s 9(2) and 9(3) analysis. First, the s 9(3) analysis focuses on several factors and requires a presiding officer to balance these factors against each other to determine fairness or unfairness, while s 9(2) analysis requires that three requirements must be met but determines that the third of these requirements entail some form of balancing. Secondly, s 9(2) analysis does not assume that different treatment on one of the grounds listed in s 9(3) constitutes impermissible discrimination and there is no shifting of onus as there is with s 9(3) analysis. See *Van Heerden* ibid para 33 where Moseneke J stated: ‘It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory.’

⁶⁸ See also Pretorius op cit note 54 at 562, who argues that this passage can be understood narrowly or broadly. If understood narrowly, it will in effect not add anything additional to the previous two rationality tests. Pretorius argues that this is how the third requirement was understood by Mokgoro J in her separate opinion.

⁶⁹ This requirement has been interpreted to mean that an ‘internal fairness requirement’ is imported into the s 9(2) inquiry. See Pretorius op cit note 54 at 564.

pass constitutional muster. In effect this is a value judgement 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 lingers on in society and other factors which might impact on the full enjoyment of all rights and privileges for all South Africans. Whether a court will determine that a particular race-based corrective measure is constitutionally valid or not, may well change over time, as circumstances in society change.

At this point it is important to reiterate that this jurisprudence stems from the court's understanding that s 9 had to be interpreted in the context of South Africa's specific history of racial exclusion, marginalisation and oppression. But the court leaves the door open for a re-evaluation of its present permissive view on racially-based corrective measures. As I pointed out in the discussion above about the court's endorsement of a substantive notion of equality, the court recognises, first, that — apart from race — there are other levels and forms of social differentiation and systematic under-privilege which still persist in our society, and that the Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. Sexism, homophobia, prejudice based on disability or HIV status and other aspects or characteristics of a person's personality which invoke opprobrium or may contribute to economic marginalisation may also be targeted. Secondly, while the Constitutional Court recognises that at present s 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 and the actual situation 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 at present.

III RACE, REDRESS AND REMEMBRANCE

Because the Constitutional Court has stated that in order to judge the permissibility of race based redress measures one must have regard to South Africa's past, it is my contention that the paradox highlighted at the start of this article can — if not be solved, then be managed — by exploring ways of engaging in a more nuanced and complex manner with South Africa's history. Neither attempting to sweep the past racism and racial discrimination and its ongoing manifestations and effects (which continue to haunt our country) under the carpet, nor reducing or simplifying the story of our past to one in which human beings only existed as markers for their racial identities, is going to help us. Rather, adopting a more nuanced attitude might allow for a jurisprudence that takes the effects of past and ongoing racism and discrimination seriously without treating all South Africans as mere representatives of their race, with the consequence that they are not treated as human

beings. What is required is to question, what I have elsewhere called,⁷⁰ the ‘grand narratives’ about our past, without falling into the kind of amnesia about South Africa’s history of racial oppression.

It was the French philosopher and literary theorist Jean Francois Lyotard who first suggested back in 1979 that one way to understand the world around us is to identify the often invisible or unquestioned ‘grand narratives’ which are produced by specific cultures or societies to make sense of the world. In a modernist world, Lyotard argued, such narratives operate as great structuring stories that are supposed to give meaning and make us understand all other events and interpretations around us.⁷¹ These ‘grand narratives’ are grand, large-scale theories and philosophies of the world, such as the progress of history, the knowability of everything by science, and the possibility of absolute freedom. Lyotard — writing from a late twentieth century Western perspective — argued that in the so called postmodern Western world people have ceased to believe that narratives of this kind are adequate to represent and contain us all. They have become alert to difference, diversity, the incompatibility of our aspirations, beliefs and desires, and for that reason postmodernity is characterised by an abundance of micro-narratives.

South Africa, however, is decidedly not a postmodern country, and ‘grand narratives’ still have a decisive hold on our imaginations — albeit that different South Africans are wedded to different ‘grand narratives’ and fit their understanding of events into such narratives in different ways. The reliance upon ‘grand narratives’ is understandable. Because it is impossible to make sense of all the available information to which we are exposed by interpreting the meaning of each event and each piece of information afresh, as if we are all clean slates without preconceived ideas and emotional commitments shaped by our past experience, we tend to deal with this information overload by discarding some facts and ideas and by fitting other facts and ideas into existing ‘grand narratives’. Although many of us might not even be aware of the existence of these ‘grand narratives’, we are nevertheless slaves to them, because these narratives help shape our understanding of the world and the people and events in it. One can argue about the mechanisms through which such ‘grand narratives’ are produced and maintained. One may also quibble about whether such ‘grand narratives’ are actually necessary tools to help us understand the world, or are rather a handy mechanism through which the powerful and dominant groups in society maintain their hegemonic position to ensure the continued subjugation of others whose cultures, beliefs and practices differ from the dominant norm. But it seems to me that much of the disagreements in South Africa — disagreements about race and redress, about the prevalence of corruption,

⁷⁰ See Pierre de Vos ‘A bridge too far?: History as context in the interpretation of the South African Constitution’ (2001) 17 *SAJHR* 1.

⁷¹ See generally J F Lyotard *The Post-Modern Condition* (1984) xxiv and 34–7. See also Keith Jenkins *Re-Thinking History* (1991) 60. What I refer to as a grand narrative is an attempt to apply Lyotard’s work to a micro level.

about the origins of injustice and the ways to deal with it, about the ways in which we make sense of living in this 'strange place'⁷² — stem from an adherence to different 'grand narratives' by those, on the one hand, who insist that South Africans should look ahead and those, on the other hand, who insist that we cannot understand the present if we do not look towards the past.⁷³ I contend that in South Africa there are therefore two particularly dominant but fundamentally clashing 'grand narratives' that vie for overall dominance. On the one hand, there is the (deeply problematic but still pervasive) narrative influenced by a long history of colonial domination of Africa, a narrative of 'darkest Africa' and 'venal natives' who 'cannot be trusted', a narrative informed by the deeply ingrained fears which have been instilled at mothers knee with dark whispers of the Mau Mau and Dingaana, a narrative that has been informed by the insecurity experienced by the once dominant colonial minority. This is a narrative that suggests that Africa is a 'dark continent' and that many Africans are corrupt, untrustworthy and lazy. When ANC Youth League leader Julius Malema is reported by *City Press* newspaper to have taken bribes to secure tenders,⁷⁴ this information can easily be slotted into the 'grand narrative' to confirm knowingly or unknowingly what is believed obviously to be true. For some, such a news story may merely affirm what is supposedly known already — even if those who embrace this narrative are now often politically too savvy actually to speak of their beliefs in such a crude manner or are unaware that their response to the news is mediated through deeply held but invisible assumptions about 'black' South Africans. Sophisticated South Africans who, knowingly or unknowingly, are wedded to this 'grand narrative' now often speak about their fears and prejudices of 'black' South Africans and of the ANC-led government in code — by bemoaning 'dropping standards', by complaining about 'rampant crime', or by arguing that race-based redress measures are turning an essentially liberal university into an institution not unlike universities in Nazi Germany.

⁷² I am, of course, here invoking the title of Samantha Vice's article on 'whiteness'. See Vice *op cit* note 29.

⁷³ I am aware that by postulating these two opposing narratives, I run the risk of oversimplifying the lived reality in South Africa and of being seen as caricaturing the way people think about the past and about their position in current day South Africa. However, it is important to note that I am not contending that many South Africans do not have a far more complex and nuanced understanding of South Africa's past and present than these two grand narratives suggest. Neither is the postulation of these two opposing narratives meant to suggest that there are not other ways in which many South Africans from different political persuasions think and talk about the past. Instead, I am contending that in public discourse, versions of these two narratives exert a decisive influence on the collective imagination and, as such, that they need to be dealt with.

⁷⁴ See Adriaan Basson & Piet Rampedi 'Malema's secret fund' *City Press*, 24 July 2011 available at <http://www.citypress.co.za/SouthAfrica/News/Malemas-secret-fund-20110723>, accessed on 30 September 2011.

A second grand narrative, which South Africa's Constitutional Court has embraced,⁷⁵ and which I have often written about and relied upon — at least partially — is the one informed by a specific understanding of our apartheid past. This narrative focuses on the injustices which have resulted from the apartheid past and the dehumanising effects of the system of racial oppression, which denied 'black' South Africans access to opportunities and robbed them of their dignity. According to this 'grand narrative' we can understand most political events in current day South Africa and the responses of many 'white' South Africans and the 'liberal media' with reference to the lingering hold of race on our imagination and the ongoing and prevalent racism which still haunts the country. It is a narrative informed by the stories — at first whispered to avoid persecution by the apartheid state, now loudly proclaimed by even those who had no part in the struggle — of a heroic and noble anti-apartheid struggle led by the ANC against an evil apartheid regime.⁷⁶ This is the narrative that focuses on the past and seeks guidance from the past in order to understand the present and seek answers to questions about the kind of future we wish to create.⁷⁷ It is nurtured by a keen awareness of the past and ongoing injustice in our country. In its more extreme forms this narrative is fed by (very legitimate) grievances about the lingering racial injustice in South Africa and the memory of past and ongoing racial prejudice. It is fed by the impossible to deny fact that racial discrimination and racism did not disappear in 1994 and by evidence that there are pockets of fantastic wealth in the 'white' community as well as evidence of the ease with which most 'white' people seem to inhabit their skins and seem to embrace their assumed privilege and superiority as if it is their due.

Those of us in South Africa ('black' and 'white') who think of ourselves as progressive — who believe in social justice and redress, in individual rights, in both representative and participatory democracy,⁷⁸ in freedom and equality, in trying to live ethical lives no matter how impossible that may seem, given the vast and immoral inequalities around us — are perhaps trying

⁷⁵ See for example *S v Makwanyane* 1995 (3) SA 391 (CC) para 156, per Ackermann J. ('We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be . . . justified rationally.');

Azanian Peoples Organisation (Azapo) & others v President of the Republic of South Africa & others 1996 (4) SA 671 (CC) paras 2–3, per Mahomed DP.

⁷⁶ By making this statement, I am not claiming that the struggle against apartheid was not just and noble, nor that the ruling ANC has played an important part in this struggle. On the contrary, I reject a discourse of moral equivalence between the apartheid regime and the forces who struggled against it and affirm my belief in the justness of the struggle against apartheid. What I am claiming here is that this is not the *only* narrative on which one should rely to make sense of the world we live in now.

⁷⁷ I have written elsewhere about this grand narrative and about the way in which South Africa's Constitutional Court has engaged with it. See *op cit* note 70.

⁷⁸ For a discussion of the South African Constitution's embrace of both representative and participatory democracy see *Doctors for Life International v Speaker of the National Assembly & others* (2006 (6) SA 416 (CC) para 110–17.

to live as postmodern citizens in a modernist world. Yet, I contend that it is important to question the wisdom of embracing any ‘master narratives’ uncritically. I contend that one way to begin to think differently about the paradox at the heart of racial redress is also to explore and write about the many small micro-narratives that contribute to the weaving of the rich tapestry of everyday life in South Africa. This approach, takes its cue in part from a distinct conception of equality as an ethical concept. It conceives equality in terms of plurality and openness to radical difference. Gesturing to the work of Henk Botha⁷⁹ and Karin van Marle,⁸⁰ this view is based on the premise that an engagement with equality needs to affirm the right of individuals to a moral and psychic space in which they are free to imagine and re-imagine their identities. Such an ethical understanding of equality concerns itself with plurality. As Botha wrote, this ethical conception of equality

‘is interested in the possibility of a heterogeneous public sphere in which a plurality of voices can be heard, in which a plurality of needs, interests and viewpoints can be articulated without being assimilated to a single, universalised standpoint. Importantly, this approach resists the essentialism, instrumentalism and reductionism into which equality discourse so easily slips. By emphasising plurality and difference, it furthermore links equality to the values of democracy and freedom’.⁸¹

In the context of race-based corrective measures, a focus on micro-narratives may help to recognise the individuality and uniqueness of each person and the fact that none of us can be reduced *merely* to our racial identities — no matter how pivotal racial identities still are in South African society. By focusing on micro-narratives, so I contend, it might become possible for South Africans to begin to embrace the variety of stories about themselves and the lives of others in a manner that would not deny the potency of race and racial identity in our lives, but would add complexity and nuance to such identities.

This is what Jacob Dlamini did in his book *Native Nostalgia*: the telling of such stories may help to humanise the lives of all South Africans and may focus on particularised experiences without airbrushing away the past and

⁷⁹ Botha op cit note 18.

⁸⁰ Karin van Marle ‘Equality: An ethical perspective’ (2000) 63 *THRHR* 595; Karin van Marle ‘No last word’ — Reflections on the imaginary domain, dignity and intrinsic worth’ (2002) 13 *Stell LR* 299; Karin van Marle ‘“The capabilities approach”, “the imaginary domain”, and “asymmetrical reciprocity”: Feminist perspectives on equality and justice’ (2003) 11 *Feminist Legal Studies* 255.

⁸¹ Botha op cit note 18 at 5. Botha notes that this notion of equality is, conceptually, not without its problems and proposes an adoption of a more nuanced and complex understanding of equality. This article represents a small attempt to engage, in one distinct way, with this issue and to ‘complexify’ our understanding of equality as it relates to the use of race-based corrective measures.

without denying the lingering effects of ongoing racial injustice around us.⁸² It is my contention that every individual in South Africa has his or her own unique story to tell and that we can all learn something from listening to and hearing — really hearing — the stories told by others about their lives. Individuals must be judged as individuals and not (merely) as a symbol or as a representative of a racial or language group; yet we know all too well that we are all also still to some extent prisoners of our racialised past which we cannot escape — no matter how much we insist that apartheid is past us and that there should be no place in our society for race based thinking. But because individuals have moral agency independent of their race or their other identity commitments, everyone's identity can be viewed as complex, intersecting and formed at least partly in relation to others. For those who believe that they fall into this category I wish to pose the following question: Does a respect for the human dignity of all and the possibility of moral agency (and the responsibility this entails) for every South African not require that we begin to question, expose and resist these 'master narratives' whose proponents are leading us down a path of absolutes which reject complexity and nuance in favour of easy but wrong answers?

In Jacob Dlamini's book he tells many stories about growing up during the apartheid years in Katlehong, a township located 35 km east of Johannesburg and south of Germiston, not far from Alberton, where I had the dubious honour of completing my primary school education. Of course, when I was a primary school child during the height of apartheid, it would have been unthinkable for me to spend time in Katlehong and to get to know Dlamini, his mother or his friends. It would also have been legally impossible for Dlamini to attend the same relatively good school as I did and unthinkable that he would spend time with me in my family home in Alberton as a friend to get to know me, my mother or my friends. One of the stories Dlamini tells about his childhood in Katlehong is about how the people living in his street listened to the radio broadcast of the world heavyweight boxing title fight in which Gerrie Coetzee (who hailed from nearby Boksburg and was hence known as the Boksburg Bomber) took on a black American, and how they all cheered on the homeboy, who, after all, grew up not too far from Katlehong.

⁸² I read Dlamini's project as a profound attack on apartheid-race thinking. Because the ideological logic of apartheid depended on thinking about all 'blacks' as essentially different from all 'whites', and 'coloureds' and as all 'blacks' sharing essential features that united them into one race, Dlamini's project of telling the stories of individual human beings who also happened to have grown up as 'black' in apartheid South Africa can be viewed as an attempt to write a kind of history in opposition to apartheid ideology. See Posel op cit note 8 at 65. This view is in opposition to that held by someone like Eric Miyeni, who attacked Dlamini's book (despite not having read it) in the following terms: 'Dlamini wrote *Native Nostalgia*, a book the premise of which, that growing up in apartheid-designed townships was fun, I find so sickening I decided never to read it'. See Eric Miyeni 'Defining blacks by past misery is unfair' *Sowetan*, 27 June 2011 available at <http://www.sowetanlive.co.za/columnists/2011/06/27/defining-blacks-by-past-misery-is-unfair>, accessed on 4 September 2011.

I too listened to that fight broadcast over the radio, albeit to the Afrikaans and ridiculously biased commentary of Gerhard Viviers — all from the relative privilege of our whites-only suburb of Brackenhurst in Alberton. And I too cheered on the Boksburg Bomber, albeit with my shouting father who was already slurring his words after one brandy too many. We were worlds apart: one slightly bewildered ‘white’ boy, living in the privileged comfort afforded to ‘white’ middle class South Africans by the system of apartheid, one ‘black’ boy subjected to the humiliation wrought by the system from which I was to benefit so handsomely. Yet, to tell the full and nuanced story of our respective childhoods it would be a mistake not to acknowledge our shared experience to remind us that — apart from belonging to the apartheid era race categories imposed on us — our life experiences intersected and overlapped in sometimes surprising and other times shocking ways and that our lives were influenced by many factors apart from our respective races. As Achille Mbembe has stated: “There is an “entanglement” of colours in South Africa. . . . There is no black history in South Africa that doesn’t involve whiteness. The history is an entanglement of colour lines.”⁸³ Of course that entanglement happened on terms set by ‘white’ South Africans and, to some degree, still does. Recognising this entanglement and recognising, further, that this entanglement has occurred against the backdrop of ‘white’ economic and social dominance, might assist us to take race (and the devastating effects of past and ongoing racism) seriously while safeguarding against the perpetuation of a society in which race is seen as the only relevant factor in determining who one is and where one fits in; a society in which race is essentialised. This engagement with our history would be incomplete if it did not note that in terms of the Population Registration Act⁸⁴ the state ensured that we had very different life experiences, that we were deemed to be different in every way. As a middle class white boy I was accorded a certain status which allowed me (unthinkingly, I must add) to enjoy the privileges that were associated with being a member of the economic, social and political dominant racial minority. Later, of course, I discovered that one might also belong to other identity categories, that my sexual orientation and the fact that I am HIV positive could change my standing in society somewhat, from being an absolute insider to a person faced with the challenges associated with these other aspects of my identity, aspects which many in our society still insist belongs on the margins. I also discovered that other aspects of my identity — my whiteness, my economic and social privilege, my academic status — could mitigate against the deeply dehumanising effects of the prejudices associated with those aspects of my identity (my sexual orientation, my HIV status) that would invite marginalisation or even rejection. The point I wish to make is that when we reflect on race-based redress measures at institutions like UCT (an institution created by ‘whites’

⁸³ See Fiona Forde *An Inconvenient Youth: Julius Malema and the ‘New’ ANC* (2011) 231.

⁸⁴ Act 30 of 1950.

for ‘whites’) and when the Constitutional Court engages with the question whether a specific race-based redress measure is constitutionally compliant, we must not lose sight of the full complexity of our past and the history of each individual who still carries this past with them — no matter how some of us might protest that the past is behind us and that we have suddenly become race-blind and stripped of the social and economic privileges our white skins might still be affording us.

I propose that the starting point for such a nuanced approach should be to recognise that the various identity categories — including race, including sexual orientation, including gender, including HIV status — are the product of a specific history and that they cannot be used accurately to predict how individuals who are said to slot into these categories will behave, what their attitudes will be, and who they are as individuals. Furthermore, when we use these categories for purposes of redress, we should do so in a contingent manner. In other words, we should never use such categories as if they are ‘real’, in the sense of really saying something profound or true about any human being, all while acknowledging that the categories feel real to most people and that being assumed to be a member of one of the race categories will often have very real consequences. (That is why I place inverted commas around the terms when I use them: I wish to signal that I believe these terms — while very real for all of us — are no more than crude and obnoxious descriptors which can never capture the full essence of each individual person supposedly described by them.)

Secondly, a more nuanced deployment of such categories in legislation, policies and regulations is required. Apart from the category of race (which for the moment we have no choice but to rely on to help address the effects of past and ongoing racism and discrimination) we may want to add other considerations — along with the race of an individual — when we decide whether an individual should be the beneficiary of a specific programme of corrective measures. The social and economic status of the individual and his or her parents; whether an individual is part of a first, second or third generation who has obtained secondary or tertiary education and the nature of that tertiary education (if any) received by his or her parents or grandparents; whether an individual grew up in a rural area or in the city; whether the individual is monolingual or speaks several South African languages; whether an individual attended a mud school in the Eastern Cape or a posh private school in Rondebosch; whether the individual is required to study in his or her home language or in a second or third language — these factors, along with many others, could all be considered as relevant (along with the race of an individual) when decisions about redress measures are made.

There might also be other ways to deal with issues of redress. I do not know whether other approaches to this problem would be as effective as the one currently employed by institutions such as UCT. What I do know is that we need to continue having a conversation about what will work best and that when we do so we ignore a critical but serious engagement with the past

at our peril. When I talk about a conversation I do not mean a shouting match in which individuals retreat into the laager of their own apartheid era racial identities and shout abuse at others who they perceive to belong to a different apartheid race category, clinging to rigid and simplistic master narratives which the ghost of our apartheid past have fixed so firmly in many of our imaginations (even if many deny this). In having this conversation it would be helpful if we could agree that it is important to take race and the need for racially-based redress seriously while also acknowledging that in doing so there is a danger that the use of apartheid era race categories will imprison us all in an apartheid of the mind. What is needed is ‘out of the box’ thinking. This we can only do if we have a real and open discussion about what race did to all of us in the past (and continues to do to us today) and how we can address the effects of race in the future; if we do not take part in the discussion as perpetual victims (of racism or of so called reverse-racism), but as equal, respectful human beings with agency and a unique take on life who believe and act like people who have the pride in themselves and the power to chart a new destiny that is fair and just for all — not just for those who belong to the same racial group to which we happen to believe that we belong.

IV 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, which was highlighted in the introduction of this article, the question must be asked whether the Constitutional Court is sufficiently attuned to the dangers of an uncritical engagement with legally mandated and endorsed race-based remedial programmes. If it is indeed correct that there is a danger that the deployment of racial categories in laws, policies and regulations can have the effect of perpetuating and legitimising racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories), is the Constitutional Court not endorsing a legalised perpetuation of a particular racial hierarchy? In recognising and dealing with racial categories, is the Constitutional 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 racial categories, and in doing so is the court not endorsing a particular harmful racial hegemony?

I contend 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, and 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. Neither is it clear that the court is alive to the complex and contingent nature of history itself, better to infuse its jurisprudence with nuance and complexity.

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 remedial programme would meet the constitutional requirement that the programme must be aimed at addressing past discrimination. This leaves the door open for the fashioning of 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. Secondly, 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 Constitutional Court has not said so explicitly, the jurisprudence leaves the door open for future contestation regarding race-based remedial measures if it becomes apparent that the deployment of racial categories in the law had the effect of perpetuating and legitimising racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories) by recognising these categories and by dealing with them as if they are a given — normal, essentialist, unchanging and unchangeable — and by failing to challenge the hierarchical assumptions underlying the deployment of these categories.