THE CONSTITUTIONAL FRAMEWORK FOR BROAD-BASED BLACK ECONOMIC EMPOWERMENT

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Declaration

I, the undersigned, declare that the thesis hereby handed in for the degree of Doctor of Laws at the University of the Free State, is my own independent work and that I have not previously submitted the same work for a qualification at/in another University/faculty.

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Signed at Bloemfontein on the 8th day of November 2010.

Adri Janse van Rensburg

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Abbreviations and Acronyms

ABE	–	Adult Basic Education
AIDS	–	Acquired immunodeficiency syndrome
ANC	–	African National Congress
AsgiSA	–	Accelerated Shared Growth Initiative for South Africa
B-BBEE Act	–	Broad-Based Black Economic Empowerment Act 53/2003
BEE	–	Black Economic Empowerment
BEECom	–	Black Economic Empowerment Commission
BMF	–	Black Management Forum
CEDAW	–	Convention on the Elimination of All Forms of Discrimination Against Women
CEO	–	Chief Executive Officer
COSATU	–	Congress of South African Trade Unions
CPF	–	Closed Pension Fund
DBSA	–	Development Bank of Southern Africa
DPE	–	Department of Public Enterprises
DTI	–	Department of Trade and Industry

EME	–	Exempted Micro-Enterprise
GDP	–	Gross Domestic Product
HIV	–	Human immunodeficiency virus
ICESCR	–	International Covenant on Economic, Social and Cultural Rights
ICRD	–	International Convention on the Elimination of All Forms of Racial Discrimination
IDC	–	Industrial Development Corporation
ILO	–	International Labour Organisation
IMF	–	International Monetary Fund
JSE	–	Johannesburg Stock Exchange
MFMA	–	Local Government: Municipal Finance Management Act 56/2003
MTCT	–	Mother-to-child transmission
Nedlac	–	National Economic Development and Labour Council
NEF	–	National Empowerment Fund
Numsa	–	National Union of Metal Workers of South Africa
PFMA	–	Public Finance Management Act 1/1999
POBF	–	Political Office-Bearers Fund
PPP	–	Public-Private Partnership
PPP BEE Balanced	–	Public-Private Partnership Black Economic

Scorecard		Empowerment Balanced Scorecard
PPPFA	–	Preferential Procurement Policy Framework Act 5/2000
QSE	–	Qualifying Small Enterprise
RDP	–	Reconstruction and Development Programme
RPL	–	Recognition of Prior Learning
SACP	–	South African Communist Party
SAIRR	–	South African Institute of Race Relations
SARS	–	South African Revenue Service
Scopa	–	Standing committee on public accounts
SDL	–	Skills Development Levy
SETAs	–	Sector Education and Training Authorities
SMMEs	–	Small, medium and micro-enterprises
SPV	–	Special Purpose Vehicle
UDHR	–	Universal Declaration of Human Rights
UNCESCR	–	United Nations Committee on Economic, Social and Cultural Rights
UNDP	–	United Nations Development Programme

Chapter 1

Introduction

1.1 Contextual background

South Africa is a relatively new democracy with a Constitution that emerged as the result of a process of negotiations between opposing groups, who, however, shared a common objective of establishing a constitutional democracy within which human rights and the rule of law should be central. The South African Constitution[1] is partly an acknowledgement of the appalling legacy of apartheid. The negative impact of the apartheid regime's policies on the social, political and economic conditions of the majority of the population persists well into the present circumstances, and remains visible in society. The Constitution also contains a vision of the type of society it envisages for South Africa. However, the inclusion of values, principles and rights on which this new society is based does not, by virtue of its design, erase all the consequences of the previous discriminatory policies. Simply removing discriminatory legislation and practices cannot alleviate the injustice and poverty that resulted from the long history of oppressive legislation and government policies.

Implicit in this constitutional vision are remedial and restitutionary measures for the achievement of the constitutional goal of a free, prosperous and egalitarian South African society. Illustrative of this fundamental commitment, several constitutional provisions, directly or indirectly, sanction remedial measures to address remaining injustices. Different types of remedial measures are envisaged, namely affirmative action programmes,[2] a government policy of preferential procurement,[3] and Black Economic

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1 Constitution of the Republic of South Africa 108/1996.

2 As governed by the Employment Equity Act 55/1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 52/2002.

3 Preferential Procurement Policy Framework Act (PPPFA) 5/2000.

Empowerment.[4] The constitutional imperative for policy tools to transform the South African economy in particular, by means of black economic empowerment is therefore clear. The underlying premise is that a society in which gender-, race- or ethnicity-based economic inequality exists will detract from social and political stability. This makes economic stability and a more equal distribution of wealth and income a constituent of social and political stability. The means employed to achieve this type of empowerment are still somewhat controversial and criticism against the programme has not yet abated.[5]

1.2 Relevance of the study

The motivation for this study is to investigate the apparent failure of the new South Africa to adequately and effectively address inherited social and economic injustice, and the ways in which these injustices are seemingly not adequately addressed by the programmes adopted to attend to these very concerns. Sixteen years after the advent of democracy in South Africa, it is necessary to place the Broad-Based Black Economic Empowerment (B-BBEE) programme, in both its theoretical and practical context, in the broader democratic ethos and real experience of South Africa.[6] The B-BBEE programme, which is conceptualised through the operation of the Broad-Based Black Economic Empowerment Act (B-BBEE Act) and the Codes of Good Practice[7] issued in terms thereof, was envisaged as the central policy instrument with which to advance the constitutional objectives of social and economic justice.

The enactment of specific legislation dealing with the subject resulted from the recognition of the need for regulatory intervention to give momentum to the process of reform. Until the time of the enactment of the B-BBEE Act, reform had been incremental and limited to a few large equity transactions, with little initiative and drive

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4 As governed by the Broad-Based Black Economic Empowerment Act (B-BBEE Act) 53/2003 and Codes of Good Practice and regulations issued in terms thereof.

5 Cheadle, Thompson & Haysom 2005 *et seq*:1-3.

6 Ramaphosa 2007:v.

7 Broad-Based Black Economic Empowerment Codes of Good Practice. Government Gazette No. 29617, 9 February 2007 (hereafter "Codes of Good Practice").

from the private sector. The B-BBEE strategy was also an acknowledgement of the market's inability to correct inequalities without a certain level of state intervention to allow for wealth redistribution. It became necessary to formalise a process which could accommodate real transformation in the economic sphere with sufficient emphasis on achieving adequately broad-based results.

The B-BBEE Act and its Codes of Good Practice provide the foundation for the drafting and implementing of the B-BBEE programme. A generic scorecard is utilised to measure a corporate entity's progress on the implementation of black economic empowerment by awarding a value to each of the different elements of black economic empowerment (or BEE). The Codes of Good Practice are organised into a series of statements on various issues regarding the measurement of the different elements.[8]

The elements of B-BBEE[9] measured in the generic scorecard are ownership,[10] management control,[11] employment equity,[12] skills development,[13] preferential procurement,[14] enterprise development,[15] and lastly, the socio-economic development and sector-specific contributions element.[16] Detail of the specific mechanisms for the measurement and calculation of the elements of the scorecard are provided in Code Series 100 to 700. Once a measured entity has determined its score by using the generic scorecard, the B-BBEE Status of the organisation is determined. This translates into its B-BBEE recognition level based on the total points scored on the scorecard. The highest status an entity can attain is as that of a Level One Contributor, which implies a score of a

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8 Further statements on the subject of the elements will from time to time be gazetted by the Minister of Trade and Industry under each of the headings.

9 These elements are set out in Paragraph 7 of the Codes of Good Practice.

10 Codes of Good Practice: Code Series 000, Statement 000, para 7.1. This element carries a weight of 20 points. See Statement 000, para 8.1.

11 Ibid, para 7.2. Ten points of the total score is awarded for this element. See Statement 000, para 8.1.

12 Ibid, para 7.3. This contributes 15 points to the scorecard. See Statement 000, para 8.1.

13 Ibid, para 7.4. It weighs 15 points. See Statement 000, para 8.1.

14 Ibid, para 7.5. It carries a weight of 20 points of the scorecard. See Statement 000, para 8.1.

15 Ibid, para 7.6. This element weighs 15 points. See Statement 000, para 8.1.

16 Ibid, para 7.7. This last element contributes the last 5 points to the scorecard which then totals 100 points. See Statement 000, para 8.1.

hundred or more points[17] on the generic scorecard and has a 135 percent B-BBEE recognition level. Scoring 30 points or less results in an organisation being classified as a Non-Compliant Contributor with a 0 percent B-BBEE recognition level.[18]

In terms of section 10 of the B-BBEE Act the contribution level of an organisation has to reasonably be taken into account by every organ of state and public entity when determining qualification criteria for the issuing of licences, concessions, etc.,[19] developing and implementing of preferential procurement policies,[20] determining qualification criteria for the sale of state-owned enterprises,[21] and entering into public-private partnerships.[22] B-BBEE is a self-regulatory and voluntary process, compliance with which is implicitly encouraged by the design of the generic scorecard. However, the operation of section 10 of the B-BBEE Act and the scorecard create a cascade effect with the result that almost every corporate entity would have to comply with the programme. B-BBEE compliance has thus become an operational necessity to ensure the survival of business enterprises. It is necessary to consider this detailed and complicated programme in its broader constitutional framework.

1.3 Objective of the study

Little has been said about the broader legal-theoretical basis of the initiative beyond stressing the remedial value and purpose thereof. The importance of black economic empowerment for South Africa as a constitutional state founded on the values of dignity, the achievement of equality and the advancement of human rights and freedoms[23] is

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17 It is possible to score in excess of 100 points due to bonus points which can be earned under certain elements on the scorecard.

18 Codes of Good Practice: Code Series 000, Statement 000, para 8.2.

19 B-BBEE Act: section 10(a).

20 Ibid, section 10(b).

21 Ibid, section 10(c).

22 Ibid, section 10(d).

23 Constitution of the Republic of South Africa: section 1.

unquestionable. It is however necessary to situate B-BBEE in the broader constitutional structure.

Within the framework of the Constitution, several provisions empower the state to adopt remedial measures to correct systemic injustice. The most apparent of these is the right to equality in section 9. It provides that everyone is equal before the law and has the right to equal protection and benefit of the law and entrenches the right not to be discriminated against, either directly or indirectly, on a number of specifically enumerated and analogous grounds. Section 9(2) makes specific provision for remedial measures, not as an exception to the equality guarantee, but rather an extension thereof — a restitutionary equality conception.[24] In the Preamble to the B-BBEE Act it is stated that one of the objectives with the Act is to "promote the achievement of the constitutional right to equality". The right to equality will therefore occupy a central place in any constitutional discussion on the B-BBEE programme. However, in order to place B-BBEE in its constitutional context it is essential to consider the totality of constitutional provisions which touch on the programme.

1.4 Scope of the study

This study focuses on analysing B-BBEE and its constitutive elements in the broader perspective of the South African Constitution. As explained above, B-BBEE is one of the initiatives undertaken in terms of section 9(2) of the Constitution. This study will not consider affirmative action or remedial measures in general, but will specifically focus on evaluating the B-BBEE programme as one specific type of such measures. The position on the constitutional validity of affirmative action measures, and therefore also the B-BBEE programme, is currently governed by the Constitutional Court's decision in *Minister of Finance v Van Heerden*,[25] where the Court formulated three elements for a valid section 9(2) measure. It will thus be necessary to analyse the Court's approach in

[24] Currie & De Waal 2005:233.

[25] *Minister of Finance and Another v Van Heerden* 2004 6 SA 121 (CC); 2004 11 BCLR 1125 (CC).

the *Van Heerden* case in order to make a determination of the constitutionality of black economic empowerment measures.

B-BBEE is, however, not only mandated by the equality clause, but by various other constitutional provisions. Any evaluation of constitutionality of B-BBEE cannot therefore be performed by simply applying the Constitutional Court's affirmative action criteria as formulated in the *Van Heerden* case. The role played by other empowering provisions will therefore also be considered in this study. Other constitutional provisions which will need to be considered are the provisions dealing with the right to socio-economic rights,[26] the provisions dealing with public administration[27] and public procurement,[28] constitutional values and principles espoused in the Preamble and founding provisions[29] of the Constitution, and the overall role of a constitutional developmental imperative.

As is the case with any remedial measure, the B-BBEE programme will impinge on the rights of certain stakeholders. To determine the validity of the limitation of rights realised by the B-BBEE programme, it will further be necessary to evaluate constitutional provisions which provide the conditions for constitutionally valid limitations of rights. These include the general limitation clause,[30] as well as internal limitations found in particular rights provisions.

In order to draw conclusions about the constitutionality of a remedial measure it is also necessary to investigate the operation of the programme and the results it achieves, and contextualise this information with reference to the objectives of the programme. The programme should be evaluated against the framework provided by the relevant constitutional provisions.

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26 Constitution of the Republic of South Africa: sections 26 (housing); 27 (health care, food, water and social security); 28 (children); 29 (education).

27 Ibid, section 195.

28 Ibid, section 217.

29 The founding provisions are contained in Chapter 1 of the Constitution, but specifically section 1 is of importance for this study.

30 Constitution of the Republic of South Africa: section 36.

1.5 Research methodology

The research methodology followed involved a study of theoretical and other literature as well as primary legal sources which included legislative material, case law, academic literature, media releases and reports, international human rights instruments, reports by independent international research and policy institutions, governmental documents and reports.

This study will entail a broad analysis of the meaning and operation of each of the elements of the Codes of Good Practice and the statements issued under each of the elements. This is necessary to establish the practical working of black economic empowerment without which no evaluation of the impact thereof on individual entities is possible. Certain economic concepts are touched on, especially as part of the evaluation of B-BBEE in practice. These concepts are dealt with only insofar as they were deemed helpful to make a meaningful constitutional evaluation of the impact of B-BBEE.

The study is not primarily comparative. However, in certain cases it was deemed necessary to draw on the jurisprudence of the United States of America, Canada, Germany and India, in order to elucidate certain aspects of the study.

The footnoting and referencing style of the Journal of Juridical Science was followed throughout this work. Only minor amendments to this style were made in instances where it was considered necessary to facilitate ease of reading.

1.6 Outline and overview of the study

In Chapter 1 a contextual background to the study is provided. A broad outline of the reasons for and necessity of remedial economic programmes is presented. The operation of the B-BBEE programme is also briefly explained. The constitutional framework within which remedial measures, and specifically the B-BBEE programme,

are set to operate is outlined. It is also explained why it is relevant to evaluate B-BBEE and the results the programme has subsequently achieved within this broader constitutional framework. Chapter 1 also explains the research methodology followed in this study.

Chapter 2 deals with the historical context of the study. The historical necessity for the implementation of measures to address social and economic inequalities and injustice stem from the history of apartheid, from which South Africa emerged in 1994. It is also critical to provide a factual background of the type of policies which created the inequalities which the B-BBEE programme intends to address.

In Chapter 3 a brief outline of the government's empowerment policies, which eventually culminated in the adoption of the B-BBEE programme, is given. The legislative context within which empowerment policies operate in South Africa is provided, as well as an overview of the policy instruments which the government utilises to realise the objective of economic empowerment of the previously marginalised majority of South Africans. In Chapter 3 the Codes of Good Practice which set out the operation of the scorecard are also briefly analysed so as to gain an understanding of how the programme is designed.

In Chapter 4 all relevant constitutional provisions are analysed. As mentioned above, various constitutional provisions either directly or indirectly mandate the use of remedial measures, which include the B-BBEE programme, for the purpose of remedying existing inequalities. The constitutional provisions which are considered to specifically address the implementation of the economic empowerment programme are discussed. Central to these provisions is the right to equality and substantial consideration is afforded to this provision. The other empowering provisions comprise provisions dealing with socio-economic rights, the provisions governing the public administration and public sector procurement, foundational constitutional values and principles, including social justice, the value of transformative constitutionalism, and the recognition of constitutional developmental objectives and imperatives. Chapter 4 also deals with constitutional provisions which outline the requirements for constitutionally valid

infringement of constitutional rights, due to the fact that B-BBEE will by implication impact negatively on the rights of certain parties.

Chapter 5 will provide an analysis of the way in which the B-BBEE programme has operated in practice to date. The operation of the scorecard elements are evaluated and considered in light of the progress made in achieving the objectives of the programme. Certain problematic issues are also identified in respect of the practical operation of the programme. These relate to the lack of an adequate method with which to monitor the implementation of the programme, the integration of B-BBEE with the macro-economic policy environment, the concerns regarding the ethics of B-BBEE and the way in which the preferential procurement policy operates, management of the overall B-BBEE process, as well as a consideration of the way in which B-BBEE has failed to achieve the empowerment of the least privileged in society.

Chapter 6 uses the factual evaluation done in Chapter 5 to make a constitutional assessment of the programme. It is attempted to establish whether or not, in light of the factual evaluation, B-BBEE can be accepted as a constitutionally valid affirmative action measure. Furthermore, certain recommendations are offered regarding ways in which the constitutional shortcomings of B-BBEE can be remedied.

Chapter 2

Historical context

2.1 Introduction

Understanding the meaning of a society based on the values set out in the Preamble, founding provisions and the Bill of Rights of the Constitution[1] requires a certain degree of reflection on the historical context within which the Constitution had its origin and the ills that continue to haunt the South African society. The society in which the system of broad-based black economic empowerment is set to operate has a particular historical frame of reference which should be understood before forming a clear perception of the programme.

Under the rule of the National Party (which came to power in 1948) a system of racial segregation and discrimination was entrenched which denied black people equal rights to integrated housing, freedom of movement, association or assembly, freedom of political affiliation or equal political representation, education and health care, and no right to vote. This system is said to have been a continuation of British policy of slavery and colonialism[2] — ultimately racial rule — which gained strength and momentum under the apartheid government.[3] Ackermann refers to apartheid as a system in which the state determined for the individual "[w]ho you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationships".[4]

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1 Constitution of the Republic of South Africa.

2 The effect of colonialism on the subsistence-based pre-colonial economy of the Eastern Cape and the subsequent mercantile domination by colonial intruders is discussed in Peires 2007:38-41; Gqubule 2006c:84-85. This also led to the establishment of a new class of Xhosa entrepreneurs (see Peires 2007:41-43).

3 O'Regan 1999:14.

4 Ackermann 2000:540. See also Albertyn & Goldblatt 2007 *et seq*:35–3.

Although a clear and decisive definition of apartheid is no easy feat, it can be said that apartheid policies, legislation,[5] measures and practices succeeded in legally removing freedom of association and choice from society and forced society to be divided along the lines of membership of population groups.[6] It generally enforced broad inequality and preserved white privilege. Racial segregation was enforced through criminal prosecution.[7] It was a sustained and all-encompassing effort to deny the majority of the population the right to self-determination and self-identification.[8] The constitutional dispensation brought about by the 1994 elections created a nation based on principles of equality and held the promise of the elimination of racial, gender and other inequalities which became entrenched in society under the system of apartheid. Stated differently, it could be said that the 1994 elections freed *all* South Africans from apartheid.[9]

2.2 The apartheid economy

Apartheid policies did not only lead to the disenfranchisement of black, coloured and Indian South Africans,[10] but also excluded these groups from meaningful participation in the economy. A process of legislative social engineering created a white monopoly of economic resources. From 1910 onwards, colonial and apartheid legislation and policies limited black ownership of land and business. The chronic state of under-development amongst black South Africans was the product of the progressive destruction of productive assets, denial of access to skills and jobs, and the undermining

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5 Legislative apartheid measures were included in acts of parliament, proclamations of the State President, ministerial regulations, provincial ordinances and municipal by-laws.

6 Burdzik & Van Wyk 1987:119.

7 O'Regan 1999:14.

8 Ackermann 2000:540.

9 Higginbotham 1995:377.

10 The Republic of South Africa Constitution Act 32/1961, read with the Electoral Laws Consolidation Act 46/1946 reserved political participation for "whites" as classified in terms of the Population Registration Act 30/1950: Burdzik & Van Wyk 1987:122; Hoffman 2008:89.

of self-employment and entrepreneurship.[11] After years of apartheid the income disparities between whites and blacks in South Africa were wide and economic resources were held by a small group to the exclusion of approximately 90 percent of the population.

South Africa, in short, was one of the most unequal societies in the world.[12] There were two separate paths of economic growth and development in South Africa, with the groups divided along racial lines. Comparing the average per capita income of whites with Africans, whites earned 9.5 times more than Africans. For example, in 1989 1.6 percent of whites lived below the poverty line, compared to 52.7 percent of Africans facing a similar fate.[13] In 1993, the richest 10 percent of the South African population shared 45 percent of the total population income, with the poorest 10 percent earning a mere 1.1 percent of the total population income.[14] Even though poverty is essentially a racial phenomenon in South Africa, it is most prominent in rural areas and especially acute in households where females stand at the head.[15] This has been called the "feminisation of poverty".[16]

Apartheid laws controlled not only the economic activities of black people, but also their residential location. Black persons engaged in jobs or other economic activities of which the government did not approve could be deported from their homes in urban areas

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11 See Black Economic Empowerment Commission (BEECom) 2001: paras 2.1 – 2.2.; Jack 2007:5-7; Scholtz 2007 *et seq*: para 1.1.

12 See also Gqubule (2006b:39) where it is stated that in 1994 white Gross Domestic Product per capita was comparable with countries like Canada, whilst black income compared with third world countries like the Congo. According to Gelb (1991:2) the position of whites in South Africa was similar to the position of the working classes in advanced industrialised countries, whereas non-whites remained impoverished. See also O'Regan 1999:14; Naff & Dupper 2009:160. According to the International Labour Organisation, South African was the most unequal country of all countries on which it held data in the early 1990's.

13 Hirsch 2005:2.

14 World Bank 2000:239. O'Regan (1999:14-15) reports the following statistics for 1995: The wealthiest 10 percent of households earn 50 percent of the total income and the poorest 60 percent of households earn less than 20 percent of the total income.

15 Aliber 2002: Table 3 and 4. According to the data used in this survey (based on the 1999 October Household Survey) unemployment was more severe among women than men, and more severe in rural areas than urban areas.

16 O'Regan 1999:15; Bentley 2004:247; Kehler 2001:3. Albertyn & Goldblatt (2007 *et seq*:35–3 – 35–4) also note the particularly difficult position women faced in the apartheid regime.

to rural areas.[17] Racist political intervention in economic affairs prevented a viable black capitalist class from being established. The system of pass laws or influx control and emigration control specifically were used to exploit black labour for the benefit of mining and farming in South Africa.[18] Cheap labour broadly benefited the mining, agriculture and manufacturing sectors of the economy.[19] Savage[20] described the system of pass laws as being used "… to balance two apparently contradictory white needs — an 'exclusionary' need to obtain political security by controlling and policing the number of Africans in 'white' areas, and an 'inclusionary' need to ensure a supply of cheap labour within these areas."

Influx control had a severe and wide-ranging impact on South African society in areas such as housing, labour, and land tenure.[21] A clear manifestation of the warped effect which segregation, apartheid, influx control and pass laws had on South Africa as a nation is evident from the unnatural distribution of unemployment. According to the World Bank, in 1998 "[i]n most developing countries, unemployment is lower in rural areas, as subsistence agriculture tends to soak up excess labor supply, but this is not true in South Africa. Among Africans in particular, the probability of unemployment is much bigger in rural than in urban and metropolitan areas."[22] This distortion in the distribution of unemployment also bolsters the theory of the dual economies created by the pass law system: parasitically drawing cheap labour from rural communities for the benefit of the mining industry whilst slowly (legislatively) causing subsistence-based rural economies to decline and therefore keeping the steady supply of cheap labour for the mining sector flowing. Commercial agriculture, manufacturing and infrastructure development

17 Hirsch 2005:10.

18 Lipton 1986:25; O'Regan 1999:14.

19 Legassick 1974:10; Schneider 2003:24.

20 Savage (1984:2) quoted by Burdzik & Van Wyk 1987:144.

21 Burdzik & Van Wyk 1987:143; O'Regan 1999:14; Butler 2006:80.

22 Fallon & Lucas 1998:ii.

prospered as the mining industry's demand for products continued to grow.[23] This caused the continual economic disempowerment of black farmers.[24]

Some of the first examples of *self-driven* BEE are found in the Eastern Cape market economy which emerged after the colonial onslaught wherein entrepreneurial peasants emerged from the indigenous people who competed successfully with white farmers in the area. Another example was the early 1870's development of diamond mining in Kimberley where black entrepreneurs benefited from the global market for diamonds by staking claims alongside white miners.[25] However, these are also the first examples of the intersection of political domination and economic disempowerment. When black people freely competed with their white entrepreneurial counterparts in farming and mining, their relative success was quickly eliminated after colonial powers heeded the calls from white entrepreneurs to forcibly suppress the economic advancement of their black counterparts. It has been argued that if colonial political domination had not forcibly ended the self-driven black entrepreneurial activities, South Africa could have developed an important black class of contributors to economic development at a much earlier stage.[26]

Factually some of the effects of apartheid can be stated as follows: Black rural dwellers had very limited access to transport services, communication, water and electricity. Hirsch[27] notes that as recently as the 1990's, 74 percent of blacks living in rural areas had to fetch water daily with little access to electricity. Whilst 85 percent of the population's white households had access to telephones, the same could only be said for 14 percent of the black population. Through the operation of the Group Areas Act,[28] black people lived at vast distances from their places of employment in industrial and commercial centres. Due to the fact that roads and rail infrastructure were developed to

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23 Innes 2007:52.

24 For example, between 1936 and 1946 the number of black farmers on the so-called black reserves declined from 2.4 million to approximately 800 000 (Innes 2007:53).

25 Peires 2007:44-45.

26 Innes 2007:51.

27 Hirsch 2005:16.

28 Group Areas Act 36/1966.

the benefit of white producers and commuters, blacks had to spend on average 40 percent more of their income on transport in comparison with whites, coloureds and Indians.[29]

Apartheid had a very specific relationship with the economic trends of the time. On the one hand apartheid was an ideology which was essentially used to disguise realities of political domination and inequality. On the other hand, it had a very real impact on another reality, i.e., economic power and its relationship with general economic activities, production, labour, etc.[30] This goes hand in hand with the reality that black people were categorically denied the right of ownership of immovable property in white areas which constituted 87 percent of the country. Black people could own property communally under the management of traditional leaders in black areas of the country which consisted the remaining 13 percent of the country's territory.[31] Statistics show that at the end of 1987, approximately only 47 000 Africans owned property under leasehold.[32]

Economic participation was also restricted due to the fact that black people were not allowed to own shares in public companies, and were restricted in the number, type and location of businesses they were allowed to own.[33] This is proven by information on

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29 Although coloured and Indian sections of the population were also hit by the Group Areas Act, it seems that these groups were less affected by the "population resettlement". The historical legacy of apartheid was also referenced in *City Council of Pretoria v Walker* 1998 2 SA 363 (CC), 1998 3 BCLR 257 (CC): para 46: "The postscript to the interim Constitution refers to our 'past of a deeply divided society'. Differentiation made on the basis of race was a central feature of those divisions and this was a source of grave assaults on the dignity of black people in particular. It was, however, not human dignity alone that suffered. White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas."

30 Legassick 1974:6; Hoffman 2008:90.

31 *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 3 SA 589 (CC); 2005 4 BCLR 347 (CC): para 38. Gqubule (2006c:98) provides the following statistics: "In the early 1990s, 67 000 white farmers owned 86% of the agricultural land, equivalent to 16.2 hectares per rural resident, while 13.1 million Africans lived in the remaining rural areas with less than one hectare per person."

32 Gqubule 2006c:98.

33 Hirch 2005:16; Gqubule 2006c:92. In terms of the Black Laws Amendment Act 42/1964 the power to licence African enterprises and business were vested in the Minister of Bantu Administration and Development. This had dire consequences for black business people. Africans were not allowed to trade in areas outside the townships and no new trading licenses were issued, with existing license holders limited to the trading of groceries and provisions. No partnerships or companies were allowed and licensees were only permitted to operate one business.

the provision of credit for entrepreneurial activities: during the early 1990's only 2 percent of bank credit provided to individuals was for black people with virtually no involvement of black people in entrepreneurial activities.[34]

As mentioned above, black people were used as a source of cheap labour and further excluded from progressing economically as salaried workers by a system which limited them to employment in semi-skilled positions. For example, in 1992 only 0.5 percent of the companies listed on the Johannesburg Stock Exchange (JSE) had black directors (of the 2 250 directors of the top 100 companies on the JSE less than 2 percent (40) were black).[35] The exclusion of black people from higher levels of employment is also illustrated by the founding process of the Black Management Forum.[36] Their initial meeting to discuss the possibility of founding a professional organisation for black managers in 1976 yielded an attendance of only nine men — none of whom were real managers because it was illegal to employ a black manager.[37] Less than 250 000 black people were employed in a professional, technical or administrative capacity in 1989. Black people occupied the lowest levels of the occupational hierarchy.[38] The only professional positions they could aspire to were teachers for black learners and preachers.[39] Lipton quotes the following statement made by Dr HF Verwoerd (then Minister of Bantu Affairs):

> "There is no place for [the Bantu] in the European community above certain forms of labour ... it is of no avail for him to receive a training which drew him away from his own community and misled him by showing him the green pastures of the Europeans, but still did not allow him to graze there. ... [This led to] the much discussed frustration of educated natives who can find no employment which is acceptable to them ... it must be replaced by

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34 Gqubule 2006c:98.

35 Ibid, at 99.

36 The Black Management Forum was to play an integral role in the establishment of the Black Economic Empowerment Council which, in turn, laid the groundwork for the Strategy document on BEE.

37 Gqubule 2006c:94, 99. In 1992 only 2 100 black people held top and middle management positions in the private sector.

38 Ibid, at 99.

39 Hirsch 2005:17; BEECom 2001: paras 2.1 – 2.2; Jack 2007:5-7; Scholtz 2007 *et seq*: para 1.1.

> planned Bantu education ... [with] its roots entirely in the Native areas, and in the Native environment and community."[40]

Adding to the indignity of African people and further darkening their economic prospects (but also severely damaging the economic progress of South Africa as a country) was the apartheid education policy. The Extension of University Education Act[41] in 1959 prohibited blacks from attending white universities and the Black Education Act of 1953[42] fixed the expenditure on black education at the same level as that of black taxes. The fact that schools and universities for blacks were deliberately located in the rural Bantustans, left learners and students secluded from the political hubs of the country and therefore isolated.[43] The education policy has rendered generations unable to productively contribute to an industrialised economy, even if the World Bank in 1996 provided figures that 84 percent of the population had a secondary school education.[44]

Since the Soweto uprising in 1976, symbolic political and economic reforms were made and certain restrictions on black economic freedoms were gradually relaxed, although it should be emphasised that these were no more than token reforms. Early voices of actual reform came from the opening address to Parliament on 31 January 1986 when the State President confirmed the government's commitment to the establishment of a framework of equal opportunities.[45]

Even before the voices for political reform gained volume, calls for economic reform were sounding. In his 1972 chairman's address Harry Oppenheimer of the Anglo American Corporation argued as follows:

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40 Lipton 1986:24.

41 Extension of University Education Act 45/1959.

42 Black Education Act 47/1953.

43 Gqubule 2006c:91; Butler 2006:80.

44 Hirsch 2005:28 fn 2; O'Regan 1999:14.

45 Burdzik & Van Wyk 1987:121. This reformist programme included (a) the restoration of South African citizenship to TBVC citizens; (b) the extension of the competence of self-governing states; (c) involvement of black communities in decision-making; (d) full ownership for members of black communities; and (e) uniform identity documents for all population groups.

> "[W]e are approaching the stage where the full potential of the economy, as it is at present organised, will have been realised, so that if structural changes are not made, we will have to content ourselves with a much lower rate of growth. ... Prospects for economic growth will not be attained so long as a large majority of the population is prevented by lack of formal education and technical training or by positive prohibition from playing the full part of which it is capable in the national development[.]"[46]

Eventually small concessions were made in order to create an African middle class which was perceived as the way to garner political influence.[47] Strong international pressure and local mobilisation of trade unions also contributed to the process which was called "black advancement".

Some early commentators, for example, WH Hutt (who was an economic libertarian with the utmost faith in the free market) viewed apartheid and its discriminatory policies as an attempt to preserve specifically economic privileges on the part of white labour.[48] Others viewed the free market as the eventual eradicator of apartheid. According to this view, the fundamental incompatibility of racist apartheid policies and capitalism would eventually lead to the elimination of racist employment through economic growth.[49] Although the issue of the link between apartheid and capitalism was hotly debated during the 1960's and 1970's, it is now axiomatic that cheap labour, created by the system of apartheid and segregation, served economic industries, but also that apartheid threatened the very existence of capitalism and economic prosperity in South Africa.[50]

It is worth pointing out that the apartheid economy enjoyed relative stability and prosperity until the mid 1970's. The post-World War II to 1974 period saw annual Gross Domestic Product (GDP) growth at an average rate of 4.9 percent per annum.[51]

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46 Quoted in Gelb 1991:19-20.

47 Iheduru 2004:4-5.

48 Schneider 2003:26.

49 Maseko 2007:75 with reference to the early work of Michael O'Dowd on the liberal-modernisation theory of economics.

50 Hirsch 2005:14; Iheduru 2004:4.

51 Gelb 1991:4.

Specifically between 1963 and 1968, the GDP growth rate stood at a spectacular 9.3 percent per annum.[52] The 1970's saw the bulk of economic growth being contributed by the manufacturing and construction sectors (28 percent of GDP), with agriculture (9 percent of GDP) and mining (10.5 percent of GDP) also playing major parts. This was accompanied by massive growth in employment. However, apartheid policies ensured that this was not followed with a commensurate increase in wages.[53] In 1960, white disposable income peaked as being three times that of blacks, but narrowed continuously from then on.[54]

The period from 1974 up until the elections in 1994 saw dire economic prospects: annual inflation was fixed at more than 13 percent; there was a weakening of the currency with low personal savings rations and stagnation in output growth.[55] This was partnered by massive and ever-increasing levels of unemployment and the manufacturing sector failing to create new jobs.[56] In 1982 unemployment had risen to 22.5 percent of the (economically active) population, but by 1994 unemployment reached 32.6 percent. A few statistics are provided to illustrate the impact of apartheid and the government's economic policy of the time: In 1988 the economy was virtually commanded by six conglomerates which controlled 85 percent of shares on the JSE. Anglo American alone accounted for 52 percent control of the JSE. Black business' estimated contribution to the GDP was less than 1 percent, with only one black controlled company listed on the JSE.[57] The economic crisis was the result of particular internal and external events which increased the socio-political pressures on the apartheid government and eventually lead to its fall. These events included the oil crises of 1973 and 1979, the independence of Mozambique and Angola in 1975 and 1976 respectively, (accelerated by the military coup in Portugal), the independence of Zimbabwe, growing international sanctions and

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52 Innes 2007:59.

53 Gqubule 2006c:91; Innes 2007:59.

54 Johnson 2009:396.

55 Gelb (1991:4) notes the following figures for growth rate in GDP: between 1974 and 1984 the annual growth rate slowed to 1.9 percent, and during the 1980's the growth rate dropped to an average of 1.5 percent per annum.

56 Ibid, at 1, 6; Gqubule 2006c:93; Innes 2007:63.

57 Gqubule 2006c:98.

disinvestment as a reaction against apartheid, and the debt crises of 1985. Internally, various workers' strike action during the 1970's and the Soweto uprising (as well as the state's brutal reaction thereto) added to the faltering economy.[58] The new government inherited an economic dispensation which was in crisis and in dire need of a new growth model and real change in the racially-shaped economic institutions. As a result of international sanctions, consumption of imported goods was low and the South African economy became more industrialised with the objective of satisfying growing local demand. However, even economic consumption (coupled with the increase in production and consumption which was a characteristic of post-war economies) was racially structured.[59]

2.3 The historical legacy in the post-1994 context

The 1994 elections brought with it the promise of political and economic equality. The process of achieving equality and establishing a new social order are bound up in the Constitution of the Republic of South Africa. The Bill of Rights as contained in the Constitution must always be interpreted both in its historical and contextual surrounding.[60] The importance of a historical perspective to interpretation stems from the particular type of society which South Africa was before 1994, and the ideal type of society against which the Constitution was framed. The right to equality in section 9 of the Constitution immediately comes to mind when considering the historical context. South African society was based on inequality and discrimination in the legal, political and socio-economic spheres.[61] Several cases have addressed the South African past and the legacy of inequality left by political, social and economic exclusion and subordination of non-white people.

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58 Innes 2007:62; Gelb 1991:22, 25; Gqubule 2006c:94; Iheduru 2004:5.

59 Gelb 1991:13.

60 *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC): para 262.

61 Currie & De Waal 2005:231.

In *Brink v Kitshoff NO* O'Regan J summarised the importance of the historical context of constitutional interpretation, with particular reference to the right to equality, as follows:

> "Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[62]

In *Zondi v MEC for Traditional and Local Government Affairs and Others*[63] racially segregated residential areas and the particularly negative impact that the prohibition on land ownership for black people came under the spotlight. Institutionalised and legislated racism and apartheid even impacted the way in which the estates of deceased white and black people were administered as discussed in *Moseneke and Others v Master of the High Court*.[64] This was also at issue in *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*[65] where the Court explained the purpose of the differentiated succession dispensation in furthering the racist division and placed it within its broader historical and political context in the following manner:

> "Section 23 [of the Black Administration Act 38 of 1927] cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with

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62 *Brink v Kitshoff NO* 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC): para 40.

63 *Zondi v MEC for Traditional and Local Government Affairs and Others*: paras 38-42.

64 *Moseneke and Others v Master of the High Court* 2001 2 SA 18 (CC); 2001 2 BCLR 103 (CC): para 1.

65 *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC).

notions of separation and exclusion of Africans from the people of 'European' descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, 'to the Native mind', would be 'both startling and unjust'. What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans."[66]

Mahomed DP (for the Court) in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*,[67] dealt with issues surrounding the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act.[68] The terms of this Act provided the framework within which the Truth and Reconciliation Commission and its subcommittees were established, and described the particularly eroding effect of apartheid on human rights and the general consequences of political domination by the minority of the majority. The Court stated that although fundamental human rights were the most prominent casualty of the struggle against apartheid, human rights abuse also spilled over into the economic sphere. The Court described it as follows:

"The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation."[69]

Although the focus in the discussion above was centred on the particular policies (especially economic) of the previous government to engineer a society divided along

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66 Ibid, para 61.

67 *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 4 SA 671 (CC); 1996 8 BCLR 1015 (CC).

68 Promotion of National Unity and Reconciliation Act 34/1995.

69 *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*: para 1.

racial lines, what should be emphasised finally is the extreme assault on dignity which non-whites had to endure as part of apartheid rule. Non-whites were treated as a means to an end, and almost never as an end in themselves. Their inner worth and dignity were never acknowledged.[70] This has also received attention in case law. In *S v Makwanyane* the Constitutional Court clearly reiterated the reason for the specific inclusion of dignity as both constitutional value and right in the Bill of Rights:

> "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[71]

In *Minister of Finance and Another v Van Heerden* Ngcobo J stated the link between apartheid and dignity as follows:

> "And this is an assault on the human dignity of the disfavoured group. Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as 'second class citizens, that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity'."[72]

The vision of the society that we as South Africans wish to transform into is central to contextualising the history of apartheid. This was clearly formulated in one of the earliest cases before the Constitutional Court, i.e., *S v Makwanyane*. The Court stated that generally a constitution is a codification of the shared aspirations and values of a nation, which should serve as guiding principles for all branches of government and

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70 Ackermann 2000:542.

71 *S v Makwanyane*: para 329.

72 *Minister of Finance and Another v Van Heerden*: para 116. The assault on dignity and inequality along racial lines were acknowledged almost a century ago in *Moller v Keimoes School Committee and Another* 1911 AD 635: 643L where the following statement was made by Lord De Villiers CJ: "As a matter of public history we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We know also, that while slavery existed, the slaves were blacks and that their descendents, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites."

national institutions. It also provides the constitutional limits for the exercise of government powers. What sets the South African Constitution apart from other constitutions is that it does not necessarily formalise the values and aspirations of a nation as the result of incremental historical development. The South African Constitution provides for a clear rejection of the past and articulates a particular commitment to a democratic, egalitarian society. It is summarised as follows:

> "What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'."[73]

Fundamental to the achievement of the above is the concept of substantive equality and the process of reaching this objective. It will require a revolution to achieve economic and social equality, which means eradicating severe poverty and systemic disadvantage, as well as instilling dignity, the right to self-determination and the achievement of personal capacity for every South African.[74]

The historical context within which the Constitution was drafted resulted in the clear and explicit inclusion of the rights and values which underlies the Constitution as a whole and particularly the Bill of Rights. It would be incongruous to attempt to fully comprehend the transformative purpose of the Constitution if due regard is not paid to the history of apartheid and the particular role the Constitution has in creating the new society.[75]

The issue of economic advancement has been a major cause for the African National Congress (ANC) government predating the time of their election in 1994.[76] The

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73 *S v Makwanyane*: paras 262-263.

74 Langa 2006:352-353.

75 Grant 2007:310.

76 A more equitable economic dispensation was envisioned in the Freedom Charter in 1955. See Strategy for Broad-Based Economic Empowerment: para 1.3; Hirsch 2005:32. The economic statement included in the Freedom Charter declared that "[t]he People shall share in the Country's Wealth" and continued as follows: "The national wealth of our country, the heritage of all South Africans, shall be restored to the people; The mineral wealth beneath the soil, the banks, and monopoly industry shall be transferred to the ownership of the people as a whole; All other

Freedom Charter was the ANC's official statement on social and economic issues since its adoption in 1955 up until the ANC's policy conference which produced the "Ready to Govern" policy statement in 1992. However, economic advancement was only one of the concerns that needed to be addressed by the new government. Following the political miracle of 1994, the time had come to expand political equality to effect tangible economic equality. In its final report the Black Economic Empowerment Commission, writing in 2001, summarised the situation as follows:

> "South Africa's democratic Government inherited a mismanaged economy designed to serve the needs of a minority of the population and condemn the black majority to a vicious cycle of extreme poverty, unemployment and underdevelopment. Over the past seven years, it has fundamentally transformed the country's political, economic and social landscape. It has entrenched the values of equality and freedom and laid the foundations for the country to chart a new path to economic development for other developing nations to follow."[77]

Although all legal impediments for black economic participation were removed with the end of apartheid, and opportunities for business people from the black community opened up, white domination of ownership and control of commercial and industrial activities continued. This included sectors such as mining, financial services, manufacturing and agriculture. White business' slow response to calls for black economic empowerment led to the eventual legislative intervention to regulate the empowerment of previously disadvantaged people on a broad basis. This was intended to break the cycle of economic exclusion perpetuated by merely removing legislative barriers as opposed to positive measures aimed at remedying past wrongs. Any political process with a measure of credibility should translate into meaningful economic participation for its subjects. Political freedom without economic independence is bound to end in dissatisfaction.

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industries and trade shall be controlled to assist the well-being of the people; All people shall have equal rights to trade where they choose, to manufacture, and to enter all crafts and professions" (quoted in Hirsch 2005:33).

[77] BEECom 2001: Chapter 2.

Chapter 3

BEE as an instrument for economic empowerment

3.1 Introduction

The legacy of apartheid has left the greater part of the South African population politically, but also economically disempowered, and the imperative which calls for policy tools to transform the South African economy by means of black economic empowerment is clear. Achieving substantive economic equality is a major task for the government. The way in which South Africa achieved political equality was admirable, but it still has to find a structured, well-organised, regulated and effective policy to extend that equality to a substantive economic equality.[1] The means employed to achieve this are somewhat controversial and as yet not completely settled.[2] Currently, the basis of the government's policies concerning black economic empowerment is the B-BBEE Act.[3] The enactment of the B-BBEE Act was the culmination of a process that began well before the 1994 elections. Various policy instruments — with varying levels of success achieved — since the early 1990's have culminated in the present Broad-Based Black Economic Empowerment policy. These policies, i.e. the Reconstruction and Development Programme and the Growth, Employment and Redistribution Strategy, are briefly discussed below because they were the foundation from which further strategies were developed. The principles and objectives of these earlier strategies are still relevant to the interpretation of later strategies and programmes. It will therefore be useful, and informative, to briefly refer to these earlier policy documents.[4]

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1 Gqubule 2006a:4-5.

2 See also Cheadle, Thompson & Haysom 2005 *et seq*:1-3.

3 The Act came into effect on 21 April 2004.

4 For example, the macro deflationary underlying policy framework of GEAR is still operative in South Africa today: Gqubule 2006b:46.

Difficulties experienced with the implementation of these earlier strategies and lack of progress made in the general economic advancement of previously disadvantaged groups led to the appointment of the Black Economic Empowerment Commission. The Commission made important recommendations, not only about the implementation processes, but also with regard to the objectives and scope of empowerment that the government should be looking to achieve. After it became clear that BEE lacked clear definition and had degenerated into a catchphrase for a variety of ideas,[5] the Commission suggested a new and more detailed definition of the concept black economic empowerment. It was in response to this report that the government came up with a strategy and legislation for broad-based black economic empowerment. Below is a brief overview of the process subsequent to 1994 and the broader legislative context within which the process of BEE will operate. The B-BBEE Act constituted a framework act and additional steps had to be taken to flesh out the actual implementation process. Progress made on the development and implementation of regulations in terms of the Act is outlined below within the broader setting of BEE as an economic instrument. Besides the achievement of substantive equality, BEE is also important for economic growth in South Africa. From the discussion below it will become clear how many of the policy instruments introduced by the government clearly display a commitment to integrating these complementary objectives. Progress in the BEE process and the advances made on the achievement of substantive economic equality will be addressed in Chapter 5.

3.2 Government's empowerment policies

3.2.1 Reconstruction and Development Programme

Following the elections in 1994 the government adopted the Reconstruction and Development Programme (RDP). This policy could be called a "basic needs" policy and was very attractive in its proposals to directly addressing inequality.[6] This programme

5 Edigheji 1999:2.

6 Gelb 2006:3.

had as its objectives the deracialisation of business ownership and control. The policies of the RDP had to ensure the elimination of discrimination in financial institutions and increase access to financial resources available to black people for business development,[7] but also foresaw the introduction of BEE elements into tendering processes. It broadly aimed to redistribute 30 percent of agricultural land to the previously disadvantaged and set out to build one million low-cost houses by 1999. Although BEE received fleeting mention in the RDP, it did not result in anything more than simply piecemeal reform and empowerment.

This strategy was phased out due to its being impractical and unsuccessful in reaching its objectives, especially within the practical reality that existed in the new democracy.[8] It was also from the onset met with opposition from international (for example, the International Monetary Fund and the World Bank) and South African voices.[9] It could only deliver the asset redistribution it envisaged over a far longer term than initially anticipated. From the failure of the RDP in delivering on its promises, evident as early as 1995, three main policy objectives emerged in the economic discussions of the day, viz: the importance of maintaining a climate in which low inflation and fiscal deficits could be fostered, in other words, macro-economic stability; deracialisation of ownership and management control in both the public and private sector; and reintegrating South African trade and finance into the international capital markets.[10]

3.2.2 Growth, Employment and Redistribution (GEAR) strategy

The Growth, Employment and Redistribution (GEAR) strategy was essentially a

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7 Reconstruction and Development Programme: 4.4.6.3.

8 Jack 2007:16-17; Gelb 2006:4.

9 Adams 1997:241; Schneider 2003:42.

10 Gelb 2006:4.

neo-liberal[11] style macro-economic stabilisation programme.[12] In contrast to the radical and interventionist economic policies contained in the RDP, the GEAR was more in favour of market and investor-friendly economic policies.[13] Key policies in GEAR were deficit reduction, low inflation, trade liberalisation, deregulation, tax reduction and privatisation. It has been blamed for being a main contributor to South Africa's low economic growth rate between 1994 and 2004.[14] It should be kept in mind that one of GEAR's first objectives was to stabilise the foreign exchange market, which had at the time just seen the exchange rate depreciate 18 percent, coupled with contractions in capital inflow.[15] Gqubule[16] doubts the existence of macro-economic instability, debt problems and inflationary crisis which GEAR was supposed to have corrected, and argues that GEAR in fact added to macro-economic instability during the first 10 years of democracy. GEAR operated on the assumption that its deflationary policies would render economic expansion by reducing the budget deficit and therefore lowering the interest rate which would attract higher investment.[17] This economic expansion would then add to job creation and wider economic empowerment of previously excluded sections of the population and thus achieve black economic empowerment. Economic expansion and a dramatically increased economic growth rate are fundamental to the effective achievement of BEE. The choice of an appropriate macro-economic policy would therefore directly impact on BEE. Gqubule[18] argued that without GEAR, and the government having rather adopted neutral fiscal policies, South Africa would have achieved a four percent annual growth rate between 1996 and 2006, which is far better than the actual growth rate realised. There has been growing disillusionment with GEAR within the ranks of the ANC, SACP and Congress of South African Trade Unions

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11 See also Adelzadeh 1996:66-67.

12 Gqubule 2006a:8.

13 Tangri & Southall 2008:702.

14 Schneider 2003:44; Gqubule 2006b:39, 47.

15 Gelb 2006:4; Schneider 2003:43.

16 Gqubule 2006b:60.

17 Ibid, at 72.

18 Gqubule 2006d:122.

(COSATU) since 2000,[19] and GEAR has failed to meet almost any of the targets it initially set out to achieve. Therefore, GEAR also failed in its efforts to bring about tangible economic empowerment.

3.2.3 BEECom, the Strategy Document, and Broad-Based Black Economic Empowerment Act 53 of 2003

A general feeling of lack of progress in the achievement of the objectives set by the RDP lead to the formation of the Black Economic Empowerment Commission or BEECom.[20] The Black Economic Empowerment Commission was formally established in May 1998, chaired by Cyril Ramaphosa. The Commission was tasked with reviewing the advances achieved in the sphere of empowerment during the 1990's, and identifying obstacles for meaningful participation in the economy by blacks. Recommendations to government had to be made on policies and instruments for advancing the process of black economic empowerment and guidelines were required to be set down for measuring the progress achieved. The Commission's report was presented to the Black Business Council in 2001 and included various targets,[21] many of which were eventually incorporated into the Codes of Good Practice.[22]

It was agreed that a strategy for black economic empowerment was necessary, because transformation efforts had up to that point merely consisted of a few politically well-connected black investors acquiring equity in existing businesses and the appointment of black directors on the boards of existing companies. Accepting BEE as merely measuring the entry into and transactions by black people in business, mainly

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19 Schneider 2003:44.

20 The Black Management Forum (BMF) had its National Conference in Stellenbosch on 14 and 15 November 1997 and expressed its concern about the progress made. The general consensus was that black people should take charge of and direct a new vision of black economic empowerment. The BEECom was established under the auspices of the Black Business Council, which represented 11 black organisations. See BEECom 2001: Introduction.

21 See BEECom Report.

22 See Balshaw & Goldberg 2005:67-68; Balshaw & Goldberg 2008:69-70; Jack 2007:21.

through BEE investment companies,[23] proved to be unsatisfactory. BEE should rather be defined so as to include the promotion and creation of new opportunities for, and increased levels of, participation of black people in ownership, management and control of economic activities. This concept should also be placed within the broader scope of empowerment processes which include job creation, rural development and urban renewal, the alleviation of poverty, land ownership, measures specifically aimed at empowering black women, education, skills and management development, meaningful ownership, and access to finances in order to conduct business activities.[24] The BEECom report therefore included both elements of narrow-based BEE (ownership and management) and broad-based BEE (empowerment financing, preferential procurement, human resources, skills development and enterprise development).[25]

The Commission defined BEE as an integrated, coherent socio-economic process, located within the context of the RDP, which should aim to redress imbalances by redistributing ownership, management and control of economic and financial means on an equitable basis to the majority of South African citizens. It sought to achieve a broader, meaningful participation in the economy by black people resulting in sustainable development and prosperity.[26] This broader approach to BEE was carried through to the Strategy for Broad-Based Black Economic Empowerment[27] and the B-BBEE Act. With reference to the difference between broad-based and narrow-based empowerment, the Strategy Document stated the following:

> "The challenge in defining black economic empowerment is to find the appropriate balance between a very broad definition and an overly narrow one. To define BEE too broadly equates BEE with economic development and transformation in general. The strategy is then commensurate with the totality of government's programme of

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23 For example, New Africa Investments Limited (Nail), Real Africa Investments Limited (Rail), and Johnnic. See BEECom 2001: Introduction, p 1.

24 BEECom 2001: Introduction, p 2.

25 Jack 2007:21; Hoffman 2008:94; Balshaw & Goldberg 2008:70.

26 BEECom 2001: Introduction p, 2.

27 Issued by the Department of Trade and Industry in 2003.

reconstruction and development. To define BEE too narrowly limits it to a set of transactions transferring corporate assets from white to black ownership."[28]

The Department of Trade and Industry (the DTI) developed a Strategy Document in the form of the White Paper on BEE issued in 2003 ("Strategy for B-BBEE"). The government's BEE policy as espoused in the strategy document could be said to be based in compromise between competing interests of white business, organised labour and black entrepreneurs.[29] This strategy document, which formed the basis for both the Act and the Codes,[30] defined BEE as an "integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities."[31] It proposed the measurement of BEE to span seven elements, namely, ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development. This attempts to drive transformation from all organisational levels, instead of just from ownership and management levels down. The cornerstone for this approach is economic growth, instead of mere redistribution.[32]

Policy objectives for broad-based black economic empowerment were listed in the strategy document[33] and these will be used as the yardstick against which successful implementation of the strategy will be measured. They include the following: —

- A substantial increase in the number of black people who have ownership and control of existing and new enterprises.

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28 South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (Strategy for B-BBEE): para 3.2.1.

29 Tangri & Southall 2008:702.

30 Jack 2007:24.

31 Strategy for B-BBEE: para 3.2.2.

32 Jack 2007:22.

33 Strategy for B-BBEE: para 3.3.

- A substantial increase in the black ownership and control of existing and new enterprises in the priority sectors of the economy that government has identified in its micro-economic reform strategy.[34]

- A significant increase in the number of new black enterprises, black-empowered enterprises and black-engendered enterprises.

- A significant increase in number of black people in executive and senior management of enterprises.

- An increasing proportion of the ownership and management of economic activities vested in community and broad-based enterprises (such as trade unions, employee trusts, and other collective enterprises) and co-operatives.

- Increased ownership of land and other productive assets, improved access to infrastructure, increased acquisition of skills, and increased participation in productive economic activities in under-developed areas including the 13 nodal areas identified in the Urban Renewal Programme and the Integrated Sustainable Rural Development Programme.[35]

- Accelerated and shared economic growth.

- Increased income levels of black persons and a reduction of income inequalities between and within race groups.

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34 These sectors include agriculture and agro-processing, mining, minerals and metals beneficiation, clothing and textiles, automobiles and components, aerospace, information and communication technology sector, chemicals, cultural industries including media, film, music and crafts, as well as high value-added services.

35 These nodal areas include, for example, OR Tambo, Alfred Nzo, Chris Hani (Eastern Cape Nodes); Ugu, Umzinyathi, Umkhanyakude, Zululand (KwaZulu-Natal Nodes); Central Karoo (Western Cape Node); Maluti-A-Phofung (Free State Node); Kgalagadi (Northern Cape Node); Sekhukhune (Limpopo Node). See the profiles of all the urban and rural nodes at http://www.thedplg.gov.za/subwebsites/URD/Contents/index.htm (accessed on 24 May 2010).

The underlying principle of the strategy document was to effect broad-based empowerment through economic growth based on sound economic principles and good governance.[36]

This combination of broad- and narrow-based empowerment concepts grounded in economic growth and expansion was carried forward to the Act. The B-BBEE Act defines[37] broad-based black economic empowerment as

> "the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to —
>
> *(a)* increasing the number of black people that manage, own and control enterprises and productive assets;
>
> *(b)* facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
>
> *(c)* human resource and skills development;
>
> *(d)* achieving equitable representation in all occupational categories and levels in the workforce;
>
> *(e)* preferential procurement; and
>
> *(f)* investment in enterprises that are owned or managed by black people."

The inclusion of the term "broad-based", as opposed to simply black economic empowerment, means that the purpose of this programme is to ultimately benefit all previously disadvantaged people and not merely a select few persons who have since become a wealthy black elite group.[38] The underlying premise is that a society in which gender, racial or ethnic wealth inequality exists will most likely cause social and political instability. This then makes economic stability and a more equal distribution of wealth

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36 Jack 2007:25.

37 B-BBEE Act: section 1.

38 Ibid. Strategy for B-BBEE: para 3.4.1. See also Cheadle, Thompson & Haysom 2005 *et seq*:1-6; Hoffman 2008:94. This reminds of the theories proposed by Booker T Washington at the beginning of the 20th century. For a more detailed discussion of this subject, see Mtima 1999:394-399.

and income a precondition of social and political stability.[39] Social and political stability can surely only exist if there is social and political equality, and if this argument is accepted, broad-based black economic empowerment is imperative for achieving the equality envisaged in section 9 of the Constitution.

However, there have been continually questions asked about the actual ability of the substructure established by the Act to effectively achieve *broad-based* empowerment.[40] This will be addressed in more detail later when dealing with the overall evaluation of the programme.[41]

3.3 The legislative context

Black economic empowerment exists within the following legislative context:[42]

- The Constitution.
- The Broad-Based Black Economic Empowerment Act.
- The Preferential Procurement Policy Framework Act and regulations in terms thereof.
- The State Tender Board Act[43] and regulations in terms thereof.
- Framework for Supply Chain Management Regulations, 2003.[44]
- The Employment Equity Act.

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39 See also Strategy for B-BBEE: para 1.3.

40 Cheadle, Thompson & Haysom 2005 *et seq*:1-7.

41 See Chapter 5.

42 See also Cheadle, Thompson & Haysom 2005 *et seq*:1-3; Lester 2007:118-119.

43 Act 86/1968.

44 Issued in terms of the Public Finance Management Act 1/1999.

- The Skills Development Act[45] and the Skills Development Levies Act[46] and regulations passed in terms of the Skills Development Act.
- The National Empowerment Fund Act.[47]
- The Competition Act.[48]
- Specific sectoral legislation such as the Telecommunications Act;[49] the Broadcasting Act;[50] the Marine Living Resources Act;[51] the Gas Act;[52] and the Minerals and Petroleum Resources Development Act.[53]

3.4 Policy instruments for the realisation of empowerment

Government has increased the efficacy of black economic empowerment by wielding its own economic influence. Section 10 of the B-BBEE Act, which sets out the status of the Codes of Good Practice, operates so as to make BEE compliance relevant to almost all instances of economic interaction between the state and the business industry. It should be kept in mind that this is an integrated approach. Procurement of services and goods as intended in the Preferential Procurement Policy Framework Act (PPPFA) can be construed as ordinary direct procurement of goods and services. However, entering into infrastructure public-private partnerships also constitutes the procurement of services.[54] Granting concessions to private operators are basically just one specific type of public-

45 Act 97/1998.

46 Act 9/1999.

47 Act 105/1998.

48 Act 89/1998.

49 Act 103/1996.

50 Act 4/1999.

51 Act 18/1998.

52 Act 48/2001.

53 Act 28/2002.

54 Manchidi & Merrifield 2001:418.

private partnerships.[55] Besides being a useful tool in reducing state debt and the resulting reduction in the high interest costs, restructuring or privatisation of state-owned enterprises increases the quality of service delivery for the broader public and frees up capital for the provision of social goods and provides opportunities for economic empowerment of previously disadvantaged groups.

3.4.1 Government preferential procurement

Indicative of the close ties which developed between the Government of National Unity and business interests is the system by which government contracts are awarded to enterprises run by black persons or in partnership with black persons.[56] Procurement was identified[57] early on as an important tool to democratise the economy, but it is one of a number of initiatives which the government intends using in order to reverse the economic disempowerment caused by apartheid.[58] Following the enactment of the PPPFA in 2000, the National Treasury issued the Preferential Procurement Regulations[59] in 2001. The Regulations provide the detail of how the preference point system provided for in the PPPFA is to be implemented. These Regulations were aimed at enhancing the participation of historically disadvantaged individuals and small, medium and micro enterprises in the procurement processes of the government.[60] They provided clear guidelines which all organs of state are to apply when dealing with all tenders for services or goods.[61] The Regulations set out an 80/20 and 90/10 preference point system which will be applicable to tenders of up to R500 000 and tenders above R500 000

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55 Ibid, at 415.

56 Schneider 2003:43.

57 It was already envisaged in the RDP. Manchidi & Harmond 2002:13.

58 Rogerson 2004:185.

59 National Treasury. Preferential Procurement Regulations, 2001 pertaining to the Preferential Procurement Policy Framework Act: No 5 of 2000. Government Notice R725, Regulation Gazette No 7134, Government Gazette No 22549, 10 August 2001.

60 See also National Treasury. 10 August 2001. Press Release: Preferential Procurement Policy Framework Act, No 5 of 2000.

61 National Treasury. 2001. Preferential Procurement Regulations, 2001, sub-regulation 1(o) and 2.

respectively.[62] For example, when a contract is put out to tender with a value of more than R500 000, the lowest acceptable tender will receive 90 points, and 10 points will be awarded to tenderers for being, or sub-contracting with, a historically disadvantaged individual, or for achieving specified RDP goals.[63] The same applies to tenders below R500 000 with respectively 80 points and 20 points being awarded during the tender evaluating process.[64]

The National Treasury also issued General Procurement Guidelines[65] which, it would seem, would have to be viewed supplementary to the Regulations. These Guidelines are a set of standards for the public service and acknowledge the general commitment by the government to promote a proper, successful government procurement system which will enhance the social and economic well-being of all South Africans. The Guidelines are based on five core principles of behaviour, namely, value for money, open and effective competition, ethics and fair dealing, accountability and reporting, and equity.[66] The value-for-money principle is defined as being more than merely the lowest price and the best possible result, taking all relevant costs and benefits into account in order to achieve the desired outcome. Value for money does not only apply to the goods or services procured, but also to the process of procurement itself.[67] The procurement process as a whole should be characterised as open and transparent, and accessible to all parties. Market circumstances should be taken into account to design a process that encourages effective competition, but this should always happen in observance of the provisions of the PPPFA.[68] Concerning the third pillar, dealings between the government and suppliers should always be based on mutual trust and respect, conducting business in

62 This is a more detailed formulae which enlightens the PPPFA: section 2.

63 National Treasury. 2001. Preferential Procurement Regulations, 2001: regulation 4.

64 Ibid, regulation 3.

65 National Treasury. Unknown date. General Procurement Guidelines.

66 Ibid, Introduction.

67 Ibid, para 1.

68 Ibid, para 2.

a fair and reasonable manner and with integrity.[69] Individuals and organisations should be accountable for their plans, actions and outcomes. Public reporting and external auditing should provide the fundamental tools to ensure an administration that is open and transparent.[70] The fifth element, namely equity, in the context of procurement means that proper cognisance should be paid to the government's policies aimed at advancing persons or categories of persons who were previously subjected to unfair discrimination. The government also wishes to create economic growth with specific attention to the development of small, medium and micro enterprises. The rationale for this is that economic growth and development of these enterprises will lead to job creation and a diversified representation of blacks and women in ownership.[71]

Since the DTI gazetted the final Codes of Good Practice in January 2007, the National Treasury has endeavoured to revise the PPPFA and its Regulations to bring the basis of evaluation of tenderers in line with the elements used to evaluate an enterprise's level of BEE compliance, and thus its procurement recognition status.[72] Draft Preferential Procurement Regulations were published in August 2009.[73] The proposed amendments are discussed in greater detail in Chapter 4 below.[74]

3.4.2 Licenses and concessions

If one considers the business imperative for BEE as based on the trickle-down effect of compliance levels, there are industries that may be less affected by a need to comply with BEE legislation. For example, companies with monopolies in the market in

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69 Ibid, para 3. This would involve government staff identifying and avoiding conflicts of interest, dealing with all suppliers in an even-handed manner, not accepting gifts or other hospitality, using state property responsibly, and assisting in the elimination of fraud and corruption.

70 National Treasury. Unknown date. General Procurement Guidelines: para 4.

71 Ibid, para 5.

72 See National Treasury. 2007. Circular: Alignment of preferential procurement with the aims of BBBEEA.

73 Draft regulations were published for public comment in Government Gazette No 32489, 14 August 2009.

74 See Chapter 4, para 4.2.9.

which they operate will not be moved by the need to comply in order to hold on their business dealings with public entities or state organs. Examples of this are to be found in the tourism industry or retailers in the food industry with strong brand loyalty. They will be less affected by this trickle-down effect because the public sector does not have direct leverage in the supply chain of these enterprises.[75] Granting of new or renewing existing operating licenses by the government or public entities will become the imperative for ensuring that these types of industries comply with the BEE programme.[76]

Licenses and concessions provide further means to expand the application of the trickle-down or cascade effect of BEE. Any enterprise, which is dependent on licences or concessions issued by the state to conduct its business, even though it does not directly transact with the state, will have to comply. This can be illustrated with reference to the mining industry. In terms of the Mineral and Petroleum Resources Development Act mining companies have to reapply for mining rights, i.e. convert old-order to new-order mining rights, by 2009. In order to obtain these rights, however, companies have to comply with certain requirements which include empowerment targets to which companies have committed themselves to in the mining empowerment charter.[77]

This was also the approach followed by Malaysia which has been described as implementing the world's most successful and most extensive affirmative action programme.[78] Malaysia introduced all-encompassing measures to advance the Bumiputera people economically. For example, all new companies were required to operate with a license and in order to obtain a license, any newly registered company had to have a plan on how it intended to increase Bumiputera equity to 30 percent.[79]

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75 Tangri & Southall 2008:707; Jack 2007:303.

76 The Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry (Petroleum Charter) was arguably the first attempt at regulating private sector conduct in order to achieve black economic empowerment objectives. The basic premise was that the government would utilise licensing to leverage support for the purpose of empowerment. This Charter was given legislative force by its inclusion as Schedule 1 of the Petroleum Products Amendment Act 58/2003.

77 Tangri & Southall 2008:707.

78 Gqubule 2006a:19-21.

79 Ibid, at 19.

3.4.3 State-owned enterprises — restructuring and privatisation

The policy development concerning the privatisation of state-owned enterprises has seen a dramatic shift from a policy of large scale nationalisation (which was the policy instrument of choice in the ANC's Freedom Charter) through the RDP to a more market-economic strategy which strongly favoured privatisation, as was contained in GEAR.[80] Due mainly to the failure of GEAR, the financial and logistical problems experienced with the first attempts at privatisation, and the negative reaction from the trade union federation COSATU, there has been a policy shift away from privatisation of state-owned enterprises. Privatisation has been replaced by a policy of restructuring of state-owned enterprises. Restructuring encompasses more than mere privatisation. Currently, government policy is focused on keeping core assets in strategic areas of the economy, streamlining operations at these state-owned entities, and disposing of non-core entities and assets.[81] Restructuring or streamlining these operations reflects the efficient management of enterprises, cost reduction and recovery and subsidisation, which has to be done in a transparent manner when used to address social objectives.[82] Government guidelines defined non-core property as "property that is not related to current or future expected operational requirements, and where disposal or alternative development will not compromise current or expected government requirements."[83] The six main state-owned enterprises under the control of the Department of Public Enterprises (DPE) are Telkom, Transnet, Eskom, Denel, Aventura, and Alexkor. Some of these entities are main providers of basic services to the public, and the importance of service delivery and providing in the basic needs of the broad public should always be kept in mind.

Privatisation was initially seen as holding key empowerment opportunities. Now the DPE recognises the opportunity for empowerment in the disposal of said property.

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80 GEAR para 7.2; Southall 2007b:201.

81 National Department of Public Enterprises 2007:3.

82 Mzaliya 2004:94.

83 National Department of Public Enterprises 2007:3, para 1.2.

The DPE issued the "Broad-Based Black Economic Empowerment Guidelines for State Owned Enterprises' Non-Core Property Disposals"[84] in April 2007. This document provides the framework for all disposal and related transactions of property by state-owned enterprises. These guidelines provide that the Codes of Good Practice issued by the DTI be applicable to all bidders for property, and therefore that BEE compliance levels be determined by means of the generic scorecard.[85] Differentiated qualification criteria for proposed bidders are provided based on the value thresholds of the properties.[86] If the property set for disposal has been valued for less than R5 million (Level A value threshold) proposed bidders must be black people or enterprises with a level 4 BEE status.[87] For properties between R5 million and R30 million (Level B value threshold), enterprises should have a level 4 BEE status, and for properties valued between R30 million and R100 million (Level C value threshold), bidding enterprises should have a level 5 BEE status.[88] Properties with value in excess of R100 million (Level D value threshold) requires bidders to have level 6 BEE status, in other words a 60 percent compliance recognition level.[89] When state-owned entities evaluate bidding offers for property disposals, an enterprise's BEE score will account for 20 points out of a total of 100 points, with the price counting for 60 to 80 points and the functionality for 0 to 20 points.[90] Functionality means that the disposal of the property is used to further a specific disposal objective. This could include, *inter alia*, social objectives, local benefits, and economic development.[91]

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84 Broad-Based Black Economic Empowerment Guidelines for State Owned Enterprises' Non-Core Property Disposals. April 2007. Available at http://www.dpe.gov.za/res/BEEGuidelines2007.pdf (accessed on 15 September 2008).

85 Although provisions made in the Codes of Good Practice for Qualifying Small Enterprises and Exempted Micro Enterprises also apply to these bidders.

86 National Department of Public Enterprises 2007:3, para 2.1.

87 Sixty-five percent BEE compliant, thus having a 100 percent recognition level. National Department of Public Enterprises 2007:4, para 2.3.

88 Sixty-five percent BEE compliant, thus having a 100 percent recognition level; and 55 percent BEE compliant, thus having a 80 percent recognition level. See National Department of Public Enterprises 2007:4-5, paras 2.4 and 2.5.

89 See National Department of Public Enterprises 2007:5, para 2.6.

90 Ibid, at para 3.1.

91 Ibid, at 6, para 3.4.2.

Part of restructuring of organisations is the process of democratisation of these institutions, in other words, removal of all discriminating policies from employment and procurement practices and implementing empowerment policies pursuant to the government's Black Economic Empowerment imperative. It is instructive to look at the progress made in two of the largest of these entities, namely Transnet and Eskom. Transnet spent 45 percent (or approximately R4.5 billion) of its total procurement budget with BEE companies during the 2003/2004 financial year. When considering management control, nearly 75 percent of its middle, senior and executive management is black.[92] Eskom annually spent R8 billion from the total R18 billion in procurement with black companies and approximately 60 percent of managerial and professional staff are black.[93]

Some problems with the process that have been highlighted are the challenges posed to targeted groups to obtain the necessary finance for purchasing equity stakes in assets which are being sold. Another issue is the land restitution claims lodged against land owned by state-owned enterprises, particularly Alexkor and Aventura.[94] The tender process has been time-consuming and this has caused delays which were originally not counted on. The checks and balances involved in evaluating every bid received from potential buyers of state assets have resulted in a tedious, and sometimes inefficient process. The financial benefits thought to be gained through such sales have also been lower than expected.[95]

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92 Lünsche 2005:87.

93 Ibid, at 86.

94 Mzaliya 2004:96.

95 Ibid, at 97.

3.4.4 Public-private partnerships

Public-private partnerships[96] are especially relevant when dealing with the establishment and expansion of infrastructure. There are several reasons why the state has to provide public infrastructure. Firstly, state involvement is necessary to provide infrastructure that will be freely available to all people, the so-called public utilities. In certain fields competitive provision of infrastructure is unfeasible and public control of the process is required to avoid negative consequences of monopolistic provision. Without state provision, certain goods or services would be underprovided to groups with financial limitations and, to balance the provision of services, the public sector has to provide these, to avoid a loss of socio-economic benefits in certain areas. The capital intensive nature of the investment makes it less likely for private sector initiatives to succeed without state backing. Specifically relevant for the discussion on economic empowerment in South Africa is the fact that public infrastructure is necessary for the realisation of economic growth.[97] Increasing reliance has been placed on public-private partnerships globally for the provision of infrastructure, and public-private partnerships have been called the modern vehicle to facilitate private sector provision of public

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96 Regulation 16 of the Treasury Regulations (issued in terms of section 76 of the Public Finance Management Act 1/1999, see Government Notice No R225, Government Gazette No 27388, 15 March 2005) defines a public-private partnership as follows:

> "public private partnership" or "PPP" means a commercial transaction between an institution and a private party in terms of which the private party —
>
> (a) performs an institutional function on behalf of the institution; and/or
>
> (b) acquires the use of state property for its own commercial purposes; and
>
> (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
>
> (d) receives a benefit for performing the institutional function or from utilising the state property, either by way of:
>
> (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or
>
> (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
>
> (iii) a combination of such consideration and such charges or fees.

97 Manchidi & Merrifield 2001:409.

infrastructure.[98] This presents another opportunity to employ preferential criteria to further the objectives of BEE.

Different types of Public-Private Partnerships (PPPs) can be identified. The typical PPP for providing infrastructure referred to above can be called a project-based PPP. Other uses for PPPs have been joint initiatives between government, aid agencies and private-sector players to combat diseases like acquired immunodeficiency syndrome (AIDS), malaria, etc., or using PPPs with the objective of promoting economic development. These types of PPPs are termed programme-based or policy-based PPPs.[99] It must be emphasised that the public-private partnerships referred to by the DTI in its Strategy for B-BBEE, the B-BBEE Act, and the National Treasury when discussing policy instruments to implement black economic empowerment are always a project-based public-private partnership.

South Africa is burdened by an enormous public infrastructure backlog.[100] Given the specific budgetary constraints which face South Africa,[101] alternative sources for the financing of these projects had to be found. Generally, project-based public-private partnerships are characterised by certain key elements. Firstly there is usually a long-term contract between the public- and private-sector parties, which concerns the design, construction, financing, and operation of public infrastructure by the private-sector party. The private-sector party will usually receive payments over the span of the contract term for the use of the said facility which is made, either by the state or public-sector party, or by the general public as users of the facility. Ownership of the facility remains with the state, or reverts back to the state after the term of the contract has expired.[102] Given the advantages of bettering public infrastructure through the use of public-private partnerships and the possibility of importing elements of policy-based PPPs aimed at promoting economic development, public-private partnerships were identified as being

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98 Yescombe 2007:2; Manchidi & Merrifield 2001:412-413.

99 Yescombe 2007:3.

100 Gqubule 2006a:37.

101 See Manchidi & Merrifield 2001:412-413.

102 Yescombe 2007:3.

particularly suitable policy instruments in the hands of the state to promote broad-based and sustained black economic empowerment. PPPs are used by both the national and provincial governments progressively to implement infrastructure and fulfil their service delivery commitments and "offer valuable opportunities for strong and sustainable BEE".[103]

Specific reasons and benefits for using PPPs in general are the operating expertise, enhanced efficiency and technological advantages that the private sector party brings to the partnership,[104] the reduction in reliance on taxes and government budget to finance the provision of infrastructure, and the increased inflow of investment it brings to the country.

The National Treasury is responsible for the regulation of PPPs and this is done in terms of the Public Finance Management Act (PFMA), more specifically, in terms of Treasury Regulation 16 to the PFMA.[105] In 2004 the National Treasury issued the Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships.[106] In this document the National Treasury clearly commits itself to the goals of BEE and declares its intention to make BEE integral to the total of the regulated PPP project cycle and to include BEE as part of the contractually binding terms in all PPP Agreements.[107] The policy objectives of Black Economic Empowerment for Public-Private Partnerships will be followed at all phases of the PPP project cycle. A PPP project cycle consists of the following phases:

(a) appointment of a Transaction Advisor by the Institution;

(b) Feasibility Study for Treasury Approval I;

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103 National Treasury. 2004. Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships: Preamble, p 5.

104 Manchidi & Merrifield 2001:416-418.

105 National Treasury. Public Finance Management Act, 1999: Amendment of Treasury Regulations in terms of section 76. Published in Government Notice R225 in Government Gazette 27388, 15 March 2005.

106 National Treasury. 2004. Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships.

107 Ibid, Preamble, p 5.

(c) PPP procurement, including:

a. bid documentation preparation for Treasury Approval IIA,

b. PPP procurement and value-for-money report on the preferred bid, for Treasury Approval IIB,

c. negotiations with the preferred bidder, and

d. Treasury Approval III for the final terms of the PPP Agreement and the Institution's plan for managing the PPP Agreement;

(d) managing the PPP Agreement.[108]

There are two procurement stages in this cycle at which time the BEE policy is to be applied, namely the selection and appointment of the Transaction Advisor, and secondly, in selecting a private sector party for the partnership. In consideration of the provisions of the PPPFA, when selecting the Transaction Advisor, 10 percent of the bid evaluation weighting will represent the BEE component thereof, and the remaining 90 percent will constitute the price and technical components of the bid. In evaluating a PPP bid from a private sector party, the BEE component of the PPP bid will represent 10 percent of the bid evaluation weighting and the financial and technical components will be weighted against the remaining 90 percent of the bid evaluation. In both the bid for Transaction Advisor and the PPP bid, the BEE component will be evaluated against a balanced scorecard designed for the specific appointment or bid. Bidders for appointment as Transaction Advisor must achieve a minimum threshold of 60 percent and bidders for the PPP must achieve a minimum threshold of 50 percent of the total BEE points. Failing to achieve this minimum threshold serves as a disqualification for any further consideration of the bid.[109]

During the Feasibility Study phase of the project cycle the state party will determine BEE targets which are realistically achievable in the particular project, and

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108 Ibid, Part III, p 16.

109 Ibid, Part I, p 6.

these targets will be weighed against project affordability, value for money and risk.[110] This then means that although the PPP BEE Balanced Scorecard provides benchmark targets, each project will receive individual consideration. The PPP BEE Scorecard consists of four elements with targets as guidance for measuring each element. A recommended bid evaluation weighting for each element is also provided. The total possible points that can be scored are 100 and the achieved points are then used in the evaluation of the bid together with the technical and financial components thereof. The scorecard elements with the respective sub-elements, targets, and weightings are as follows:

The first element, A, is Private Party equity with a recommended bid evaluation weighting of 20 percent.[111] Element B is Private Party management and employment and has a recommended bid evaluation weighting of 15 percent.[112] Thirdly element C deals with subcontracting with a recommended bid evaluation weighting of 50 percent.[113] The last element, D, is the local socio-economic impact of the bid or project and counts for a recommended bid evaluation weighting of 15 percent.[114] It would therefore seem that, if properly implemented and monitored, public private partnerships have the potential to both provide in South Africa's infrastructure, give value for money, as well as add to the process of black economic empowerment.[115]

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110 Ibid, Part III, p 18.

111 Element A consists of 4 sub-elements with its own PPP project target: A1: Black Equity (40 percent); A2: Active Equity (55 percent of A1); A3: Cost of Black Equity (Value for money); A4: Timing of project cash flows to Black Shareholders (Early and ongoing).

112 Element B consists of 4 sub-elements with its own PPP project target: B1: Black Management Control (Commensurate with A1 and A2); B2: Black Women in Management Control (15 percent of B1); B3: Employment equity (Compliant with law); B4: Skills development (1 percent of payroll).

113 Element C consists of 7 sub-elements with its own PPP project target: C1: Capital expenditure cash flow to Black People and/or Black Enterprises (30 percent); C2: Operating expenditure cash flow to Black People and/or Black Enterprises (30 percent); C3: Black Management Control (25 percent); C4: Black Women in Management Control (15 percent of C3); C5: Employment equity (Compliant with law); C6: Skills development (1 percent of payroll); C7: Procurement to Black Enterprise SMMEs (30 percent).

114 No sub-elements are provided under the local socio-economic impact of the project but should follow a sustainable, effective plan.

115 Penfold & Reyburn 2003 *et seq*:25-29.

3.5 The Broad-Based Black Economic Empowerment Act 53 of 2003

The BEECom report and BEE Strategy document culminated in the promulgation of the B-BBEE Act in 2003. This Act is the central element of the government's economic empowerment policy. The purpose of the Act is basically the achievement of economic justice and the promotion of the achievement of the constitutional right to equality.[116] The ultimate goal of the process of black economic empowerment also includes achieving a higher economic growth rate in the South African economy, which had been performing below its potential because of the large portion of society being excluded from meaningful participation in it. The Preamble to the Act states clearly that the Act is meant as a framework, within the parameters of which the Minister of Trade and Industry will issue Codes of Good Practice, Sector Transformation Charters and Sector Codes. The B-BBEE Act further creates a Black Economic Empowerment Advisory Council to advise the government on various issues and review progress in achieving the objectives of the Act.[117]

Basically, the effectiveness of the B-BBEE Act in achieving its objectives will largely depend on the instruments employed toward its implementation.[118] The Codes of Good Practice, Sector Transformation Charters and Sector Codes provide the detail and specific criteria for implementation of black economic empowerment programmes. The B-BBEE Act merely provides a framework for the implementation of programmes. The framework is created through the Act's provision for the establishment of a Black Economic Empowerment Advisory Council[119] and authorising the issuance of a Strategy[120] and Codes of Good Practice.[121] It further provides that the Codes must be taken into account by all public entities when setting qualification criteria for the issuing

116 B-BBEE Act: Preamble.

117 Sections 4-8.

118 See Balshaw & Goldberg 2005:71.

119 B-BBEE Act: section 4.

120 Ibid, section 11.

121 Ibid, section 9.

of licences, concessions or other legal authorisations, when developing and implementing preferential procurement policies, when determining qualification criteria for the sale of state-owned enterprises, and when entering into public-private partnerships.[122] The Act also allows for transformation charters and sectoral codes for specific sectors.[123]

The Strategy for Broad-Based Black Economic Empowerment

Section 11 of the B-BBEE Act provides that the Minister must issue a strategy for broad-based black economic empowerment. The strategy, consistent with the Act, has to provide all stakeholders with an integrated, co-ordinated and uniform approach to black economic empowerment. A plan for financing black economic empowerment has to be developed together with a system for the preparation of plans and effective reporting on the implementation thereof.[124]

Black Economic Empowerment Advisory Council

The Black Economic Empowerment Advisory Council is established in terms of section 4 of the B-BBEE Act. The function of the Council will be to advise the government on matters pertaining to black economic empowerment[125] and continually review progress in achieving black economic empowerment. The Council will facilitate partnerships between the public and the private sector.[126] The Council which was initially to be formed towards the end of 2008[127] was established during December 2009.[128]

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122 Ibid, section 10.

123 Ibid, section 12.

124 Cheadle, Thompson & Haysom 2005 *et seq*:1-10.

125 B-BBEE Act: section 5(a), (c), (d) and (e).

126 Ibid, section 5(f).

127 Johwa 2008:2.

128 Ensor 2009a:6; Jacks 2009b:1.

3.6 The Codes of Good Practice

Nearly thirteen years after the advent of democracy in South Africa and almost three years after publication of the first draft, the DTI gazetted[129] the first set of Codes of Good Practice in terms of section 9 of the B-BBEE Act. Without definite measurement guidelines, compliance with a process of economic empowerment was open to misinterpretation and abuse.[130] These Codes provide clarity on the drafting and implementing of BEE programmes and measures the contributions to empowerment made by enterprises. The Codes are standardised measurement instruments[131] organised into a series of codes and statements on various issues regarding the measurement of the different elements. Further statements on the subject of the elements will from time to time be gazetted by the Minister under each of the headings. Generally, Code 000 is the framework that sets out the BEE process and lays the fundamentals for measurement; Code 100 to Code 700 provides the detail of how each element of the generic scorecard has to be measured; and Code 800 deals specifically with measuring BEE in qualifying small enterprises.

In Code 000, Statement 000, the general principles and the generic scorecard are introduced. Definitions, interpretative principles, the scope of application of the Codes, the Generic Scorecard and various procedural matters are explained.

Key principles for understanding and applying BEE are set out in paragraph 2 of Statement 000. Emphasis is placed on substance taking precedence over form.[132] When implementing BEE strategies business entities should keep the fundamental objectives of BEE as their guideline and avoid manipulative strategies which merely attempt to accumulate the maximum points without giving consideration to the empowerment actually achieved.[133]

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129 Government Gazette No 29617, General Notice No 112, 9 February 2007.

130 Jack 2007:66.

131 Ibid; Hoffman 2008:94-95.

132 Codes of Good Practice: Code Series 000, Statement 000, para 2.1.

133 Balshaw & Goldberg 2008:83; Jack 2007:67.

On a more practical note, the Codes do not prescribe regular verification of enterprises. Obviously an entity looking to deal with government organisations will need to prove their level of compliance at relevant times and could consider doing determinations of compliance at regular intervals.[134] The Codes provide that measurement of an entity is done on the basis of compliance at the specific time of measurement.[135] Up-to-date compliance information would count in an entity's favour when having to provide proof of their level of compliance. Proof of compliance should be provided by means of supporting documentary evidence.[136] Without suitable documentation as proof an entity will not be able to claim recognition for BEE initiatives. When standard valuation methods are applied to measure the indicators, the same standard valuation method should be used consistently and an entity should not change its measurement standard.[137]

Two broadly formulated and general anti-avoidance provisions are included in the principles of the Codes. Entities misrepresenting or attempting to make misrepresentations regarding their BEE status risk disqualification of their entire scorecard.[138] According to Vuyo Jack[139] disqualification means that the specific entity will be deemed a non-compliant contributor for a term to be specified by the Minister of Trade and Industry.[140] The second anti-avoidance provision deals with enterprises that attempt to avoid compliance through circumventing the threshold levels set for Exempted Micro-Enterprises or Qualifying Small Enterprises.[141] The Codes anticipate that enterprises will attempt this through splitting or dividing entities into smaller enterprises. All entities involved in this scheme will have their scorecards disqualified.

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134 Jack 2007:68.

135 Codes of Good Practice: Code Series 000, Statement 000: para 2.3.

136 Ibid, para 2.6.

137 Ibid, para 2.7. See also Jack 2007:69.

138 Ibid, para 2.4.

139 Jack 2007:70. See also Balshaw & Goldberg 2008:83.

140 The author provides no authority for this statement. However, this definition is not provided either in the B-BBEE Act or the Codes of Good Practice.

141 Codes of Good Practice: Code Series 000, Statement 000, para 2.5.

Lastly, the Codes should be interpreted in a manner that is reasonable and consistent with the objectives of both the B-BBEE Act and the B-BBEE Strategy.[142]

Concerning their scope of application, the Codes define the entities that should apply the Codes to measure their BEE compliance levels. All public entities listed in schedule 2 or 3 of the Public Finance Management Act should use the Codes to measure their BEE compliance.[143] Schedule 2 of the Public Finance Management Act lists the relevant major public entities, for example, the Airports Company of South Africa, Alexkor Limited, ESKOM, and Telkom SA Limited.[144] Schedule 3 lists other national and provincial public entities, and national and provincial government business entities. Included in schedule 3 are entities such as the SA Revenue Service, the Road Accident Fund, the Human Sciences Research Council, the Public Investment Corporation Limited, and the SA Bureau of Standards.

Other entities that should use the Codes to measure their compliance include any enterprise that undertakes business with a public entity or organ of state, either directly or indirectly.[145]

The entities which are not included in the public entities listed in schedule 2 or 3 of the Public Finance Management Act are the national, provincial and local government. Therefore, for example, government departments do not have to use the Codes to measure their own compliance. Their contributions to BEE are regulated by the relevant provisions of the B-BBEE Act, section 217 of the Constitution, and the Preferential Procurement Policy Framework Act.

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142 Ibid, para 2.2.

143 Ibid, paras 3.1.1 and 3.1.2.

144 Others include Air Traffic and Navigation Services Company; Armaments Corporation of SA; CEF (Pty) Ltd (previously the Central Energy Fund); DENEL; Development Bank of Southern Africa; Independent Development Trust; Industrial Development Corporation of SA Ltd; Land and Agricultural Bank of SA; SA Broadcasting Corporation Ltd; SA Forestry Company Ltd; SA Nuclear Energy Corporation; SA Post Office Ltd; Trans-Caledon Tunnel Authority; Transnet Ltd; and any subsidiary or entity under the ownership control of the above public entities.

145 Codes of Good Practice: Code Series 000, Statement 000, paras 3.1.3 and 3.1.4.

The operation of the scope of application inadvertently establishes the binding nature of the BEE process for the private sector. Although neither the provisions of the B-BBEE Act nor the Codes are compulsory, any private entity *directly* or *indirectly* dealing with the government, either supplying goods or services or wishing to obtain licenses, tenders, etc., will have to offer proof of its BEE compliance, thus, its BEE status. Indirectly, it will impact upon private enterprises through the operation of the cascade or trickle-down effect of B-BBEE's procurement element, which would require evidence of an enterprise's BEE status. This status of the procuring private enterprise partly consists of the BEE status of the enterprises from whom it procures services and supplies for itself. It is this trickle-down effect which makes BEE compliance something that indirectly affects every level of the public and private sector. Therefore, through the leverage the state holds by means of its own substantial buying power, the Codes — as the sole basis[146] of measurement for BEE compliance — become binding on all enterprises.[147] Failing compliance any enterprise will feel the pinch in its own reduced revenue. This approach gives broad-based black economic empowerment a scope of application that covers nearly every level of economic activity. Through a series of incentives the Codes are attempting to spread empowerment through the entire economy by ensuring that enterprises insist that those entities with whom they transact should also be empowered.[148] Section 10 of the B-BBEE Act, together with Code 000 Statement 000 paragraph 3, codify the cascade effect which makes BEE compliance critical for every business entity in South Africa.

The Codes do make provision for different modes of measurement for certain specified entities. Qualifying Small Enterprises (QSEs) are defined as enterprises with an annual turnover of between R5 million and R35 million.[149] These enterprises have a separate measurement standard set out in Code Series 800 with a specific scorecard for

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146 Jack (2007:71) argues that through para 3.1.4 of Code Series 000, Statement 000 the Codes are the *de facto* measurement tool for any entity's BEE contribution.

147 See Scholtz 2007 *et seq*: para 1.2.; Jack 2007:44-45, 71; Cheadle, Thompson & Haysom 2005 *et seq*:1-8; Shubane & Reddy 2005:6.

148 Shubane & Reddy 2005:13; Balshaw & Goldberg 2008:18.

149 Codes of Good Practice: Code Series 000, Statement 000, para 5.1.

Qualifying Small Enterprises.[150] A business entity with an annual turnover of R5 million or less, which has to be confirmed by means of the necessary documentation,[151] is an Exempted Micro-Enterprise (EME) and deemed BEE compliant.[152] Another category of businesses specifically provided for in the Codes are Start-up Enterprises. These are defined as a "recently formed or incorporated Entity that has been in operation for less than 1 year. A start-up enterprise does not include any newly constituted enterprise which is merely a continuation of a pre-existing enterprise."[153] Anti-avoidance was clearly at issue here. It was contemplated that businesses would attempt to rely on this concession by means of annual reincorporation or dummy sales of enterprises. The sale of an existing running concern does not qualify it as a start-up enterprise in the hands of the new owners. Irrespective of a start-up enterprise's actual turnover, it receives recognition as an exempted micro-enterprise for a period of twelve months after inception,[154] and receives BEE status of a Level Four Contributor, in other words 100 percent B-BBEE recognition.[155] This is however not an unqualified exemption. It only operates in an unqualified sense when the enterprise deals with other businesses in the private sector. When a start-up enterprise transacts with the state or public entity as envisaged in section 10 of the B-BBEE Act,[156] it will not enjoy exempted status. For transactions between R5 million and R35 million, a QSE Scorecard has to be submitted and for contracts in excess of R35 million, a generic scorecard must be submitted.[157] The proposed exemption of start-up enterprises therefore has a somewhat limited application. It would only benefit a business which has a turnover of more than R5 million in its first year of business insofar as it contributes to the procurement element of private sector

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150 Ibid, para 5.2.

151 This should take the form of an auditor's certificate or similar certificate issued by an accounting officer or verification agency. See Code Series 000, Statement 000, para 4.5.

152 Codes of Good Practice: Code Series 000, Statement 000, para 4.

153 Codes of Good Practice: Schedule 1, Part 2, Definitions.

154 Ibid, Code Series 000, Statement 000, para 6.1.

155 Ibid, para 6.2.

156 Thus, when the start-up enterprise applies for licenses, concessions or other authorisations, wants to buy a state-owned enterprise, or seek to enter into a public-private partnership.

157 Codes of Good Practice: Code Series 000, Statement 000, para 6.4.

entities' generic scorecard. Several practical problems exist with establishing independent confirmation of an entity's start-up status.[158]

3.7 The scorecard and its elements

Generally, sound economic and business principles are the underlying basis of all elements. For example, promoting a black person to a management position would add points to a company's scorecard, but the decision to promote the individual should be made on a sound economic basis. This would mean that a person should be suitably qualified and trained for the specific type of job and promotions should not be awarded purely for points because this would amount to fronting. These decisions should be made against the broader background of what would be good for the business within which these promotions or appointments will be exercised. Black economic empowerment is always focused on economic growth and expansion and any fronting practices will inevitably not benefit the company or the broader economic growth objective. This would then mean that the core business of the company and its growth and expansion should count as the first priority.

The elements of B-BBEE as measured in the generic scorecard are set out in paragraph 7[159] of the Codes of Good Practice. These elements are firstly the ownership element which measures the effective ownership of enterprises[160] and carries a weight of 20 points of the total scorecard.[161] The element of management control measures the effective control of black people in an enterprise[162] and weighs 10 points.[163] Initiatives of organisations to achieve equity in the workplace under the B-BBEE Act and the

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158 Required in terms of Code Series 000, Statement 000, para 6.3. For discussion of these problems see Jack 2007:74.

159 Codes of Good Practice: Code Series 000, Statement 000, para 7.

160 Ibid, para 7.1.

161 Ibid, para 8.1.

162 Ibid, para 7.2.

163 Ibid, para 8.1.

Employment Equity Act are reflected in the employment equity element[164] which contributes 15 points to the scorecard.[165] Fourthly, the skills development element measures employers' initiatives designed to develop the competencies of black employees[166] and weighs 15 points.[167] The extent to which enterprises source goods and services from suppliers with strong B-BBEE procurement recognition levels is measured by the preferential procurement element[168] which carries a weight of 20 points of the scorecard.[169] The enterprise development element, which weighs 15 points,[170] measures the degree to which the organisation carries out initiatives intended to assist and accelerate the development and sustainability of other enterprises.[171] The last element, the socio-economic development and sector-specific contributions element measures the extent to which an organisation implements initiatives aimed at contributing to socio-economic development or sector specific initiatives that promote access to the economy for black people.[172] This last element contributes the last 5 points to the scorecard which then totals 100 points.[173]

The specific mechanisms for the measurement and calculation of the elements of the scorecard are provided in Code Series 100 to 700. Once a measured entity has determined its score by using the generic scorecard, the B-BBEE status of the organisation is awarded. An organisation's B-BBEE status translates into its B-BBEE recognition level based on the total points scored on the scorecard. The highest status an entity can attain is as a Level One Contributor, which means that it scored 100 or more points (which is possible through achieving bonus points available under the various elements) on the generic scorecard and has a 135 percent B-BBEE recognition level.

164 Ibid, para 7.3.

165 Ibid, para 8.1.

166 Ibid, para 7.4.

167 Ibid, para 8.1.

168 Ibid, para 7.5.

169 Ibid, para 8.1.

170 Ibid.

171 Ibid, para 7.6.

172 Ibid, para 7.7.

173 Ibid, para 8.1.

Scoring 30 points or less result in an organisation being classified as a Non-Compliant Contributor with a 0 percent B-BBEE recognition level.[174]

Certain groups of black people are purposely targeted in order to specifically advance their interests. These are black women and black disabled persons, black youth, black people living in rural areas and black unemployed people, and are granted enhanced recognition in various criteria throughout the Codes.[175] Accordingly, black women should account for between 40 percent and 50 percent of the beneficiaries of all elements of the generic scorecard. Black disabled persons, black youth, black people living in rural areas and black unemployed people, should form between two and three percent of the beneficiaries of all elements of the generic scorecard.[176] If a measured entity fails to achieve these particular goals, it would be penalised because it would not be able score the maximum points under each element.

Ultimately the object of the process of economic empowerment is to move people out of the vicious cycle of poverty to become economically independent and empowered. This would entail that they be in control of economic resources and be fully integrated in the mainstream of economic society.[177] In attempting to achieve this, different levels of needs and abilities that exist in the designated section of the population should be taken into account. Different levels of skills and education and varying socio-economic needs make a one-size-fits-all approach to empowerment impossible. The different elements of the scorecard are thus aimed at addressing the vast scope of requirements.

For example, when considering the skills development element of the scorecard it is clear that the intended beneficiaries are persons that are capable of economic survival, but need additional training opportunities and skills to advance themselves.[178] The employment equity element and the enterprise development element are further tools to advance this group's progression to ultimately become economically empowered.

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174 Ibid, para 8.2.

175 Ibid, para 9.

176 Ibid, paras 9.1 and 9.2.

177 Balshaw & Goldberg 2008:29; Jack 2007:59.

178 Jack 2007:58.

Certain individuals are already in possession of the necessary skills but lack the opportunities and resources to acquire ownership and control of business resources. In this instance the ownership, enterprise development, preferential procurement and management elements of the scorecard are specifically targeted to promote these persons in their efforts to become economically empowered. The employment equity element could also play a role in this instance.

This begs the question what would become of individuals from the designated groups once they can be labelled "economically empowered". Vuyo Jack states it as follows:

> "Once BEE beneficiaries operate in the mainstream economy without the need for assistance envisaged by BEE, they should no longer monopolise the opportunities presented by BEE but allow other people to use the policy to gain access to the mainstream economy.
>
> The principle of graduation is simple — if no one graduates, the school will soon become too full and all the students will suffer."[179]

It is essential that a broad basis of participation is established. This will only be achieved when companies that had already benefited compete in areas other than only the BEE arenas.[180] At the moment there are no provisions to legally exclude repeat beneficiaries of BEE. The "creamy layer" test developed in India to exclude designated individuals who have previously been advantaged from again benefiting from affirmative action measures could be informative in this respect.[181]

3.7.1 Element 1: Ownership

The ownership element is of utmost importance. Black people hardly own anything in the economy — in most economic sectors, black people own less than one percent.[182]

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179 Ibid, at 59-60.

180 Shubane & Reddy 2007a:9.

181 This will be discussed in more detail below in Chapter 6, para 6.2.2.4. See further discussion on issues associated with repeat beneficiaries Chapter 6, paras 6.1.2 and 6.1.8.

182 Gqubule 2006d:103.

Due to a number of macro-economic factors, the government's fiscal and monetary policies, and the fact that capital reform was left largely to the private sector, very little equity reform has occurred over the last 12 to 14 years.[183] In general people view empowerment as simply the transfer of shares to a group of black people.[184]

The ownership control element became particularly relevant when, at the end of the first wave of narrow-based[185] BEE transactions in 1999-2001, it became evident that many of the so-called black investment companies were largely managed by white males. For example, Wiphold Financial Services, which was set up by the Women's Investment Portfolio Holdings, had an all white board of directors. For the greater part the boards of directors of African Life and Metropolitan Life, which were deemed leading BEE companies, consisted of white males.[186] It became clear that blacks were not in control of equity and were given token non-executive positions. A transformation of BEE transactions in essence was thus needed.[187] Within the context of BEE, ownership should not be seen as merely giving equity to black people without giving them the opportunity to gain insight into managing and controlling their resources.[188] The transfer of equity is usually accompanied by a slow process of wealth creation associated with empowerment.[189]

The ownership element of the scorecard seeks to address problematic issues which became evident after the first wave of BEE transactions. Therefore, in order to measure the substance of ownership and the real benefit which accrue to black people from that ownership, the scorecard was divided into three sub-elements. Shareholding is divided into its two components, namely, the voting rights and the right to share in economic

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183 Ibid, at 104.

184 Shubane & Reddy 2007a:5.

185 Narrow-based BEE refers to the earlier attempts of black economic empowerment which focused only on ownership and management control. It benefitted only those black people who were able to acquire an equity stake in companies or were appointed in senior management positions. This obviously had limited consequence in reality and only reached a small group of beneficiaries.

186 Gqubule 2006d:119 citing Edigheji 1999.

187 Interpretative Guide 2007:32.

188 Jack 2007:116.

189 Shubane & Reddy 2007a:9.

benefit resulting from that holding (i.e. dividends, etc.). Experience has however shown that complex financing transactions dilute the economic value of the shares and may even result in economic losses for the black owner. Therefore, another sub-element was introduced, namely ownership realisation. Together, these three indicators give the most reliable measurement of actual ownership, attending to both the legal structure and economic substance of ownership.[190] Obtaining shares in listed companies, for example, would probably have been more beneficial if these were obtained before 2002. This is because of an enormous growth in the equity markets in the period following. Most of the wealth would however have been wiped out from June 2008 through December 2009 due to worsening international market conditions.

In order for a measured entity to score the possible 20 points from the ownership element, the entity must follow a particularly difficult and detailed prescribed process in order to determine its score.

(a) Voting rights

Generally, for every share held in a company, the shareholder has one vote.[191] Therefore, voting rights mean control of the company. Control in an enterprise is achieved through holding the majority of voting rights. The more exercisable voting rights held, the more control the owner of these rights has in the enterprise. It is vital that the voting rights must be exercisable by the black person holding the shares otherwise these shares will not qualify for measurement on the scorecard. This has been a contested issue because in some instances black shareholders have ceded their voting rights to financiers of the shares.

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190 Jack 2007:119.

191 Companies Act 61/1973: sections 193, 195. See also Close Corporations Act 69/1984: section 46.

(b) Economic interest

The Codes define "economic interest" as "a claim against an Entity representing a return on ownership of the Entity similar in nature to a dividend right, measured [by] using the Flow Through and, where applicable, the Modified Flow-Through Principles".[192]

Deciding on what actually constitutes economic interest is not easy in practice. Previous definitions of economic interest were aimed at anti-avoidance measures. The Codes of Good Practice on B-BBEE — Phase One[193] defined an economic interest as

> "a participant's claim against an enterprise representing a return on ownership of the enterprise, measured in accordance with the flow-through and modified flow-through principles. In this regard, a participant's entitlement to receive any payment or part payment on the participant's claim from a measured enterprise that is not in the nature of a return on ownership in that measured enterprise, will be treated as an economic interest if such payment is:
>
> - Not [made at] arm's length;
> - Not market related;
> - Mala fide; or
> - Without commercial rationale; or
> - Intended to circumvent the provisions of this statement or provisions of this Act."

The term was therefore widely defined to include regular distribution of income and gains of a company, and also to capture payments made which were intended to reduce profits so that the total available distributable amount would be lowered.[194] A reduction in distributable profits would dilute black persons' economic interest in the company. Although the anti-avoidance aspect of the definition was not expressly retained in its entirety in the final Codes of Good Practice, the general gist of the

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192 Codes of Good Practice: Schedule 1, Part 2, Definitions. See below under "Key Measurement Principles" (para d) for further discussion of these concepts.

193 The BEE Codes of Good Practice — Phase 1, Statement 100: para 1.19.

194 Scholtz 2007 *et seq*: para 5.9; Jack 2007:124.

principle is still the same. Cliffe Dekker[195] cautions that although some commentators refer to economic interest as being virtually the same thing as the entitlement to dividends, this would not necessarily be the case. It is summed up as follows:

> "Preferent dividends resulting from a debt financing arrangement do not always constitute economic interest, while non-dividend payments to shareholders which are excessive, paid in bad faith or intended to circumvent the BEE Act and the Codes, are treated as economic interest."

As a general rule though, it is acceptable to state that an entitlement to dividends will amount to economic interests, while only in exceptional circumstances would economic interests not amount to dividend entitlement.

The economic interest sub-element of the ownership scorecard seeks to benefit particular beneficiaries. Therefore the sub-element is broken down into three indicators. Primarily, black people are to benefit from the economic interest held by them in an enterprise, and, secondly, black women are identified as a separate priority group. Further points are awarded for the economic interest held by black designated groups, black participants in employee ownership schemes, black beneficiaries of certain types of broad-based ownership schemes, and black participants in co-operatives. Besides black women, these groups are further priority groups amongst which the benefit of economic interest is more equitably distributed. According to Jack,[196] the rationale for granting extra points for these groups is to broaden the base of distribution and to avoid a situation where the same people are repeatedly the beneficiaries of BEE.

Black designated groups are defined in the Codes[197] and means:

> (a) unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution;

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195 Cliffe Dekker 2007:17.

196 Jack 2007:128.

197 Codes of Good Practice: Schedule 1, Part 2, Definitions.

(b) Black people who are youth as defined in the National Youth Commission Act of 1996;[198]

(c) Black people who are persons with disabilities as defined in the Code of Good Practise on employment of people with disabilities issued under the Employment Equity Act;

(d) Black people living in rural and under-developed areas.

It is worth noting that black aged persons, included in the draft codes, have been removed from the definition of black designated groups.

(c) Realisation points

In many instances black people who hold shares in an entity have encumbered those shares and the rights attached thereto following finance arrangements or debt attached to those shares. Complicated debt structures have been used so as to circumvent the general objective of BEE, that is, to increase the capital held by black people in the economy. Although black people may legally own the shares, the economic benefits flow to the original owners or financiers of those shares.[199] Two concepts for which points are awarded were introduced on the scorecard to correct the situation of abuse which stemmed from this type of manipulation which was especially evident after the first wave of BEE transactions in the late 1990's.

The first is "net value" points which measures the level of indebtedness of black people's ownership in the measured entity incurred for the sole purpose of acquiring such ownership. The calculation of net value points is done by means of specific formulas provided in the Codes.

The second is the points awarded for "ownership fulfilment", in which case points are not awarded until all conditions which might prevent black shareholders from receiving the full benefit of their shares have been removed. Thus, when black people

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198 Act 19/1996. The National Youth Commission Act is repealed by the National Youth Development Agency Act 54/2008.

199 Jack 2007:129; Cliffe Dekker 2007:27; Shubane & Reddy 2007a:7.

hold an economic interest in a measured enterprise and the rights flowing from the interest have been encumbered with financing agreements by means of which the acquisition of those rights were facilitated, this encumbrance has to be removed before the points can be awarded. However, there is a further condition for scoring ownership fulfilment points. It is only once the measured entity scores full marks (seven points) for the net value sub-element, that points can be scored under ownership fulfilment. Thus the black shareholder has to be released from all debt outstanding to third parties for the shares, including the debt owed to the measured entity itself,[200] before points will be awarded for ownership fulfilment. This would make ownership fulfilment one of the more difficult points to score. The measured entity cannot force its shareholders to repay debt. Without control over the debt repayment it would be difficult to score here.

(d) Measurement principles

Certain key measurement principles are provided in the Codes[201] which are essential in determining an enterprise's score under the ownership element of the scorecard. These will briefly be discussed below.

(d.1) The "flow-through principle" and the "modified flow-through principle"

The application of the flow-through principle is described[202] as follows:

> "As a general principle, when measuring the rights of ownership of any category of black people in a Measured Enterprise, only rights held by natural persons are relevant. If the rights of ownership of black people pass through a juristic person, then the rights of ownership of black people in that juristic person are measurable. This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a black person holding rights of ownership."

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200 Companies Act: section 38.

201 Codes of Good Practice: Code Series 100, Statement 100, para 3.

202 Ibid, para 3.2.1.

This is a fundamental principle in the Codes. When the modified flow-through principle is unclear the measured entity must revert back to the flow-through principle. Provision for such a principle is clear when considering the way in which listed companies, in particular, operate. Group holdings of shares and company groups are common arrangements, and provision for this type of holding was essential. But it was also necessary to avoid negating the objectives of BEE through the use of complicated funding structures.

What the principle basically entails is that when shares are held by black people through another legal entity or an intermediary entity, for example, trusts etc., the "flow-through principle" is applied to measure the actual benefit that trickles down to black persons, or the actual voting rights held by black people and the level of black participation in that economic interest.[203] Voting rights and economic interest are diluted when held in a multi-tiered entity. The flow-through principle is a mathematical formula to determine the real benefit accruing to black people.[204]

The "modified flow-through principle" has limited application and must only be applied when measuring the sub-elements of voting rights and economic interest under the ownership scorecard,[205] but not when economic interest and voting rights are used in other sub-elements or calculations, as, for example, when calculating the realisation points on the scorecard. The Codes provide[206] that

> "[i]n calculating Exercisable Voting Rights under paragraph 2.1.1. and Economic Interest under paragraph 2.2.1 the following applies: Where in the chain of ownership, black people have a flow-through level of participation in excess of 50%, then only once in that chain may such black participation be treated as if it were 100% black."

This means that a measured entity can bulk up the participation of one black majority-owned company to 100 percent black-owned in an ownership structure for every

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203 Cliffe Dekker 2007:18.

204 Ibid, at 17; Jack 2007:134.

205 Although in previous drafts of the Codes the modified flow-through principle was only applicable to the voting rights sub-element of the ownership scorecard.

206 Codes of Good Practice: Code Series 100, Statement 100, para 3.3.2.

chain of ownership involved in the measured entity. This can only be done on one tier in a chain of ownership.

The reason for the inclusion of such a principle can be explained as follows: when black businesses are looking for finance they have one of two choices, selling equity to non-black people or increasing their debt through finance from outside. Increasing debt finance is difficult to obtain and carries risks for black parties. On the other hand, selling an equity stake in their business to non-blacks will result in a dilution of the score under the ownership element. They would have to limit the sale of equity to only black people and this would considerably shrink the number of available up-takers of equity. It became necessary to accommodate this in one or other way in the overall scorecard and this was done through the introduction of the modified flow-through principle.[207]

(d.2) The exclusion principle

The exclusion principle is applicable only to the measurement of ownership and provides for the exclusion of certain types of ownership from measurement of ownership in the measured entity. This principle concerns several types of ownership,[208] namely ownership held by organs of state or public entities, ownership held directly by mandated investments, multinationals, and ownership held directly by Section 21 companies or companies limited by guarantee. All government ownership has to be excluded from the calculation, unless the concerned entity has been designated as being a BEE facilitator by the Minister.[209]

Whereas stakes held by the government have to be excluded, mandated investments may be excluded, limited to a maximum of 40 percent of ownership in the measured

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207 See Jack 2007:136.

208 Under the Key Measurement Principles in para 3 of Statement 100 provision is made for only government ownership and ownership held through mandated investments. Other exclusions discussed here were added due to the exclusions provided for elsewhere in the Statement.

209 Codes of Good Practice: Code Series 100, Statement 100, paras 3.4.1, 3.4.2, 3.4.3.

entity.[210] An entity cannot choose individually which mandated investments it wants to include and which to exclude. Once it elects to exclude one mandated investment, all mandated investment must be excluded, and *vice versa*.[211] In terms of the definitions section of the Codes of Good Practice, mandated investment means "any investments made by or through any third party regulated by legislation on behalf of the actual owner of the funds, pursuant to a mandate given by the owner to a third party, which mandate is governed by that legislation."[212] This type of investment was previously referred to as indirect ownership. When an entity chooses to include mandated investment in its ownership, the measured entity has to show economic interest and net value attributable to black people and illustrate how it promotes shareholder activism. The included portion of Mandated Investment is limited to a maximum of 40 percent of total value of the equity of the measured entity.[213]

When South African multinationals have an ownership stake in the measured entity, all non-South African operations of such multinationals may be excluded for purposes of calculating black participation in ownership.[214]

Ownership held by Section 21 companies or companies limited by guarantee may be included or excluded for purposes of measuring the ownership in a measured entity. When the measured entity chooses to exclude these companies, the exclusion is limited to a maximum of 40 percent of the ownership held by Section 21 companies or companies limited by guarantee.[215] However, if these companies house a Broad-Based Ownership Scheme or an Employee Ownership Scheme it will be subject to the provisions specific to those in Code 100. When a measured entity chooses to include the ownership held by

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210 Ibid, paras 3.4.4, 3.4.5.

211 Ibid, para 3.4.6.

212 Codes of Good Practice: Schedule 1, Part 2, Definitions.

213 Codes of Good Practice: Code Series 100, Statement 100, para 3.4.5.

214 Jack 2007:144; Cliffe Dekker 2007:19.

215 Codes of Good Practice: Code Series 100, Statement 100, para 6.2.

Section 21 companies or companies limited by guarantee it should take note of the following provisions in the Codes:[216]

> "6.3 A Measured Entity electing not to exclude section 21 companies or companies limited by guarantee when it is entitled to do so, may either treat all of that ownership as non-black or obtain a competent person's report estimating the extent of black rights of ownership measurable in the Measured Entity and originating from those section 21 companies or companies limited by guarantee.
>
> 6.4 Black Participants in a Section 21 Company holding rights of ownership in a Measured Entity may contribute:
>
> 6.4.1 a maximum of 40% of the total points on the ownership scorecard of the Measured Entity if they meet the qualification criteria for Broad-Based Ownership Schemes set out in Annexe 100(B).
>
> 6.4.2 100% of the total points on the ownership scorecard of the Measured Entity if they meet the additional qualification criteria set out for Broad-Based Ownership Schemes in Annex 100(B)."

(d.3) Continued recognition of ownership after the sale or loss of shares by black participants

The idea behind BEE was to create sustained and long-term ownership of capital for black people in the economy and by these means drive the process of transformation. It soon became problematic for black investment companies to fully utilise or obtain liquidity. Companies selling equity to black investors lose BEE points when these black shareholders sell their shares or default on financing agreements initially entered into to obtain the shares. Therefore companies contractually locked black shareholders in to prevent the sale of shares in order to not lose their BEE score. The continued recognition principle was introduced as a middle ground for companies to retain their BEE score while allowing black shareholders to dispose of shares at any time they would so wish. The black shareholder has easier access to capital while continuing to aid the process of

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[216] Ibid, paras 6.3, 6.4.

transformation in the measured entity through the continued recognition of ownership. The continued recognition principle may be applied in two situations, namely when the black participant sells the shares to gain access to liquidity or when the black participant used the shares as guarantee for finance and defaults on the loan agreement, and the shareholding reverts to the financier.

This continued recognition in case of loss or sale of shares by black shareholders is subject to certain requirements:

(a) the black participant held the shares for a period of at least three years;

(b) value must have been created[217] in the hands of black people;

(c) transformation has taken place within the measured entity.[218]

The continued recognition of ownership is limited to a maximum of 40 percent of the score on the ownership scorecard. Determining the attributable ownership points is done through multiplying the following elements:

(i) The value created in black hands as a percentage of the value of the Measured Entity at the date of the loss of shares as a percentage of Measured Entity's value;

(ii) The B-BBEE status of the Measured Entity based on the balanced scorecard at the date of measurement; and

(iii) The ownership points attributable to the Measured Enterprise on the date of sale or loss.[219]

The continued recognition is not limited for a specific period by the Codes. However, in the case of loss of shares by the black shareholder, additional rules apply:

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217 Value created is determined in a formula using net value as basis of calculation.

218 Codes of Good Practice: Code Series 100, Statement 100, para 3.5.1.

219 Ibid, para 3.5.4.

- a written tripartite agreement between the Measured Enterprise, the black participant and a lender must record the loan or security arrangement, unless the Measured Entity is the lender; and

- the period over which the points were allocated or recognised will not exceed the period over which the shares were held.[220]

(d.4) Treatment of different types of ownership

To have any real value, measurement should offer useful comparatives. In order to be aptly measured, different types of ownership should be standardised in order to be measured in the same way. To determine how much of a measured entity's equity is held by black people, a distinction should be drawn between direct and indirect ownership.[221] Black direct ownership is not difficult to ascertain. However, the same does not hold true when black ownership is held through participation in pension funds, broad-based groups, unit trusts, etc. When determining whether the black person enjoys the full ownership benefit, thus economic benefits, voting rights, and carries the risks accompanied with ownership, the task becomes extremely complex. Indirect ownership[222] is an umbrella term for different forms of ownership like mandated

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220 Ibid, para 3.5.3.

221 In Codes of Good Practice: Code Series 100, Statement 100, para 3.1.1 provision is made for different types of ownership. It provides as follows:

"3.1.1. Black people may hold their rights of ownership in a Measured Entity as direct Participants or as Participants through some form of business such as:

3.1.1.1 a company with shares;

3.1.1.2 a close corporation;

3.1.1.3 a co-operative;

3.1.1.4 any form of juristic person recognised under South African law;

3.1.1.5 a partnership or other association of natural persons;

3.1.1.6 a Broad-Based Ownership Scheme;

3.1.1.7 an Employee Ownership Scheme; and

3.1.1.8 a Trust."

222 See Jack 2007:154.

investments,[223] broad-based ownership,[224] government ownership, and other types of ownership which would include private equity funds, trade union funds, and investment by stokvels. The Codes of Good Practice provide additional scoring principles for these types of ownership,[225] but also additional rules applicable to different types of enterprises.[226] Recognition of these additional means of holding equity in an enterprise again points to the government's objective of spreading empowerment as wide as possible and countering the perception that equity empowerment has only succeeded in enriching a select few politically connected individuals.[227]

Cheadle, Thompson and Haysom hold[228] the opinion that the provision made for broad-based ownership schemes and employee schemes, as well as the special incentives for participation of such schemes in the generic scorecard, will go a long way to ensure that empowerment is indeed broad-based. This was based on the revised codes published for public comment in 2005, prior to the gazetting of the final codes in February 2007. The final Codes do however place a cap on the credit which an institution may be awarded for the participation in these schemes.

3.7.2 Element 2: Management control

Black participation in the management of a company or representation on the board of directors of a company is essential in achieving greater control for black people over the country's economic resources. A company's management is responsible for the daily operation of the business and active participation in this section will ensure involvement in and control over assets and resources. Earlier attempts at black economic empowerment saw black people being appointed to seats on the boards of companies or

223 For example, pension funds, long-term insurance products.

224 For example, broad-based ownership schemes, employee ownership schemes, public benefit organisations.

225 Codes of Good Practice: Code Series 100, Statement 100, paras 4, 5, 6, 7, 8, and 9.

226 Ibid, Annex 100(B).

227 Shubane & Reddy 2005:14.

228 Cheadle, Thompson & Haysom 2005 *et seq*:1-8.

given equity in companies without having any real control over or say in the day-to-day matters of running a company.

The management control element of the scorecard aims to measure the participation of black people at board and top management level in an organisation.[229] Management on the scorecard can be split into two parts, namely participation on the board of directors, and top management.[230] With respect to control over a company, it is the aspect of board membership that is particularly important. A black board member will usually wield a lot more control and power than a black shareholder.[231] A certain level of window-dressing has taken place in the past where companies looking to avoid complying with provisions of the Codes appointed black persons as non-executive board members. Jack defines "board member" for the purposes of the Codes as follows:[232]

> "People appointed by the participants, normally shareholders, in the measured entity to undertake management control of the measured entity. Board members have a primary function of control over the measured enterprise over and above, if any, participation in the day-to-day running of the enterprise."

Control is the central element here.

With regard to levels of management, it should be noted that in the management element of the scorecard only top management are measured. Although other levels of management are typically found in enterprises, only senior top management and top management are accommodated under Code Series 200. Other typical management levels, i.e. middle and junior management, are accounted for under Code Series 300, which deals with employment equity. The reason for this is that although middle and junior levels are representative of management and do carry responsibility, very little, if

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229 Codes of Good Practice: Code Series 200, Statement 200, para 4.1.

230 Jack 2007:228.

231 Cilliers & Benade 2000:104, 137; Jack 2007:229.

232 Jack 2007:228.

any, control is vested in these individuals.[233] The Codes[234] define "senior top management" and "top manager" as follows:

> "Senior Top Management means employees of a Measured Entity who are:
>
> (a) members of the occupation category of "Top Management" as determined using the EE Regulations as qualified in a Sector Code;
>
> (b) appointed by or on the authority of the Board to undertake the day-to-day management of that Measured Entity and who:
>
> (i) have individual responsibility for the overall management and for the financial management of that Measured Entity; and
>
> (ii) actively involved in developing and implementing the Measured Entity's overall strategy."
>
> "Top Manager means employees of a Measured Entity who hold rights of ownership, serve on the Board, undertake the day to day management, have overall responsibility for the overall financial management and are actively involved in developing and implementing the overall strategy of the Measured Entity."

The Codes[235] also give examples of positions commonly viewed as being senior top management, and other top management as guidelines for entities to classify levels of management. The chief executive officer, the chief operating officer, the chief financial officer and other people holding similar positions are classified as "Senior Top Management". Positions such as the chief information officer, the head of marketing, the head of sales, the head of public relations, the head of transformation, the head of human resources and other people holding similar positions will fall under "Other Top Management".

What differentiates these managers from other senior, middle and junior management is the fact that they have the power to influence policy in the enterprises they are involved in. It gives these individuals a measure of operational involvement in

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233 Ibid, at 234.

234 Codes of Good Practice: Schedule 1, Part 2, Definitions.

235 Codes of Good Practice: Code Series 200, Statement 200, para 3.

management which is important for two reasons. Firstly, it engages previously excluded individuals to the right of control over operations, and, secondly, it is instrumental in creating diversity in an organisation in order to reach a level of transformation to a more equal society.[236] Just as the employment equity element categorises junior, middle and senior management levels so as to carefully track the progress made by black people on the corporate ladder, a distinction is made between senior and top management. To date, few black people have been appointed to positions in top management, and the evaluation of this state of affairs by means of the scorecard is what drives the process of incorporation of black people to these strategic positions in business.[237]

The management control scorecard makes further distinctions within the two main categories it measures. Under board participation, a differentiation is made between board members who have voting rights and black executive directors. Because board members with voting rights will likely have greater influence over matters of a strategic nature within the company, this category carries more weight.[238] Top management are divided between black participation in senior top management and other top management, with senior top management carrying more weight for the same reason.[239]

Once again, in the evaluation process, it is the *substance* of the job and not the title that is decisive in awarding points on the scorecard.[240]

The company has to use the information contained in the reports filed with the Department of Labour, in terms of the Employment Equity Act, to complete this element of the scorecard.[241]

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236 Jack 2007:235.

237 Ibid.

238 Exercisable voting rights held by black board members weigh 3 points while black executive directors only account for 2 points.

239 Black senior top management rewards the entity with 3 points whereas other top management only weighs 2 points.

240 Codes of Good Practice: Code Series 000, Statement 000, para 2.1.

241 Codes of Good Practice: Code Series 200, Statement 200, para 4.2.

This element of the scorecard presents one of the few opportunities for double scoring. When a black person is the Chief Executive Officer (CEO) of a company, he/she will score under board participation as well as under senior top management. However, when a person is measured under senior top management, that person may not be scored again under the category for other top management.[242] Furthermore, the limitation of measurement of top management under either Code Series 200 or 300 avoids double counting of the same persons under both. When an organisation does not distinguish between senior top management and other top management, allowance is made to combine these two under one indicator. Provision is also made to combine senior management under the management control scorecard when a company does not make a distinction between top management and senior management, but this will then not be measured again under Code Series 300. This is however not a very practical approach because combining these will result in the target for management control being increased. The targets for management participation are generally very high and difficult to attain.[243] Jack argues that companies should look within themselves and fast track the careers for promising black people to earn points on this element of the scorecard. Once again it should be noted that these targets are set to be achieved over a ten year period and is part of the process of BEE. A bonus point is awarded for the appointment of black independent non-executive directors which would amount to 40 percent of the total number of independent non-executive directors.

3.7.3 Element 3: Employment equity

Employment equity has been an issue for the government which pre-dates its inclusion as an element in the generic scorecard, and the enactment of employment equity legislation is testament to this.[244] Equality in the labour market and affirmative measures in employment were a key priority to eliminate job discrimination and the resulting

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242 Jack 2007:240-241.

243 Ibid, at 241.

244 Employment Equity Act.

economic inequality which were the direct result of apartheid legislation. Employment is a key element through which inequality can be corrected, and is instrumental in the empowerment of the previously disadvantaged. By including an employment equity element on the scorecard, the government was perhaps trying to place new focus and emphasis on employment equity in the market. The Enployment Equity Act (EEA) has not yet produced the results it set out to do in 1998. The EEA had as its main objective the creation of a workplace representative of the country's demographics in all occupational categories and levels by removing discrimination from the workplace and accelerating integration by providing for affirmative action measures.[245] Employment equity is very difficult to achieve in the absence of economic growth and an increased number of available jobs. Economic growth creates increased job opportunities and an increased uptake of the growing number of jobseekers in a fast expanding labour force. This is why one should not lose sight of the overall objective of the government's economic growth strategy. On the other hand, poor skills training and education result in the pool of suitable candidates from which employers can draw being less than adequate. Therefore employment equity and the skills development element cannot be viewed as mutually exclusive.

The B-BBEE Act and Codes of Good Practice do not conflict with the provisions of the Employment Equity Act, but their scope of beneficiaries is more limited than that of the EEA. The EEA provides for the advancement of persons belonging to designated groups,[246] which include white women and white people with disabilities, whereas these two groups are not designated as beneficiaries in terms of the B-BBEE Act and Codes.[247] The fact that different legislative provisions from different acts regulate employment equity could complicate compliance[248] with B-BBEE requirements and the development of an employment equity plan under the Employment Equity Act.[249] Measurement of

245 Ibid, section 2.

246 Ibid, section 1, definition of "designated groups".

247 See definition of Black people in Statement 000.

248 Pretorius, Klinck & Ngwena 2009 *et seq*:10-6.

249 Employment Equity Act: sections 13, 20.

employment equity under the scorecard differs from the measurement and reporting in terms of the Employment Equity Act.[250]

Although fair representation on all occupational levels is the objective of both the EEA and the Codes, this does not mean that mere numerical representative compliance would fulfil this objective. Active participation and contribution by designated groups at all levels of employment is key to satisfying this objective, but so is income equality. Persons doing comparable work and with comparable responsibility should earn comparable remuneration. The EEA specifically requires that income differentials be reported by employers as part of their Employment Equity Report to the Director-General in the Department of Labour.[251]

The employment equity element of the scorecard emphasises that this element is based on preference for previously disadvantaged persons, and not on the exclusion of white persons. This once again forms part of the point of departure, premised on the fact that black people should be empowered in employment through the creation of more job opportunities and not through replacing white people with black employees.[252] The employment equity element is embodied in Code Series 300 of the Codes of Good Practice. The flexibility of this element resides in the fact that the Employment Equity Scorecard accommodates both compliance targets for periods 0 to 5 years and 6 to 10 years.[253] However, unless a measured entity achieves a sub-minimum of 40 percent of each of the targets set out in the scorecard, it will receive no points under the employment equity element.[254]

Code Series 300 measures the representation of black employees in the measured entity's organisation. The term "employee" is defined[255] as having the same meaning as

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250 Pretorius, Klinck & Ngwena 2009 *et seq*:10-6.

251 Employment Equity Act: section 27.

252 Jack 2007:252.

253 Codes of Good Practice: Code Series 300, Statement 300, para 2.1; Jack 2007:252.

254 Codes of Good Practice: Code Series 300, Statement 300, para 3.1.1.

255 Codes of Good Practice: Schedule 1 Part 2, Definitions.

that which is set out in the Labour Relations Act.[256] In terms of the Labour Relations Act[257] an employee is defined as

> *(a)* any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer.

Persons not falling within the scope of this definition may not be measured under the employment equity element of the scorecard and will fall under a category of non-employees which will be measured under the preferential procurement element of the scorecard. This group, which is excluded from Code Series 300, will include casual labourers and independent contractors. The exclusion is aimed at anti-avoidance measures. The preferential procurement element of the scorecard accounts for 20 points, whereas employment equity only accounts for 15 points. In an attempt to better scores under employment equity, some measured entities appoint senior white staff on a contract basis. However, white management personnel who are appointed on a contract basis are measured under the preferential procurement element, which will then weigh more heavily on the measured entity's scorecard as opposed to keeping these contractors as employees and scoring less under the employment equity element.[258]

The employment equity scorecard categorises employees as measureable in the categories senior management, middle management, and junior management. The Codes do not define these occupational levels and this could lead to some measure of uncertainty. Occupational levels and categories are differentiated according to the economic substance of the particular job, and not by applying differentiations based on job titles or remuneration. These occupational levels do not correspond directly to the

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256 Labour Relations Act 66/1995.

257 Ibid, section 213.

258 See Jack 2007:255.

occupational levels provided in the employment equity regulations.[259] Jack[260] lists factors that will assist in determining the economic substance of an occupational level:

(i) the level of responsibility carried in the specific occupation;

(ii) the appropriate level of remuneration for the job;

(iii) the inherent authority of the position; and

(iv) decision-making authority of the position.

The employment equity element of the scorecard measures the representation of black people on various occupational levels and does not take black people in the lower occupational levels into account, except for the representation of black people with disabilities. It does not measure the overall representation of black people in an enterprise. Jack[261] states that the rationale behind this is that there is generally an overrepresentation of black people on lower occupational levels and that the general idea of this element is to create incentives in areas where change is critical.

There is a possibility that persons counted under senior management in employment equity may be measured again under the management element on the scorecard. Specifically at risk are employees who serve as executive directors on the boards of companies. However, Code Series 200 provides that senior management measured under the management element in statement 200 cannot be measured under statement 300.[262]

The measured entity can score a maximum of 15 points from the employment equity element.

Provisions are made for smaller entities using the generic scorecard where the occupational levels are not so specifically differentiated. Target levels where the

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259 General Administrative Regulation, Annexure 2. Government Gazette 29130, General Notice No R841, 18 August 2006.

260 2007:259.

261 Ibid, at 256.

262 Codes of Good Practice: Code Series 200, Statement 200, para 4.3.

measured entity does not have any measurable level of employees are allocated to and grouped with the target of the lower occupational levels.[263]

Qualifying Small Enterprises have a different employment equity scorecard which measures black people in management and black people as a percentage of the total employees with the added bonus points.[264] It also provides for differentiated compliance targets.

3.7.4 Element 4: Skills development

Together with the employment equity element, skills development is the expression of the human resource development component of Black Economic Empowerment.[265] The skills development element of the scorecard seeks to remedy the lack of skills and poor education that is prevalent amongst black people, mainly as a result of general apartheid policies, for example job reservation.[266] As a first response to remedy the backlog in training and skills, the government adopted the Skills Development Act and the Skills Development Levies Act in 1998 and 1999.

When considering the management control element and the employment equity element, it can be argued that the skills development element is intended to act as a support function of these two elements. Although skills development will play an

263 Jack 2007:260.

264 Codes of Good Practice: Code Series 800, Statement 803.

265 See the Strategy for B-BBEE: Appendix A.

266 See Strategy for B-BBEE: para 2.2.4 where the following was stated: "A job reservation policy was reinforced by a vastly inferior education system for black learners and this had devastating effects on skills, particularly technical and science skills, with the resultant impact on and the positions that the majority of workers obtained in the labour market. Only a small minority gained access to higher education. Technological and professional careers were made less attainable by chronic inadequacies in the teaching of mathematics and sciences in black schools. Millions of adult South Africans were deliberately under-equipped for modernising industrial and commercial economy. When the economy adjusted in the 1990s to re-enter global markets and became more competitive, the harsh reality has been the displacement of these same poorly equipped black workers. This has had a severely distorting effect on income distribution, the levels of effective demand for goods and services in the economy and the ability of displaced and retrenched workers to generate self-employment." See also Jack 2007:272-273.

important role in assisting with compliance with these two elements, it actually has a wider scope of application.

In short, the Skills Development Act and the Skills Development Levies Act operate to compel employers to pay a levy of one percent of its leviable payroll to the South African Revenue Service (SARS) which in turn distributes the collected levies to the relevant Sector Education and Training Authorities (SETAs). Employers then submit annual returns to their respective SETAs and may then claim up to 60 percent of levies paid for actually spent training expenses. However, many employers have come to view the Skills Development Levy (SDL) as merely another tax and do not bother to recover training costs from the SETAs. On the other hand, many SETAs are inefficient and delivery on the implementation of the Skills Development Strategy has been slow. The Department of Labour has even shut some SETAs down due to poor performance. Skills development therefore was in need of a new initiative which is exactly what was intended with the inclusion of the skills development element in the generic scorecard. SETAs still have an important role to play in the BEE process. The Codes do not provide that only SETA-accredited training programmes will count for measurement of the element, but it remains preferable to use SETA training.[267]

Skills development in terms of the Skills Development Act and skills development for purposes of the scorecard do share certain definitions[268] and objectives but are not identical in requirements. The reasoning behind the different requirements is that levies in terms of the Skills Development Levies Act are payable to SARS, and only skills development spending within the measured entity can be directly measured against the training of the entity's own employees.[269] Therefore, the skills development spending in terms of the BEE scorecard will contribute to its overall score over and above the amount paid to the SARS. In order to be true to the key underlying principles of the Codes of Good Practice it is important to consider the economic substance of skills development

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267 Jack 2007:274.

268 For example, the scorecard skills development element uses the definition of "leviable amount" as provided in the Skill Development Levies Act.

269 Jack 2007:275.

instead of merely paying lip service to it. Jack[270] argues that it is skills development that will enable black people to make a meaningful contribution to the company within which they hold employment. This would be better served with skills development and training in the core and critical skills needed for the particular enterprise. Although core and critical skills training were expressly provided for in previous drafts of the Codes, it is not included in the final Codes of Good Practice, but the definitions pertaining thereto have been retained, because it remains of critical importance.

3.7.5 Element 5: Preferential procurement

Due to apartheid legislation that prevented black people from entering the mainstream economy as business owners and suppliers of goods and services, a situation exists today where a few companies wield enormous economic power across a variety of industries. The difficulties which this situation caused for new black entrepreneurs looking to gain market share has resulted in a preferential procurement element being included in the generic scorecard. The need to make use of affirmative procurement policies, especially to promote black small, medium and micro-enterprises (SMMEs), was already part of the RDP.[271] In order to maximise the benefit for black entrepreneurs from public sector procurement, it became essential to have a properly regulated monitoring system to track the benefits from this programme. It is necessary to monitor the amount of procurement spending with black enterprises, but also the level of black empowerment in the enterprises with which business is conducted. This would have to be accompanied by an effective procurement system from the side of the public sector.

Although much leverage lies with the buying power of the public sector, addressed though the PPPFA, it became evident that much was to be gained through ensuring that black enterprise has increased access to opportunities in the private sector. It is through this element that the trickle-down effect of the B-BBEE Act functions optimally. Awarding 20 points to the preferential procurement element of the generic scorecard

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[270] Ibid, at 275-277.

[271] White Paper on Reconstruction and Development: Chapter 3, para 3.10.

made this an element to be reckoned with for measured entities. Although compliance with the provisions of the B-BBEE Act is not compulsory, entities engaging with public entities and state organs (which are bound by the provisions of the Act) will need to consider the BEE rating of the firms from which they buy goods or procure services. Because the procurement element contributes so substantially to an entity's scorecard, these suppliers (second tier suppliers) will then in turn have to pay closer attention to the BEE rating of the enterprises from which they procure. Showing preference to procure from companies with favourable BEE ratings becomes essential for any enterprise looking to increase its BEE compliance levels, which in turn will render economic benefit for the enterprise.

Two of the implications of the preferential procurement trickle-down effect, as identified by Jack,[272] for BEE within its wider context are of relevance for this discussion. Firstly, it increases market access and market share for black companies in the private sector which alleviates its reliance on the public sector for market share. Secondly, it operates as a business imperative for business as opposed to a legislative compliance issue. This ensures a greater measure of compliance due to the competitive and value drivers for business built into the process.

The way in which this element is measured makes reaching the targets an onerous exercise. Entities will have to consciously focus on reorganising their procurement systems in order to favour suppliers with favourable BEE ratings. It involves a complicated calculation which centres on the amount of preferential procurement spent as a percentage of the entity's total procurement.[273] Procurement is divided into three indicators, namely a general preferential procurement indicator (which counts most), procurement from businesses which are qualifying small enterprises or exempted micro-enterprises, and procurement from businesses 50 percent black-owned or 30 percent owned by black women.

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272 Jack 2007:300.

273 Jack (2007:306) explains it as follows: "Preferential procurement is calculated on the value of the procurement from an individual supplier, multiplied by the supplier's BEE recognition level. All suppliers are added together and divided by the total measured procurement spend and compared with the compliance target. The total measured procurement spend becomes a critical definition."

This element of the generic scorecard presents another opportunity at cross-scoring, because, for example, procurement from a qualifying small enterprise will also count for consideration under the general procurement indicator. This element also provides for the reward of enhanced recognition status for certain categories of preferential procurement.[274] This enhanced recognition exists for procurement from entities that receive enterprise development contributions from the procuring business, and when procurement is sourced from value-adding suppliers, as defined.[275]

Another feature of this element is the emphasis it places on the development and encouragement of black intellectual property. It tries to achieve this by promoting the use of black-owned professional service providers and entrepreneurs as preferred service providers.[276] Procurement from black-owned professional service providers and entrepreneurs, which are in compliance with the provisions of the Codes, qualifies for scoring in all three indicators of the scorecard as well as for the enhanced recognition of value-adding suppliers.[277]

3.7.6 Element 6: Enterprise development

The development of entrepreneurship in South Africa is fundamental to the creation of economic growth. The effect of the ownership element has a limited impact on the advancement of entrepreneurship and the creation of new business ventures for black people. Black business development is the aim of this element through which the sustainability of black economic participation will be achieved over the longer term.

This element is closely tied to the preferential procurement element. The reasoning behind this can be explained as follows: the key principles of measurement in this

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274 Codes of Good Practice: Code Series 500, Statement 500, para 3.3.

275 A "Value-Adding Enterprise" is defined in the Codes of Good Practice (Schedule 1, part 2, Definitions) as meaning an Entity registered as a vendor under the Value-Added Tax Act of 1991, whose Net Profit Before Tax summed with its Total Labour Cost exceeds 25 percent of the value of its Total Revenue.

276 Codes of Good Practice: Code Series 500, Statement 500, para 4.1.

277 Ibid, para 4.2.

element revolve around the contributions that a company makes to ensure or contribute to the financial and/or operational capacity of the black enterprise. This is clear from the principles for recognition set out in the Codes:[278]

> "Enterprise Development Contributions consist of monetary or non-monetary, recoverable or non-recoverable contributions actually initiated and implemented in favour of beneficiary entities by a Measured Entity with the specific objective of assisting or accelerating the development, sustainability and ultimate financial and operational independence of that beneficiary. This is commonly accomplished through the expansion of those beneficiaries' financial and/or operational capacity."

It is a matter of common sense that an enterprise will make these types of contributions to businesses within its own supply or value chain. Therefore, procuring from this entity will have a positive effect on that entity's financial and operational independence, and will have thus assisted that entity. The greater the effect, the higher score will be achieved by the contributing enterprise. Thus, when an entity makes a loan to a developing enterprise, the vested interest held by the contributing entity would be best served if procurement is done from that entity, ensuring that the developing enterprise is financially successful and thus capable of repaying the loan. Making provision for the allocation of points for recoverable contributions serves as encouragement for entities to develop an interest in black enterprises.

Essentially, the enterprise development scorecard allocates a maximum of 15 points for the average annual value of all enterprise development contributions and sector specific programmes made by the measured entity. Measurement of the monetary value spent accumulates[279] year after year and the target for the enterprise development spending is three percent of the measured entity's net profit after tax. The Codes[280] provide a list of what could be considered as enterprise development contributions. These include:

- grants made to and investments in beneficiary entities;

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278 Codes of Good Practice: Code Series 600, Statement 600, para 3.2.1.

279 Ibid, para 3.1.2.

280 Ibid, para 3.2.5.

- loans made to beneficiary entities;
- guarantees given or security provided on behalf of beneficiaries;
- preferential credit terms granted by the measured entity in respect of its supply of goods or services to beneficiary entities;
- payments made by the measured entity to third parties to perform enterprise development on the measured entity's behalf;
- discounts given to beneficiary entities in relation to the acquisition and maintenance costs associated with the grant to those beneficiary entities of franchise, licence, agency, distribution or other similar business rights;
- provision of training or mentoring to beneficiary entities which will assist the beneficiary entities to increase their operational or financial capacity;

It should also be kept in mind that developing infrastructure services in specific areas, in cooperation with the government in order to facilitate sustainable business development also qualify as enterprise development.[281]

Enterprises that qualify as beneficiary entities are identifiable when looking at the definition of enterprise development contributions provided in the Codes. The contribution is defined as:[282]

> "monetary or non-monetary contributions carried out for the following beneficiaries, with the objective of contributing to the development, sustainability and financial and operational independence of those beneficiaries:
>
> (a) Category A Enterprise Development Contributions involves Enterprise Development Contributions to Exempted Micro-Enterprises or Qualifying Small Enterprises which are 50% black owned or black women owned;

[281] Jack 2007:322.

[282] Codes of Good Practice: Schedule 1, Part 2, Definitions.

(b) Category B Enterprise Development Contributions involves Enterprise Development Contributions to any other Entity that is 50% black owned or black women owned; or 25% black owned or black women owned with a BEE status of between Level One and Level Six."

Thus beneficiary entities include black micro- and small businesses, black-owned businesses that make fair contributions to transformation, and white-owned companies that make substantial contributions to transformation.[283]

Provision is made for measurement of enterprise development for Qualifying Small Enterprises in Statement 806 of the Codes. The scorecard award a maximum of 25 points for this element based on a target of two percent of the measured entity's net profit after tax.

Together with the second indicator under the preferential procurement element, these are the drivers for enterprise development and the creation of new business in South Africa.

3.7.7 Element 7: Socio-economic development

Corporate social investment or the term "corporate social responsibility" has, for a variety of reasons, gained momentum in the international business world. Contributing towards socio-economic development stands to benefit both the contributor and receiver.

In terms of the Codes the key objective sought with the inclusion of such an element on the scorecard is the advancement or promotion of sustainable access to the economy, whether directly or indirectly. This is underlined by the key measuring principles which, *inter alia*, provide that socio-economic development contributions "consist of monetary or non-monetary contributions actually initiated and implemented in favour of beneficiaries by a Measured Entity with the specific objective of facilitating sustainable access to the economy for those beneficiaries."[284] The criteria for measuring

283 See Jack 2007:326 and Cliffe Dekker 2007:56-57.

284 Code of Good Practice: Code Series 700, Statement 700, para 3.2.1.

this element are whether or not the contribution facilitated sustainable access to the economy. The intended beneficiaries of these contributions are people who are not part of the mainstream economy. To score maximum points in this category, the groups of individuals benefiting from these contributions should be at least 75 percent black.

Keeping the spirit of BEE in mind, entities are given considerable leeway to interpret contributions as being direct or indirect facilitators of access to the economy. The Codes do provide a list of contributions that qualify as socio-economic development contributions. These include *inter alia*:

- direct costs incurred by a measured entity in assisting beneficiaries;
- developmental capital advanced to beneficiary communities;
- preferential terms granted by a measured entity for its supply of goods or services to beneficiary communities.

An entity can score five points for contributing one percent of its net profit, after tax, to socio-economic development.

3.8 Charters and codes

In terms of the B-BBEE Act specific sectors within the economy may develop sector codes or transformation charters[285] which will apply particularly to that

[285] Examples of charters gazetted under section 12 of the B-BBEE Act to date include:

- Construction Sector Charter. Government Gazette No 29616, General Notice 111 of 2007, 9 February 2007.
- Financial Sector Charter. Government Gazette No 29610, General Notice 110 of 2007, 9 February 2007.
- Property Sector Charter. Government Gazette No 30333, General Notice 1248 of 2007, 5 October 2007.
- AgriBEE Sector Charter. Government Gazette No 30886, Government Notice 314 of 2008, 20 March 2008.
- Media, Advertising and Communication M (MAC) Sector Charter. Government Gazette 31371, Government Notice 924 of 2008, 29 August 2008.

sector.[286] The Codes of Good Practice provide guidelines for the development and gazetting of transformation charters and sector codes.[287] It is important to distinguish between sector codes and sector-specific transformation charters. Transformation charters are documents which indicate a specific sector's good intent and commitment to transformation. These are guidelines only, developed by the major role players in the specific sector, but have no legal effect. Entities in the specific industry will still be compelled to comply with and use the Codes of Good Practice to measure compliance with B-BBEE legislation.[288] The only guideline provided in the B-BBEE Act is the requirement that they (the Charters) be developed by the major stakeholders and to advance the objectives of the Act.[289]

A sector code is a code of good practice which applies to the specific sector. It has the same legal effect as the Codes of Good Practice and will be issued as part of the Codes of Good Practice under a separate Code Series. It will be binding on organs of state, public entities and all the entities that operate in the specific sector and will constitute the basis for measurement of compliance of these entities.[290]

A number of transformation charters have been adopted, for example the Financial Services Charter, the Information and Communication Technology Charter, and the Construction Sector Charter. Although sector transformation charters are not legally binding on public entities or state organs, it does have political importance because it shows a commitment to transformation in the sector. Furthermore, in certain sectors there is a need for sectoral guidance due to fundamentally complicated issues pertaining to the application of the generic scorecard to the specific industry.[291] Failure to develop sector-specific guidelines could in certain instances render parts of the generic scorecard

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286 B-BBEE Act: sections 9, 12.

287 Codes of Good Practice: Code Series 000, Statement 003.

288 Ibid, paras 4.1 and 4.2.

289 B-BBEE Act: section 12.

290 Codes of Good Practice: Code Series 000, Statement 003, para 4.3.

291 Jack 2007:93; Shubane & Reddy 2005:12.

as value-deficient for the specific industry due to the over-simplification of certain issues in the Codes of Good Practice.

However, it is also possible for a transformation charter to gain legal effect through means other than being gazetted as a Sector Code as part of the Codes of Good Practice. The first two transformation charters, namely the Mining Charter and the Liquid Fuels Charter, were usurped into legislation as part of the Mineral and Petroleum Resources Development Act. This does however prove problematic because entities subject to this legislation still have to comply with the provisions of the Codes of Good Practice when contracting with the state. Only when applying for licenses do these entities have to comply with the Charters. This may create double work and compliance issues.

After the flurry of sector charters adopted early in the BEE process, the government realised the need to have more uniformity in requirements for transformation sector charters. In the Codes of Good Practice the government issued strict guidelines for the process of development and the gazetting of transformation charters and codes. However, the strict guidelines laid down by the government poses some problems. Firstly, a number of charters were adopted before the publication of the final Codes of Good Practice. Earlier drafts of the Codes imposed less strict guidelines, with the result that older charters will now be faced with compliance issues, which, in some instances, are more serious than others. The process of drafting these charters is time-consuming and complicated and the revision process that will have to be undergone in order to streamline existing charters with the Codes could prove difficult. However, since transformation charters are published merely for public comment and have no actual legal binding effect, enterprises within chartered sectors would still have to comply with the Codes of Good Practice.

Exceptions to BEE compliance regarding foreign enterprises have emerged. In this regard, Shubane and Reddy[292] refer to the Information and Communication Technology Charter which recognised the futility of insistence of similar ownership targets when dealing with companies based abroad.

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[292] Shubane & Reddy 2005:6.

Chapter 4

The constitutional framework for BEE

4.1 Introduction

The discussion in Chapter 3 focussed on broad-based black economic empowerment as an economic instrument with which to achieve economic and social justice. The empowerment policies and strategy decisions leading up to the enactment of the B-BBEE Act and formulation of the programme were also discussed, together with the practical operation of the policy instruments which set the framework for its operation and implementation. As stated before, the programme is envisioned to bring about change in the grossly unequal distribution of economic resources which resulted from years of systemic racial discrimination under the apartheid government.

The Constitution embodies a history which engages a transition from a society based on injustice, exclusion and broad divisions to a society which is based on the dignity and equality of all citizens, which include economic equality. The South African Constitution provides the basis for any type of remedial measure or programme. It is therefore essential to do an analysis of the B-BBEE programme from a constitutional perspective. The Constitution both mandates the adoption of remedial measures, but also provides the guidelines for the constitutionality of affirmative action programmes. In this chapter the discussion will focus on constitutional provisions and principles which enable the implementation of remedial measures, which in this case consists of the B-BBEE programme, as well as constitutional principles and provisions which limit the type of measures which can constitutionally be implemented.

4.2 BEE in its empowering constitutional context

4.2.1 Introduction

In this section the various constitutional provisions which enable the government to formulate and implement remedial measures, which therefore include the B-BBEE programme, will be analysed. The central enabling constitutional provision is the right to equality in section 9. Section 9 specifically allows the government to take affirmative legislative and other measures to promote the achievement of equality by advancing the interests of individuals or groups disadvantaged by unfair discrimination. The right to equality plays a central role in a discussion on the constitutional framework of the B-BBEE programme. Other enabling provisions and principles are also considered. These are the foundational constitutional principles and values, the principles of transformative constitutionalism, social and economic justice, constitutional developmental objectives and imperatives, the constitutional provisions guaranteeing socio-economic rights, the constitutional provisions dealing with the public administration and public sector procurement.

The discussion will then proceed to consider the constitutional provisions which contain the requirements for constitutionally valid limitations of rights and which therefore provide the guidelines for valid affirmative action measures, including the B-BBEE programme. The analysis centres on the general limitation clause of the Constitution in section 36. However, various constitutional provisions also present specific internal requirements which could have a bearing on the conditions for valid remedial measures and relevant provisions are also discussed.

4.2.2 Transformative constitutionalism

When considering constitutionalism, a distinction may be drawn between what can generally be termed preservative and transformative constitutionalism. Preservative

constitutions seek to maintain the *status quo* of existing practices. Transformative constitutions provide a summary of aspirations which can only be described as challenges to existing, longstanding practices.[1] The concept of "transformative constitutionalism" refers to the transition that has to be made from the dispensation under apartheid rule to a dispensation that aims to promote the values underlying the Constitution.[2] The transformative objectives or goals are very clearly set out in the Preamble of the Constitution. It provides that the Constitution was adopted so as to

> "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

This is a clear recognition of the devastating legacy left by the racially discriminatory practices of apartheid rule, and its equally devastating consequences, including the economic injustices suffered by the vast majority of South Africans. In South Africa, transformation entails promoting and achieving a "society based on democratic values, social justice and fundamental human rights".[3] In other words, all legislation, government policies and programmes, legal adjudication and general legal

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1 Sunstein 2001:125. The author refers to the English Constitution as an example of a preservative constitution and the US Constitution as a mixture between a preservative and transformative constitution. Van der Walt (2006:4-5) argues that "transformative constitutionalism" is a term which creates an internal tension between constitutionalism — which seems to secure/entrench stability — and transformation — which commands change. This begs the question as to whether a constitution which demands and legitimates large scale change would also be capable of securing stability and continuity. Van der Walt concludes (2006:17) that "transformative constitutionalism" is indeed contradictory but displays a delicately balanced tension.

2 *S v Makwanyane*: para 262, per Mahomed J: "The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

3 Constitution of the Republic of South Africa: Preamble. See also Klare 1998:149.

practice should promote and fulfil the "democratic values of human dignity, equality and freedom".[4] A new culture of respect for human rights must be developed.[5]

The Constitution is a document which drives the fundamental restructuring of society[6] and outlines the type of society it seeks to achieve or which typifies the aspirations of South African society. However, the Constitution moves beyond merely requiring that all discriminatory practices and provisions be removed.[7] It also mandates that the necessary action be taken to realise this transformation — actually compelling South Africans to move in the direction of the society it wishes to establish.[8] This is done through the duty it places on the state and subject (it provides for both vertical and horizontal application[9]) to take positive action or remedial or affirmative action in order to remedy the legacy left by apartheid and create this newly envisaged society,[10] clearly also foreseeing measures to redress economic injustice. Merely providing for equal rights for all in the new democratic dispensation would only concern the protection of rights. By further extention, the principle of substantive equality is fundamentally concerned with transformation.[11] It has also been said that a commitment to social justice is central to the transformative processes and objectives of the South African Constitution.[12] As explained below, economic justice is part of the broader concept of social justice. The government's broad-based black economic empowerment programme, with its basic objective of achieving economic justice, clearly forms part of the overall transformative spirit of the Constitution.

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4 Ibid, section 7(1).

5 Langa 1998:151.

6 See Andrews 2005:1162.

7 *S v Makwanyane*: para 262.

8 Liebenberg 2006:6; Sripati 2007:109; Langa 1998:151; De Wet 1995a:41; Van der Walt 2006:5.

9 See especially Constitution of the Republic of South Africa: sections 8 and 9(3) and (4).

10 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); 2004 7 BCLR 687 (CC): para 74.

11 Hughes 1999:35; Liebenberg & Goldblatt 2007:338.

12 Liebenberg 2006:6.

The Constitution does not merely state that we are a society based on democratic values, social justice and fundamental human rights, but also that we seek to "[h]eal the divisions of the past and *establish* a society based on" these ideals.[13] It further strives to "*[i]mprove* the quality of life of all citizens"[14] and states that one of the founding values of our democratic state is the "*achievement* of equality"[15]. It becomes clear that the Constitution has transformation in mind when it lays down the obligation to achieve these ideals. It is even more clear when it further states that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."[16] According to Chaskalson the Constitution demands that our society be transformed.[17] Sachs J in *Minister of Finance and Another v Van Heerden* strongly emphasised this when he wrote:

> "[R]edress is not simply an option, it is an imperative. Without major transformation we cannot 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'."[18]

In the Interim Constitution, the Postamble stated that the Bill of Rights aims to be "a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[19] This, according to Langa, is the basis for understanding transformative constitutionalism.[20] This "bridge" metaphor has particular significance. It indicates that there should be a process of change, of moving from one position towards another, but it also illustrates the nature of the *status quo ante*, and what the transformation process should move towards, in other words, what

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13 See Constitution of the Republic of South Africa: Preamble. Own emphasis.

14 Ibid.

15 Ibid, section 1(a). Own emphasis.

16 Ibid, section 7(2).

17 2000:199.

18 *Minister of Finance and Another v Van Heerden*: para 137.

19 Interim Constitution of the Republic of South Africa 200/1993. This was also quoted by Langa 2006:352. See further *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC); 2002 8 BCLR 810 (CC): para 50.

20 Langa 2006:352.

it should strive to become.[21] In *Rates Action Group v City of Cape Town* the following formulation was given by Budlender AJ:

> "Our Constitution provides a mandate, a framework and, to some extent, a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity."[22]

Mureinik[23] stresses the importance of a clear understanding of both these states, namely where the bridge originates, and what the bridge leads to, an identification of how the societies on either side of the bridge differ from each other.[24] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* Ngcobo J describes South Africa as "a country in transition. It is a transition from a society based on inequality to one based on equality."[25]

Transformative constitutionalism is a widely accepted description of the South African Constitution and various references hereto exist in case law[26] and academic literature.[27] An example may be found in *Soobramoney v Minister of Health, KwaZulu-*

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21 *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC); 1996 5 BCLR 658 (CC): para 157 per Madala J. See also *S v Makwanyane*: para 262.

22 *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C); 2004 12 BCLR 1328 (C): para 100.

23 Mureinik 1994:31.

24 See also Langa 2006:352.

25 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 73.

26 For example see *S v Makwanyane*: para 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: paras 73-74; *Minister of Finance and Another v Van Heerden*: para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W); 2006 6 BCLR 728 (W): paras 51-52; *Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group v Kuhn and Another* 2008 2 SA 375 (C); 2007 4 All SA 1368 (C): para 30; *Magidimisi v Premier of the Eastern Cape & Others* 2006 JOL 17274 (Ck): para 26; *Rates Action Group v City of Cape Town*: para 100: "Ours is a transformative Constitution. Justice Scalia, of the US Supreme Court, has said that 'the whole purpose of a constitution, old or new . . . is to impede change or pejoratively put "to obstruct modernity"': A Scalia 'Modernity and the Constitution' in E Smith (ed) Constitutional Justice under Old Constitutions (1995) quoted in G van Bueren 'Including the Excluded: The case for an Economic, Social and Cultural Human Rights Act' [2002] Public Law 456 - 472 at 457. Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and, to some extent, a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity."

27 Klare 1998:148; Albertyn & Goldblatt 1998:248; Liebenberg 2006:6; Moseneke 2002:314; Botha 2003a:29, 34; Pieterse 2005:155; Van der Walt 2006:4; Langa 2006:351; Liebenberg & Goldblatt 2007:338; Sunstein 2001:125.

Natal,[28] in which Chaskalson P refers to "a commitment … to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."[29]

However, it is not always easy to give an exact definition of what transformative constitutionalism means.[30] The process of transformation or change was interpreted by Albertyn and Goldblatt[31] to mean the following:

> "We understand transformation to require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allows people to realise their full human potential within positive social relationships."

This underscores the central concept within transformative constitutionalism, namely the achievement of substantive equality.[32] Addressing inequality is important with regard to the transformative objective of the Constitution.[33] Substantive equality is one of the bases of the new society that transformation should create. Indeed, in *Minister of Finance and Another v Van Heerden* Sachs J stated that substantive equality is in itself rooted in a transformative constitutional philosophy.[34] It is contended here that transformative constitutionalism is an umbrella description which embodies the notions of substantive equality, access to social and economic services and enforcement of such rights, social justice and economic justice. Any attempt by the government to address affirmative or remedial matters, or issues regarding equality, social and economic rights, or other developmental activities, which thus also includes the B-BBEE programme,

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28 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); 1997 12 BCLR 1696 (CC).

29 Ibid, at para 8.

30 Langa 2006:351; Moseneke 2002:315; Albertyn & Goldblatt 1998:248.

31 1998:249.

32 Langa 2006:352; Albertyn & Goldblatt 2007 *et seq*:35-1; De Vos 2002:27.

33 Albertyn & Goldblatt 2007 *et seq*:35-4.

34 *Minister of Finance and Another v Van Heerden*: para 142.

should be implemented or dealt with against the background of the principle of transformative constitutionalism.

A strong feature of this transformative constitutionalism is the need to provide for the social and economic needs of society, especially those deemed most vulnerable in society, and also to provide greater access to education and other social and economic rights.[35] Albertyn and Goldblatt refer to this as the "aspirational value of substantive equality: a social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential".[36]

Measures to address existing *economic* inequalities along racial lines clearly fall within the wider cadre of transforming society into one based on equality. These affirmative measures, designed to establish substantive economic equality, clearly entail the type of measures contained in the state's B-BBEE programme.

The broad term transformative constitutionalism also addresses itself to other concerns. Langa[37] identified particular challenges facing transformative constitutionalism in South Africa. One of these involves inequality in access to justice — which can be labelled as symptomatic of the currently persistent economic inequality. Equality before the law presupposes equal access to justice or the law. In the broader South African society with its severe divisions between the economic haves and the have-nots, access to justice often translates into one's ability to access the means to afford justice. This is closely tied to and interrelated with the transformative idea of change in the social and economic circumstances of those who are most vulnerable in society.

The South African Constitution has been called "radical" in that it does not merely create political institutions and introduce the necessary limitations on the powers of its rulers to avoid abuse, but in that it seeks radical political, social and economic transformation.[38] It also recognises that merely providing for a right to equality may

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35 Langa 2006:352.

36 Albertyn & Goldblatt 1998:249. See also Langa 2006:352; Albertyn & Goldblatt 2007 *et seq*:35-5.

37 2006:355.

38 Sripati 2007:115.

serve only to entrench existing and systemic inequalities in society.[39] Consequently, the transitional process will have to be ongoing.[40] Creating this new society will be accomplished through different measures, one of the most important being positive measures or affirmative action — meant here in its broadest context as measures aimed at remedying the disparate impact of past discriminatory practices. When considering the broader objectives of the black economic empowerment programme, it is clear that it is but one of the programmes aimed at giving impetus to the transformative ideals of the Constitution.

Section 9(2) of the Constitution, labelled as the affirmative action provision[41] of the right to equality, has been closely linked to the transformation process in the Constitution. In *Minister of Finance and Another v Van Heerden* Mokgoro J in her judgement emphasised this interrelatedness as follows:

> "The vision of substantive equality and the need for transformation cannot be underestimated. For that reason s 9(2), as an instrument for transformation and the creation of a truly equal society, is powerful and unapologetic."[42]

In light of the necessity of affirmative action programmes, it should be added that although affirmative action, and therefore transformation, may impact differently on different groups, it is indeed everyone that would eventually benefit from the equality aspired to through the implementation of such programmes and policies.[43] It is recognised in case law that the transformation process would inevitably affect some members of society more adversely.[44] However, programmes, policies or any measures

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39 See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 74.

40 Langa 1998:151.

41 As it was labelled in *South African Police Service v Public Service Association* 2007 3 SA 521 (CC): para 71; Rautenbach 2005:173.

42 *Minister of Finance and Another v Van Heerden*: para 87.

43 Ibid, para 145, per Sachs J.

44 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 76; *Minister of Finance and Another v Van Heerden*: para 145; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* 2002 3 SA 265 (CC); 2002 9 BCLR 891 (CC): para 7.

taken in order to effect transformation in our society must be taken and carried out in accordance with the Constitution.[45]

Transformation is required on different levels, also in the judiciary,[46] public service and local government.[47] The South African Constitution introduced constitutional supremacy[48] and a justiciable Bill of Rights to the South African legal landscape. This was in direct opposition to the authoritarian culture of parliamentary supremacy that predated 1994 towards a culture of justification where any exercise of power should be justifiable.[49] This also gives a central role to the courts which are constitutionally mandated to review acts of legislative or executive power.[50] It demands a transformation in the way the judiciary operates. It is tasked with fulfilling and promoting the values underlying the Bill of Rights[51] which holds the key to the culture of justification.[52] An independent and constitutionally mandated judiciary is the actual engine that drives transformation.[53] In light of the provisions of section 39 of the Constitution the Courts,

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45 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 76; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another*: para 7.

46 *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*: para 50: "This Court has on more than one occasion stressed the transformative purpose of the interim Constitution and the 1996 Constitution. This transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular, white men."

47 *Van der Merwe and Another v Taylor NO and Others* 2008 1 SA 1 (CC); 2007 11 BCLR 1167 (CC): para 72; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC); 1998 12 BCLR 1458 (CC): paras 2-4.

48 Constitution of the Republic of South Africa: section 2.

49 Mureinik 1994:32; Langa 1998:150.

50 Chaskalson 2000:199; Langa 1998:150. See Constitution of the Republic of South Africa: section 39(2).

51 Klare 1998:149. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 72.

52 Mureinik 1994:32.

53 This sentiment was echoed by the High Court in *Nakin v The MEC, Department of Education, Eastern Cape Province and Another* 2008 6 SA 320 (Ck); 2008 6 BCLR 643 (Ck): para 35. See also Sripati 2007:109; Langa 1998:151-154; Van der Walt 2006:16.

and especially the Constitutional Court, will have a major role to play in the continued transformative aspects of constitutional reform.[54]

Moseneke[55] provides an outline of the features of transformative adjudication. Jurisprudence in the transformative context should be fundamentally committed to substantive equality, forsaking a formal approach to equality. This requires a contextual approach and seeks to place any rights violations in its broader context by examining systemic forms of domination or discrimination within society.[56] Transformative jurisprudence aspires to optimise human (individual and group) development and promote (individual and group) self-determination. There should always be sensitivity to the interrelated and intertwined relationship between different fundamental rights and a commitment to transparency and accountability in adjudication.[57] It should also command a change in the judiciary's approach to its new task. Langa calls for a strong, independent, and fearless judiciary which would not hesitate to intervene, with continued emphasis on the openness, transparency, and accountability of the government. In the absence of this, the new democracy would be meaningless.[58]

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54 In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 1 SA 545 (CC); 2000 10 BCLR 1079 (CC): para 21 the Constitutional Court made the following statement on the way the Constitution, especially section 39(2), functions: "Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. It states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

55 Moseneke 2002:317.

56 The importance of a contextual approach to social and economic rights jurisprudence was emphasised in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC): paras 21, 22 and 25, and in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC): para 24.

57 Klare 1998:164.

58 Langa 1998:150.

Beyond the required changes in the process of adjudication, this would also entail a change of the legal culture in the area of legal education.[59] Although much value still remains in the teachings of "rational deduction of inevitable conclusions from unquestionable principles",[60] there needs to be change in the dynamic of these teachings so as to include the culture of justification introduced through the Bill of Rights and the Constitution. Critical engagement with constitutional principles is required from students and practitioners of law alike. The values underlying the Constitution have to permeate the entire legal culture and reach beyond constitutional jurisprudence to other fields of legal practice such as private law, commercial law and criminal law. No legal practitioner will practice law in complete isolation from the Constitution and therefore legal education in any of these fields cannot take place with a total ignorance of the provisions of the Constitution. Langa argues that "[a] truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education."[61] The contextual analysis within which the Court should engage its adjudication process can be said to create the interconnectedness between different provisions in the Bill of Rights. For example, the provisions relating to social and economic rights cannot be interpreted without at least some sort of cognisance of the right to equality. The very factual contexts within which plaintiffs find themselves are probably more often than not linked to the provision of the equality right.

A change in legal culture is also necessitated by the fact that it is legal culture that empowers adjudication and substantive legal development.[62] Legal culture, developed over many years, could not remain unaffected. In fact, a major change in law and legal culture is required, without which social, political and economic change would be impossible.[63] Attempting to answer the question about what is meant when referring to "legal culture", Klare gives the following summary:

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59 Langa 2006:355.

60 Ibid.

61 Ibid, at 356.

62 Klare 1998:168; Van der Walt 2006:16.

63 Van der Walt 2006:6.

> "By legal culture, I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire or recurring argumentative moves? What counts as persuasive legal argument? What types of legal arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence political discourse? What understandings of and assumptions about politics, social life and justice? What 'inarticulate premises, [are] culturally and historically ingrained' in the professional discourse and outlook?"[64]

Specifically in the area of adjudication, careful reflection is required upon the adjudicative practices of the past in order to assist in the process of democratic transformation. Klare states this requirement as follows: "[S]earching and critical examination of the legal culture and its multifaceted and diffuse influences on interpretive practices would seem to be a constitutional duty in the new dispensation."[65] It could be said that legal culture and tradition are infused by apartheid-era thinking which needs change.[66]

It could be stated that substantive equality, along with economic or socio-economic transformation, and a change in the legal culture, are the basic ideas behind transformation in South Africa. In addition to this some academics have argued that transformation in itself should be another core idea. In this sense transformation is a core value because it is a constant and not a process that terminates in the sense of the "bridge" metaphor.[67] On the other hand it could be argued that any process necessarily presupposes a beginning and an end. When Sachs J reaches his conclusion[68] in *Minister of Finance and Another v Van Heerden* about transformation, with the differential impact inherent to the transformation process — referring in particular to the impact of affirmative action or remedial measures — the learned judge foresees an envisaged

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64 Klare 1998:166-167, with reference to judgement by Kriegler J in *Du Plessis and Others v De Klerk and Another*: para 119.

65 Ibid, at 168.

66 Van der Walt 2006:19.

67 Langa 2006:353. See also Botha 2002:612 *et seq*; Botha 2003a:20 *et seq*; Van der Walt 2001:296.

68 *Minister of Finance and Another v Van Heerden*: para 145.

outcome of equality that would be beneficial to everyone. Clearly this encompasses a result — which is not an indefinite continuance of transformation — at the end of the transformative process.

It should be clear from the above discussion that the transformative nature of the Constitution implies action by the state — and by implication prohibits inaction — to achieve the society the Constitution envisages.[69] The transformative label of the Constitution is an outright rejection of the *status quo* in South Africa with regard to power relations, social conditions, etc., but specifically also the reigning economic resource allocation and wealth distribution attributable to past discriminatory practices. The transformative and reformative action mandated by the Constitution are given substance in the B-BBEE programme, a programme designed to directly address issues of economic redistribution and wealth creation for all South Africans, especially those who suffered from previously race-based discrimination. B-BBEE can thus be labelled one of the transformative programmes designed by the state in fulfilling its constitutional obligation of transforming South Africa into the envisaged society. Failing to address economic injustice in particular would therefore be a violation of a part of the underlying transformative principle of the Constitution.

4.2.3 Social justice

The transformative imperative of the Constitution acknowledges the fact that it is of great importance that group-based disadvantage and social and economic barriers be removed in order to achieve the value of social justice.[70] The commitment to social justice is central to the transformative objective of the Constitution, and, like other fundamental values of the Constitution, it should permeate the interpretation of all Bill of Rights provisions.[71]

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69 De Vos 2001b:259, 265; Van der Walt 2004:266.

70 Liebenberg & Goldblatt 2007:338.

71 Liebenberg 2006:6.

The Preamble to the Constitution[72] states as one of the objectives of the Constitution, the establishment of a "society based on democratic values, social justice and fundamental human rights." This objective is expressly recognised and referred to in various legislation.[73] Specific mention to the value of social justice can be found in the Labour Relations Act[74] and the Basic Conditions of Employment Act[75] which assert the advancement of social justice as its purpose. This is also echoed in the Promotion of Access to Information Act[76] and the Promotion of Equality and Prevention of Unfair Discrimination Act[77]. The striving towards a society based on social justice is held in high regard by the South African Constitutional Court.[78] However, despite various references to the concept in case law,[79] there is little definition given to what this value espouses. It is fair to say that the context in which social justice is used within the Constitution and case law, as a foundational principle, informs transformative

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72 Constitution of the Republic of South Africa.

73 The Older Persons Act 13/2006: Preamble; National Health Act 61/2003: Preamble; Commission of the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities Act 19/2002: Preamble; Children's Act 38/2005: Preamble.

74 Labour Relations Act: section 1: "The purpose of the [Labour Relations Act] is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, … ."

75 Basic Conditions of Employment Act 75/1997: section 2: "The purpose of [the Basic Conditions of Employment Act] is to advance economic development and social justice by fulfilling the primary objects of this Act … ."

76 Promotion of Access to Information Act 2/2000: section 9(c): "The objects of this Act are — …. to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, …"

77 Promotion of Equality and Prevention of Unfair Discrimination Act: Preamble: " … Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish."

78 *Minister of Finance and Another v Van Heerden*: para 25.

79 For example, *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*: para 6; *Minister of Finance and Another v Van Heerden*: para 25; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC); 2006 1 BCLR 1 (CC): para 111; *Government of the Republic of South Africa and Others v Grootboom and Others*: para 1; *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 5 SA 3 (CC); 2005 8 BCLR 786 (CC): para 36.

constitutionalism[80] — in other words, it elucidates the type of society South Africans strive to achieve.

The concept of equality, which is substantive in nature[81] and strongly underlines restitutionary or remedial equality, is integral to the concept of social justice.[82] With reference to the concept *ubuntu*, the Constitutional Court in *S v Makwanyane*[83] reflected that "[t]he concept carries in it the ideas of humaneness, social justice and fairness."

Social justice[84] is basically concerned with unequal relations between groups, characterised by institutional patterns of subordination, i.e., systemic types of discrimination based on race, gender, etc., which result in disadvantage for the affected groups.[85] In particular, social justice concerns the protection of vulnerable groups in order to protect them from further exploitation.[86] Overcoming these forms and types of inequality and domination is tantamount to creating a society based on social justice, which would include favourable treatment. Social justice relates to equality of opportunity, with a levelling of the playing field especially where relations based on dominance are prevalent, which in turn requires positive state action.[87] It concerns itself with the betterment of the most vulnerable in society, with the improvement of the social and economic circumstances of the most needy. Social justice carries a strong distributive element due to the fact that patterns of discrimination and dominance more often than not result in a disproportionate distribution of economic resources.[88] Without the necessary economic and social resources, self-realisation for the individual and the

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80 *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*: para 6; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 73; *Minister of Finance and Another v Van Heerden*: para 137.

81 *Minister of Finance and Another v Van Heerden*: para 30.

82 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC): para 61.

83 Para 237.

84 It has also sometimes been labelled "political justice". See Sager 1993:410-411; Sandalow 1993:461.

85 Liebenberg 2006:7.

86 De Wet 1995a:39; De Wet 1996:24; Braithwaite 2000:186.

87 De Wet 1995a:40; De Wet 1996:24.

88 See Liebenberg (2006:8) referring to Fraser's social justice theory of participatory parity.

group remains a hollow concept which is devoid of any tangible meaning. Civil and political freedom and equality diminish in value where individuals and groups are left in abject poverty, and lack access to basic social and economic resources.[89] Thus, the social justice notion is broadly concerned with social security, with a just social order, and an increase in the general standard of living.[90] This situation is by no means unique to South Africa. Young refers to the "recognition of the tremendous social and economic injustice that forms a central fault line of Canadian society".[91] Social justice ultimately aims to balance community interests through a systematic reconciliation of diverse social interests, with due regard to affected interests.[92]

Honoré argued that the principle of social justice consists of two propositions, which he describes as follows:

> "The first is the contention that *all men considered merely as men and apart from their conduct or choice have a claim to and to an equal share in all those things, here called advantages, which are generally desired and are in fact conducive to their well-being*. … The second proposition … is that *there is a limited set of factors which can justify departure from the principle embodied in the first proposition*. These are the *choice* of the claimant or the citizen on the one hand and his *conduct* on the other."[93]

According to Honoré, fairness of treatment of individuals or groups depends on the principles of social justice.[94] Proportionality and the principle of justice according to need are important aspects of social justice.[95] When correlating social justice with the pursuit of the common good, however, other questions might arise about the exact content of the "common good". This is, at best, a vague concept, and also comprises

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89 Langa 1998:151.

90 De Wet 1995a:35. See also Constitution of the Republic of South Africa: Preamble.

91 Young 2005:539.

92 De Wet 1995a:40, 41; De Wet 1996:24.

93 Honoré 1962:78-79. This point of view reminds of the principle of justice as fairness formulated by John Rawls. See also Welsch 2004:55.

94 Honoré 1962:84.

95 Ibid, at 91.

other values or ideas such as the preservation of society, which stands removed from the value of justice as such.[96]

Equality of opportunity lies at the very core of social justice.[97] Without equality of opportunity there can be no real social justice, and within the notion of equality of opportunity is contained the idea of preferential treatment for the underprivileged.

The inclusion of social and economic rights in the Constitution, and subsequent social and economic rights litigation, has the potential to make a significant impact on the pursuit and achievement of transformation within a society based on social justice.[98] This is so despite the fact that the way in which the Constitutional Court has chosen to adjudicate such claims, based on reasonableness, could possibly slow down the process of transformative progress.[99]

Sandra Liebenberg makes the following observation:

> "The winning of affirmative social benefits through litigation can create a favourable terrain for broader mobilisation around deeper reforms. A substantive jurisprudence on social rights can facilitate 'nonreformist reforms' and advance transformation. … In particular, it can serve to enhance the participatory capabilities of those living in poverty and expose the socially constructed nature of poverty and inequality. At its best it should remind us of our … commitment to establishing a society based on social justice, and facilitate the inclusion of marginalised voices in the debate on what is required to achieve such a society."[100]

Linking with transformative constitutionalism and reform, social justice carries implications for the way in which the judiciary adjudicates rights-litigation. It is thus fair to conclude that the courts, although not solely responsible for its advancement, will nevertheless play an invaluable role in advancing social justice.[101] With specific

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96 Ibid, at 94 fn 38.

97 Ibid, at 101.

98 Pieterse 2006:118, 131.

99 See the discussion on social and economic rights in para 4.2.7.

100 Liebenberg 2006:36.

101 Langa 1998:151-154; Moseneke 2002:313; Pieterse 2006:120.

reference to the role of the courts in the pursuit of social justice, Moseneke makes the following argument:

> "It is at the very least arguable that the constitutional goal of social justice is not explicitly coterminous with the expanded statement of the right to equality in s 9 of the Bill of Rights. Even so, it is argued here that a creative jurisprudence of equality coupled with substantive interpretation of the content of 'socio-economic' rights should restore social justice as a premier foundational value of our constitutional democracy side by side, if not interactively with, human dignity, equality, freedom, accountability, responsiveness and openness."[102]

Achieving a society based on social justice requires a commitment from the legislature, the executive and the judiciary to address imbalances, and the social and economic needs of society, especially the most vulnerable, and to command active state participation in related matters.[103]

At least two different theories on social justice reject formal equality as a probable basis for social justice. Honoré, as set out above, explicitly recognises equality of opportunities and preferential treatment for the underprivileged as components of social justice. According to Liebenberg, Fraser in her theory on social justice as based on participatory parity, rejects formal equality as insufficient to construct social justice.[104] This ties in with the central tenets of the South African constitutional jurisprudence and its fundamental commitment to achieving substantive equality. In fact, De Vos, in his discussion of social and economic rights case law, states that substantive equality and social and economic rights — which translates here into the achievement of social justice — are two sides of the same concept.[105] Even though a close relation exists between the right to substantive equality and the establishment of social justice, it is submitted that equality as such, and for that matter a rights-based approach in general — as is also noted in the discussion of economic justice — is not capable of providing an adequate

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102 Moseneke 2002:314.

103 Not unlike the situation in Germany after World War II. See De Wet 1995a:43, 44.

104 Liebenberg 2002:7.

105 De Vos 2001b:263.

framework for the creation of social justice.[106] The transformative character of the Constitution, and the commitment to social justice, do prescribe state action to realise the objective of establishing a society based on social justice. Affirmative measures may thus be viewed as an implicit component of state action. B-BBEE programmes therefore aid the achievement of this broad objective by attempting to improve the quality of life of previously disadvantaged groups through access to economic opportunities.

It could also be argued that the achievement of social justice is crucial for the optimal functioning and implementation of B-BBEE programmes. In other words, progress made in addressing social injustice will directly impact on the accomplishments of affirmative economic programmes. The neediest in society are more often than not unable to meaningfully participate in the economy. This is due to the fact that these most vulnerable of people find it hard to make productive contributions to the mainstream economy because of the day-to-day struggle for survival. On the other hand, this section of the population, who are for the most part unemployed, would hardly be in a position to add to economic growth and expansion through increased consumerism. Lack of access to education — the provision of which would form part of the achievement of social justice — limits employment opportunities.

In order for persons to benefit from B-BBEE programmes, it is essential that advances be made in providing for people's basic needs, thus advancing the achievement of social justice.

4.2.4 Economic justice

4.2.4.1 Introduction

Closely related to social justice, and, some would argue, part of the wider concept of social justice, is the notion of economic justice. Economic justice is concerned with

[106] Van der Walt 2004:267.

fairness or equity in matters of an economic nature.[107] Justice, as part of the concept of economic justice, refers to legal rights, fairness, and equity, and the substantive achievement of these with specific reference to economic matters.[108] The economy cannot be separated from social life, but is embedded in the social structures within which it operates. Neither does the economy exist in isolation from the social and historical realities of society, and should, for this reason, therefore form an integral part of the solution of systemic problems.

4.2.4.2 The interrelationship between social and economic justice

Economic justice, like social justice, is closely related to human rights and equality.[109] Every human being is entitled to have access to certain basic economic goods, for example, housing, health care, employment, social security, etc. Every person is entitled to lead a dignified and autonomous existence, and by implication, every person is entitled to the conditions in which this entitlement may be realised.[110] In the Preamble of the Constitution,[111] it is explicitly provided that all citizens should be able to realise their potential. The Preamble moreover calls for the improvement of the quality of life of all citizens. Although no specific reference is made to economic justice in the Constitution, participation in economic activities is integral to the realisation of this objective. This is because the improvement of the quality of life for all citizens presupposes that citizens should be able to earn a living. This thus touches on subjects that, for example, concern job creation and other economic participatory activities. The eradication of deprivation or poverty could, for purposes of this study, be classified as belonging to the sphere of the creation of a society based on social justice (as part of a broader concept of distributive justice). This refers to access to health care, food, water, basic social security, housing, and education. Economic justice, as a metaphor for the

107 Peritz 2003:362.

108 Ibid.

109 Landesman 2008:226.

110 Blake 2002:259.

111 Constitution of the Republic of South Africa.

distribution of economic resources,[112] addresses issues of relative deprivation of economic equality, such as the ever-increasing gap between the rich and the poor in South Africa, and the measures employed to address the existing unequal division of economic resources along racial lines, which is the result of racially discriminatory practices of the past, i.e., a situation characterised by unjustifiable economic inequality.

4.2.4.3 The importance of economic justice

In line with the overall transformative role of the Constitution, what is needed in South Africa is economic justice, which would necessarily entail visible, significant changes in the distribution of wealth and privilege.[113] It is clear that the promotion of economic justice in South Africa should display a strong distributive character. Despite political transformation, widespread economic inequality still exists along racial lines, which could eventually result in civil unrest and threaten political stability.[114] It is generally accepted that a failure to address and correct economic inequality, especially where extreme inequality exists, poses a risk of social unrest, a threat to democracy, and leaves hard-earned civil and political rights virtually empty and worthless.[115] It is also true that economic equality and economic justice are feeding grounds for equality in all aspects of life.[116] Promoting economic justice aids in maintaining a deliberative democracy in itself.[117] This is because economic justice, together with social justice, focuses attention on interests which are fundamental to the values of dignity and equality. In order for a society to be founded on justice, it is necessary to ensure that all citizens

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112 Landesman 2008:225.

113 Van der Walt 2006:9.

114 Schneider 2003:24.

115 Ibid. See also Sen 1973:1; Hoffman 2008:93.

116 Hobbs 1997:244-245; Ludlam 2007:371.

117 Sunstein 2001:124.

have the "requisite primary goods to enable them to make intelligent and effective use of their freedoms".[118]

In any discussion regarding economic justice, controversial questions always arise about policy-decisions to be made regarding *what* should be redistributed, *how* this should be done, and *who* should be the beneficiaries.[119] B-BBEE is hailed as a system by which a new order of economic justice will be introduced in South Africa and through which the economy will be transformed and deracialised, therefore advancing the transformative objective of the Constitution. It is the primary economic vehicle for the achievement of these goals.[120] It is a programme designed with the specific objectives of benefiting a clearly defined group of beneficiaries, namely previously disadvantaged persons or groups of persons, with a clearly formulated methodology on how this redistribution is eventually to be achieved. The relative success of the programme will be evaluated in a later chapter.[121]

An important facet of understanding economic justice is an appreciation of the historical context of the current dispensation. Economic justice cannot be promoted without due regard to the economic inequalities that exist, and the causes thereof. In the chapter on the legacy of apartheid it was explained that apartheid was a legislative means of refusing a sector of the population access to capital, productive assets, and the opportunity to meaningfully participate in mainstream economic activities.[122] Under this regime, employment was available to black people, but limited to lower skilled, low-compensation jobs with little prospects of progress. This legacy of inequality urgently calls for economic redistribution, change and transformation, which are part of the overall objectives of B-BBEE. Jack[123] groups the South African population into four levels of socio-economic standing: below the poverty line; economic survival; economically ready

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118 Rawls 1999:14. See also Scaperlanda 1999:420.

119 This is also controversial when dealing with international models of economic justice, which have become more relevant of late. See Kapstein 2006:1-44.

120 Gewirth 1985:7.

121 See Chapters 5 and 6 below.

122 See Chapter 2 above.

123 Jack 2005:27.

and economically empowered. One of the most critical concerns of economic empowerment should obviously be the first of the four groups, and this correlates very closely with the discussion on social justice. In order for the broader South African population to be economically active and productive it is necessary to first see to the basic needs of social groups, for example housing, food, health care and education. These are critical components to any society which wishes to advance persons to the economically-ready level and beyond.

4.2.4.4 The Constitution and economic justice

The Constitution mandates the progressive realisation of economic rights in the transformation to a state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. Therefore, like socio-economic rights in general, the state has a duty to act to ensure the achievement of economic justice.[124] The Constitution (as well as other international human rights instruments, for example, the UN Charter and Universal Declaration of Human Rights[125]) grants certain rights and prohibits discrimination in the enjoyment of economic, social and cultural rights. This means that both formal and substantive discrimination should be eliminated.[126] In other words, the eventual goal should be economic justice which is both formally and substantively just. This would once again include the application of positive or affirmative measures to achieve economic justice. The mere removal of obstacles for the equal enjoyment of economic rights would, therefore, be insufficient. Thus, economic justice demands that similarly situated persons or groups of persons should be treated equally, but also entails remedying existing injustice.[127]

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124 Constitution of the Republic of South Africa: section 8(1).

125 Charter of the United Nations: Preamble, article 1(3) and 55; Universal Declaration of Human Rights: article 2(1).

126 See also Gewirth 1985:10; Peritz 2003:362.

127 Meyers 1985:3.

As stated above, the Constitution does not make specific mention of the term "economic justice", but various provisions in the Constitution concern matters of economic justice. Economic justice is served by, among other things, legislation protecting workers' rights, ensuring just and favourable conditions of work, trade union freedom and living wages. Economic justice also ties in with the concept of substantive equality. Section 9 provides for equality and prohibits discrimination based on certain prohibited grounds, which means that it encompasses, among other things, issues of economic justice, such as the right to equal remuneration for work of equal value and equal opportunity for everyone to be promoted in employment. The general dictate is that similar situations should be treated similarly, that only relevant distinctions should be taken into account, that discrimination is not allowed, and that affirmative distributive measures are allowed to eliminate inequalities which stem from discriminatory practices.[128] Section 9(2) also explicitly sanctions affirmative measures taken for the establishment of a more equal society and therefore also includes measures taken to correct economic inequalities which were created by racially discriminatory practices. Both the enforcement of social and economic rights and the substantive outcomes achieved by promoting these rights should be underscored by fairness. Difficult questions arise when considering the relevant criteria to apply when making comparisons between groups.

Section 25 of the Constitution provides for the protection of property rights, but, in this particular context, section 25(5) is to be considered as especially relevant. Section 25(5) deals specifically with affirmative measures to ensure that all South Africans gain access to land. Correcting unequal land distribution which exists along racial lines promotes economic justice. As was argued above, the constitutional provisions dealing with housing, health care, food, water and social security are, for purposes of this discussion, classified as issues regarding the assurance of a basic livelihood and thus resort under social justice, as the broader umbrella term under which economic justice resorts.

[128] Peritz 2003:362; Meyers 1985:1.

4.2.4.5 Economic justice within the South African economy

Economic justice should be the guiding principle when decisions regarding national economic principles, policies and programmes are made, with the emphasis on creating a substantively egalitarian society. It could be said that economic justice is the moral compass for decisions on economic policy. In order to give effect to the transformative imperative of the Constitution, the government's response to economic injustice and inequality, as well as the success of the B-BBEE programme, will be particularly telling.[129]

Fair economic processes relate to the type of economic system in play. It is instructive for this part of the discussion to refer to the German Constitution. The German Basic Law does not provide for a specific economic dispensation, but Ossenbühl[130] deduces from certain constituent elements that Germany has a free market, social economy. These elements comprise the following: "contractual liberty, economic freedom, the guarantee of private property, the freedom of price fixing, the freedom of competition, the freedom of movement, the freedom of expression, and the freedom to advertise".[131] Similarly, the South African Constitution makes no mention of a specific economic order, but guarantees certain basic rights from which it is possible to deduce that South Africa subscribes to a free market economy. From a South African perspective these elements are provided in the Constitution, legislation and the common law. The South African Constitution guarantees freedom of movement[132] and freedom of expression[133]. The Constitutional Court has taken the view that "expression" should not be interpreted narrowly[134] and that freedom of expression includes the freedom of commercial speech. Currie and De Waal note that "… a market-orientated economy

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129 Daly 2001-2002:74.

130 Ossenbühl 2000:561-562.

131 Ibid.

132 Section 21.

133 Section 16.

134 See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 1 SA 406 (CC); 2003 12 BCLR 1333 (CC): para 48.

cannot function properly and effectively without commercial speech."[135] The Constitution also provides for private property,[136] and freedom of trade, occupation and profession.[137] Devenish[138] argues that the inclusion of the provision dealing with freedom of trade, occupation and profession in the Constitution encompasses a clear choice for a particular economic system, namely a market-driven economy.

Freedom, maintenance and promotion of competition are provided for in the Competition Act, but also in common law principles.[139] Contractual liberty is well established in the common law maxim *pacta sunt servanda* and its corollary, the principle of freedom of contract,[140] although it does not represent absolute and unlimited values.[141] Undoubtedly, the Constitution will impact on the South African law of contract, but freedom of contract will continue to be one of the basic principles of the law of contract.[142]

Similar to the conclusions reached by Ossenbühl regarding the nature of the German economy, it can be stated that the South African Constitution subscribes to a free market, social economy. In a constitutional democracy, a symbiotic relationship exists between a well-functioning economy and the state. The state relies on the economy for generating a large portion of its income through taxation, and the economy relies on state

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135 Currie & De Waal 2005:379-380.

136 Section 25.

137 Section 22.

138 2004: para 122.

139 Competition Act. Neethling & Rutherford 2003: para 234; Sutherland & Kemp 2006 *et seq*: para 3.1.

140 For a detailed discussion of the historic development of contractual liberty as an embodiment of liberty and a basic human right, see Atiyah 1979:69 *et seq*; Hawthorne 1995:162-163.

141 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A): 613B-C: "Freedom of contract, the principles of *pacta servanda sunt* and certainty are not however absolute values. They did not prevent the modification in England of the common law by equity, which *inter alia* gives relief against 'unconscionable' bargains." For a discussion of the limits of contractual freedom, see Hawthorne 1995:166-167.

142 This is confirmed by the following dictum of Cameron JA in *Brisley v Drotsky* 2002 4 SA 1 (SCA); 2002 12 BCLR 1229 (SCA): para 94: "… the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons … is that contractual autonomy is part of freedom."

protection and the infrastructure of the legal order.[143] This is true especially for a free market or open-market economy. However, the concept of a fair economic process also relates to the concept of the social state as discussed in the section dealing with the social constitutional state. Market economics, when left to operate without any type of government involvement, will be unable to correct existing unjust imbalances.

The state can influence the economy in a variety of ways and for different reasons. The free market economy of the constitutional democratic state needs the state's promotion and protection to ensure its preservation and proper functioning. The state thus has a fundamental role to play in exercising its influence when it is necessary for the protection of the market.[144] In the connected relationship between state and market, a certain influence by state on market and *vice versa* is undeniable.[145] Some of the objectives of state influence are clear, for example, to prevent monopolies or unfair competition. This serves to protect both the objective of economic justice and the proper functioning of the market.[146] Other objectives can however also call for state influence. Socio-political objectives could drive state influence. In order to correct property and income inequality that exist in the market, the state may implement collective measures that are not market driven. The same applies to the removal of social and economic inequalities which exist as a result of past discriminatory practices.

Achieving a society based on economic justice will necessarily entail government intervention in the operation of the market economy to ensure that conditions are created within which all people have meaningful access and participation.[147] This intervention is mandated, not only by the various provisions in the Constitution guaranteeing a variety of

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143 Musgrave 1992:92; Ossenbühl 2000:561; Genschel 2005:53, 55.

144 Ossenbühl 2000:564.

145 Adam Smith's theory that state and economy exist in an idealistic order of free interplay, only subject to economic forces, is simply too far removed from reality to continue to have relevance. Ossenbühl (2000:564) refers to the analogy used by Adam Smith (An Inquiry into the Nature and Causes of the Wealth of Nations (1776)) where the economy is portrayed as free of any interference, but guided by an "invisible hand".

146 Ossenbühl 2000:564.

147 See also Peritz 2003:362; Hoffman 2008:103.

social and economic rights, but also by section 7(2) of the Constitution,[148] which states that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights".[149] To illustrate this point, reference can be made to section 25 of the Constitution which protects private property. This protection is clearly compatible with market economy principles. It endorses the notion that not all South Africans have equal holdings of property. But it also clearly provides for state intervention, by means of legislative or other measures, to address issues of land reform, in order to remedy the consequences of past racial discrimination and create the conditions under which all citizens could gain access to land on an equitable basis.[150]

It is therefore justified for the state to exercise a certain degree of influence on the economy or market in order to achieve its socio-economic goals. In South Africa, socio-political objectives have a clear and important place. Correcting the extreme property and income inequality resulting from the apartheid regime remains a prominent concern in state policies and governance.

Although it is true that economic growth is important to achieve the objectives of social and economic justice, as set out in the Reconstruction and Development Programme, it should by no means be accepted that a free market economy is the holy grail for the attainment of these ideals. Economic justice has a strong redistributive element and foresees affirmative policies and programmes which would accomplish substantive equality and which would correct the wide economic disparities that still exist along racial lines. It requires affirmative measures to correct the current inequality which was the result of years of economic separation between racial groups.

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148 In its Preamble, the South African Constitution specifically provides for a "…society based on democratic values, social justice and fundamental human rights". The discussion in Chapter 4 identifies numerous constitutional provisions, principles and values which form the basis of interventionist measures in the South African context.

149 State intervention in economic matters was also explicitly sanctioned in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC); 1996 1 BCLR 1 (CC): para 52.

150 Constitution of the Republic of South Africa: section 25(5) – (9).

4.2.4.6 State intervention to achieve economic justice

Economic and fiscal legislation can be utilised as instruments in the process of achieving substantive equality, social and economic justice.[151] This raises the question as to the permissible level of state interference in the market economy. The Constitution's role in allowing state intervention in the economy can be explained with reference to the principle of contractual freedom. As stated above, there is no unqualified freedom of contract. The Constitution, especially section 9, will most noticeably act to fill the gaps, which were created by the inequality of bargaining power of the parties, that exist in contract law.[152] This would be in line with the constitutional duty of the courts, created in section 8(3)(a), to develop the common law.[153] There will have to be a weighing of rights whenever the Court finds that a provision of the Bill of Rights competes with other rights.[154]

Essentially the right to self-determination cannot be realised fully in a market or a society characterised by dramatic systemic and structural inequality. As part of the definition of economic development, it is now generally accepted that economic development is no longer only measured in terms of a reduction of poverty, inequality and unemployment (i.e., meeting basic needs such as food, education, health care, water supply, housing), but also includes the individual and societal gains in self-esteem and dignity through increased economic independence and national prosperity.[155] The state has to act to resolve this inherent conflict between equality and market freedom. The principle of equality is used to level out the market economy.

4.2.4.6.1 Types of market interventionist mechanisms

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151 This can be likened to the way in which the European Union tries to promote and enforce its environmental policies. See Rebhinder 1993:57-81.

152 Christie 2001:16-17, 22.

153 Ibid, at 22.

154 Christie 2006 *et seq*: para 3H6. This is confirmed by the Supreme Court of Appeal in *Brisley v Drotsky*: paras 93-94.

155 Pierson 1999:249.

Market influence can take different forms, such as market influence through supervision of the economy, market regulation, and market control. Each of these raises legal and constitutional issues. Market influence through supervision is a protective measure to guard against market mechanisms which could work to the detriment of the public interest. Although the theoretical boundary between supervision and market control can easily become clouded, these notions should be kept apart in principle as two distinct concepts. Besides protecting individual or common group interests, state supervision of the economy could also aim to achieve state policy objectives of economic growth.[156]

South African policy objectives of transformation and development of the economy to support the government's economic goals of growth, employment and equity will be achieved by increasing investment in and competitiveness of the economy, and the broadening of economic participation in mainstream economic activities of previously excluded people.[157]

What is typical of increased economic development is an increase in the state's supervisory role. In South Africa, numerous industries, for example, banking and financial institutions, energy supply, and insurance, are subject to state supervision.[158] The state makes use of different methods of supervision which include state authority to gather information, to do inspections, controlling, licensing, and the approval of prices.

State economic supervision epitomises the basic conflict between economic freedom and other constitutional principles such as social justice, equality and socio-economic rights. It is necessary for the state to determine and maintain the appropriate balance between these rights and principles.[159]

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156 Ossenbühl 2000:568.

157 Overview of the Department of Trade and Industry. Available at http://www.thedti.gov.za/thedti/vision.htm (accessed on 16 November 2007).

158 In Germany the following industries are subject to supervision: banks, trade, aviation, anti-trust, passenger transport, trucking, energy supply, nuclear power, emission control, and insurance. Ossenbühl 2000:568.

159 De Wet 1996:123-125; Ossenbühl 2000:568. It should be kept in mind that when the legislature transfers its regulatory competencies to administrative bodies it could create constitutional and

Another form of state influence exists through market regulation.[160] This type of regulation typically becomes necessary when state assets or services are privatised, for example Telkom, thus, when services delivered by the state are transformed into private services delivered or rendered by private enterprise. The partial privatisation of Telkom involved a transfer of state assets to the private sector. The government sought to advance both social and economic objectives with the partial privatisation, namely a specific emphasis on the promotion of empowerment[161] and improvement of the efficiency of the enterprise usually associated with service delivery when subject to normal economic forces.[162]

Market control presents both direct and indirect forms of behaviour control, and both the direct and indirect forms of state influence pose constitutional issues.[163] In Germany indirect behaviour control as market influence has recently increased in relevance, particularly with regard to environmental law. The basic premise is that financial incentives are used to promote certain desired behaviour which would then

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practical problems because it could lead to the regulating supervisory body overstretching its mandate.

160 Ossenbühl 2000:568.

161 The empowerment goal is clear when one reviews the way in which the public offer of shares was structured. In 2003 Telkom SA Ltd offered ordinary shares at 20 percent discount to the initial public offering price, known as the Khulisa offer, to historically disadvantaged individuals and stokvels consisting only of historically disadvantaged individuals. See TELKOM SA Ltd — Pricing, Allocation and Results Announcement dated 3 April 2003, available at https://secure1.telkom.co.za/ir/news/sens/sensarticle_79.jsp (accessed on 13 November 2007). Ossenbühl (2000:569) uses the example of the privatisation of the postal service and telecommunications (*Deutsche Bundespost*) to explain this form of market influence. The state takes one of its constitutionally assigned functions and places it under market rules, which results in an opening-up of the market in the field of postal services and telecommunications. Regulation of the market is essential to maintain a sufficient infrastructure. The supervisory function is assumed by a regulatory agency. This type of regulation has to ensure fair competition and serve as protection against monopolies, but it also ensures adequate service delivery independent of mere market forces. In other words, regulation has to ensure a continued basic service delivery even when on solely economic grounds it may not be viable in certain instances. Viewed in this light, market regulation becomes more than merely supervising the economy. A broad array of functions is vested in the regulatory body, i.e., licensing, supervising performance, and price fixing.

162 Jerome & Rangata 2003:10-11.

163 Ossenbühl (2000:570) explains direct state influence with reference to the restrictions placed on market access and the provision of Article 12, section 1 of the Basic Law which guarantees freedom to choose a profession. These restrictions on market access relates broadly to aspects of the person, management in the specific sector, and requirements of public safety and interests through quality standards or price regulation. When reviewing statutes regulating professions the German Federal Constitutional Court applies the standard of Article 12, section 1 of the Basic Law.

hopefully lead to the prevention of undesired behaviour. By imposing higher taxes linked to a corporation or entity's production or emission levels, it is presumed that the environment will become one of the *internal* cost considerations for corporations. The environmental costs then become part of the market mechanisms because product prices trigger competition mechanisms which lead to preventative effects. By increasing the cost of operations through levies and taxes, the environment becomes another factor driving the market.[164]

Through the design of the Codes of Good Practice and the scorecard, B-BBEE is internalised as a part of corporate market mechanisms. Lucrative government procurement contracts, licenses, etc.[165] are dependent on a corporation/entity's scorecard, of which the procurement element, contributing 20 percent of the total score, depends on the scorecard of the entity's creditors. Voluntary compliance with BEE becomes a competitive mechanism driven by profit seeking. Thus, BEE becomes internalised as a market mechanism, through the mechanism of competition, compliance measures are triggered.

4.2.4.7 Conclusion

It should be added that a purely factual equality-based approach to economic justice, with its strong comparative character, does not provide clear and adequate answers to all questions of economic justice in a market economic system. One of the essential components of an open market economy is the incidence of certain levels of

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164 Ossenbühl 2000:570.

165 B-BBEE Act: section 10 provides the status of the Codes of Good Practice as follows:

Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in —

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;

(b) developing and implementing a preferential procurement policy;

(c) determining qualification criteria for the sale of state-owned enterprises; and

(d) developing criteria for entering into partnerships with the private sector.

factual inequality of property and income.[166] This would seem to be in contradiction with the constitutional principle of equality. The exercise of freedom results in market inequality which sets it in opposition to the basic constitutional principle of equality.[167] The constitutional concept of equality is, however, not a purely factual concept of equality, but rather a legal notion, which seeks to eradicate all types of unjustified and discriminatory inequalities. Within this broader constitutional concept of equality it is possible to accommodate the factual inequalities which are inherent in the free market economy, whilst at the same time employing measures to eliminate unjustified economic and social inequality.

4.2.5 Constitutional developmental objectives and imperatives

Correcting economic inequality as part of a broader initiative to address the remnants of apartheid is premised on the implementation of affirmative measures to eliminate inequality which exists along racial lines. Correcting economic inequality pertains to more than the redistribution of current economic holdings. It is also premised on accelerated economic growth and increased access of previously excluded groups to the economic opportunities and wealth that this creates. Economic growth and expansion are strongly dependent on the adequately developmental role of the state. What needs to be addressed is whether a constitutional development objective can be formulated which translates into obligations for the state to act and direct itself accordingly. It should be stated at the outset that the term "developmental state" is used by political economists to refer to a specific model of state-driven macro-economic policy, which was prevalent in East Asia in the late twentieth century. It was characterised by extensive state intervention and regulation of the economy. It is not the intention in this chapter to give a full exposition of this particular macro-economic strategy. Reference to "developmental state" should rather be seen as incorporating the developmental imperatives

166 Ossenbühl 2000:565.

167 Dworkin 1981:284; Ossenbühl 2000:565.

constitutionally placed on government and the state, and the meaning this holds for economic empowerment and the search for economic justice.

The elimination of poverty through development — thus, economic empowerment through development — has become increasingly relevant as part of international thought on human rights.[168] Whereas traditionally development was measured primarily by GDP per capita, this has often resulted in a narrow focus on economic growth and a concomitant disregard of the development of human beings and the distribution of wealth or income.[169] The rapid economic growth in countries such as India and China, which has largely resulted in widespread environmental degradation and increased wealth inequality — the poor getting poorer and the rich richer — is evidence of the result of a narrow-based approach to development. A developmental state may be identified as a state "which works successfully to combine extensive social redistribution with high economic growth, thereby effectively tackling poverty, overcoming historic racial divides, and generally rendering the economy more dynamic, innovative, just and equitable."[170] This is indeed the type of state envisaged in the Preamble of the Constitution.[171]

The ANC has in recent years been more inclined to adopt and emphasise the notion of a developmental state. This has largely been in reaction to the inadequate results rendered by the neo-liberal economic model adopted in previous economic policy instruments[172] in the reduction of social insecurity, economic inequality and poverty.[173] The government launched its Accelerated Shared Growth Initiative for South Africa (AsgiSA) in 2006. This comprises a more state-driven developmental strategy to economic growth. AsgiSA ties in with the premise that the Constitution upholds

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168 Du Plessis 2007:211.

169 Pillay 2007:205.

170 Southall 2007a:1.

171 Constitution of the Republic of South Africa.

172 For example, the Reconstruction and Development Programme and Growth, Employment and Redistribution.

173 Pillay 2007:204.

particular developmental objectives and imperatives that are part of the broader empowerment imperatives, which is the focus of discussion in this study.

In the South African Constitution, various subjective constitutional rights are directly associated with the economic empowerment of previously disadvantaged persons or groups of persons.[174] In addition, it is also possible to deduce a number of objective legal norms containing a developmental mandate from a variety of constitutional provisions which could be labelled directive principles of state policy. These principles are concerned with the protection and enforcement of economic developmental imperatives through objective legal norms as opposed to subjective constitutional rights. The directive principles, insofar as they are relevant to a discussion on economic empowerment, could be described as the developmental objectives contained in the Constitution which calls on government to steer its policies in a particular direction. De Villiers describes directive principles as the "embodiment of a national spirit and consensus on social, economic and cultural issues which have to be addressed by the state".[175] According to De Wet, directive principles operate "[b]y means of general instructions, directions, orientations and obligations [to channel] state activities ... in a specific direction".[176] These directive principles form obligations for the legislature to uphold economic and social rights without guaranteeing individual rights, and also serve as interpretative guidelines for the executive and judicial arms of the state.[177] The concrete content of directive principles is dependent on legislation and as such, these directive principles do not constitute subjective rights for individuals.[178]

Directive principles of state policy are found in the constitutions of Germany, India and Ireland where they generally deal with social and economic rights issues.[179]

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174 These constitutional provisions are, for example, the sections dealing with equality (section 9), social and economic rights (sections 26, 27, 28, 29), property (section 25), and are dealt elsewhere in this study.

175 De Villiers 1992:29.

176 De Wet 1996:30.

177 De Villiers 1992:29; Davis 1992:485, 486; De Wet 1996:17.

178 De Wet 1995b:464; De Wet 1996:30.

179 Alexander 1952:291; Kommers 1991:865-866; De Villiers 1992:29; Davis 1992:485; De Wet 1995b:463; De Wet 1996:27-32; Usman 2007:644.

Regarding the South African Constitution, a case can be made for the recognition of directive principles of state policy placing an economic-developmental duty on the state in order to provide the framework for the achievement of a "society based on democratic values, social justice and fundamental human rights." Economic development forms part of the process of generating circumstances which facilitate the fullest possible realisation of human rights. It has particular links to social and economic rights issues concerning health care, food, water, social security, housing, but also links up with broader issues concerning economic justice. This developmental imperative is the driving force behind the actual delivery of economic empowerment and the achievement of social justice and substantive equality.

These developmental objectives are found in a number of constitutional provisions relating to local government, public administration and finance. Municipalities and local government must strive to promote social and economic development.[180] Furthermore, the Constitution instructs municipalities and local government to structure and manage their administration and budgeting and planning processes in such a manner as to promote the social and economic development of the community.[181] This clearly places positive obligations on local government to effect economic development, and development in general, and to direct policy to this end.

This developmental objective becomes even clearer when considering the Municipal Systems Act.[182] The Municipal Systems Act forms an integral part of legislation which gives effect to the system of local government. It provides the principles, mechanisms and processes through which municipalities should achieve their objectives. The Act is definitional of the legal nature of municipalities and their rights and duties, functions and powers. The Preamble to the Act declares that municipalities

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180 Constitution of the Republic of South Africa: section 152(1)(c). Section 152(2) states that municipalities must strive, within their financial and administrative capacity, to achieve the objects of local government.

181 Constitution of the Republic of South Africa: section 153.

182 Local Government: Municipal Systems Act 32/2000.

should be fundamentally developmental in orientation.[183] The Act further demands that municipal planning must be developmentally oriented,[184] so as to, *inter alia*, ensure they contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.[185] Chapter 5 of the Municipal Systems Act provides for the adoption of integrated developmental plans and regulates the process through which these plans are drafted, the contents thereof, the status of the plans and the way in which effect should be given to the integrated development plans.[186]

The "social law state" is a directive principle that should specifically be addressed here. This discussion carries marked references to the same concept, defined as a directive principle, in German law. De Wet[187] describes the term "social law state" as being the "balance which German law pursues to protect socio-economic interests on the one hand and civil and political rights on the other hand." It can be said that the social law state, in its current usage here, is equally apt in describing the South African Constitution. In other words, the nature of the Constitution is such that there is a fusion between principles of a constitutional state under the rule of law and a social state. The social state principle is an objective legal norm, therefore not giving rise to guaranteed individual subjective rights, but still posing obligations for the legislature to uphold social and economic rights. This means that the social state principle also serves as an interpretative tool for the judiciary and executive authority.[188] The social state principle underlies the enabling of economic empowerment and elimination of inequality as

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183 The Municipal Systems Act defines "development" as meaning "sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at —

(a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and

(b) ensuring that development serves present and future generations."

184 Local Government: Municipal Systems Act: section 23.

185 Section 23(1)(c). These sections of the Constitution deal with issues regarding the environment, property, housing, health care, food, water and social security, and education.

186 The Municipal Finance Management Act 56/2003 deals extensively with budgetary and other financial matters associated with municipalities' integrated development plans.

187 De Wet 1996:17.

188 Ibid.

discussed in the sections concerning social and economic rights[189] and social[190] and economic justice[191]. De Wet refers to Zacher who described the social state as a state which "appreciates, ensures and changes economic relations in the community, with a view to guaranteeing a decent living for each person, reducing the differences in well-being and either controlling or eliminating the social dependence of the mass."[192] However, as De Wet argues further, the social state principle also encompasses a limiting aspect, and this is then relevant to the discussion on limitations.

From the Constitution itself it is clear that South Africa is a constitutional state. What can be deduced from all the provisions in the Bill of Rights which deal with social and economic rights, and the central role of dignity in our Constitution, is that the Constitution in effect endorses the social state principle. Upon these two basic premises rests the above assumption that South Africa is a social law state or social constitutional state.

In this respect a strong parallel can be drawn between the South African and German Constitutions. The German Constitution also endorses the social law state principle. The German Federal Constitution contains the following provisions:

> "Article 20(1): The Federal Republic of Germany is a democratic and social federal state.
>
> Article 28(1): The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law."

It is acceptable in a society based on social justice for government to implement legislation, policies or programmes which seek to remedy imbalances which exist between groups. The object of the social state and the social justice principle is indeed to protect socially vulnerable groups in relation to other groups which stand in a dominant relation to them. This form of protection is aimed at creating a society where parties

189 Para 4.2.7.

190 Para 4.2.3.

191 Para 4.2.4.

192 De Wet 1996:20 fn 15 referring to Zacher 1987:1066.

have equal (or dramatically less unequal) standing in socio-economic relations. There should be a gradual reconciliation of conflicting interests.[193]

Nevertheless, the social state principle also requires that no group's interests should simply be ignored when seeking to protect or advance vulnerable groups in society. The advancement of or preference for one group at the expense of another should always be aimed at creating a balance of interests. De Wet makes this point in the following statement:

> "[The favouring of those in a weaker socio-economic position] does not, however, boil down to a radical levelling of all inequalities, but a systematic reconciliation of diverse societal interests … The protection given to one group may never lead to the interests of the other group simply not being taken into account. The ultimate aim of the social law state is a balance in community interests."[194]

A German case[195] dealing with differential income tax scales illustrates the way in which the social state principle can be said to favour more vulnerable groups over other groups in society. It was found that legislation in terms of which the investments of persons with low income were exempted from income tax did not discriminate against those in higher income brackets who had to pay income tax. The differential income tax levels were held to be reconcilable with the concept of equality in German law.

Legislation which allowed women to reach eligibility for state pension at the age of 60 (as opposed to 65 in the case of men) was found to be constitutional because it aimed at compensating for previous patterns of discrimination. The German court held that a socially just order would in some instances require the adoption of remedial measures.[196] The court was however at pains to emphasise that any such measure should be taken as a way in which to promote the general interests of society, with due regard to the interests of those groups not favoured by the programme in question.

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193 Ibid, at 24.

194 Ibid.

195 BVerfGE 50, 57 (107-108), referred to by De Wet 1996:25.

196 BVerfGE 74, 12 (179), referred to by De Wet 1996:25.

The social state concept thus cautions against an approach whereby the interests of society are equated with those of one or more groups within the broader society. Therefore, the social state principle can be seen as something which both enables *and* limits the implementation of affirmative or remedial programmes. Viewed from the opposite perspective, the social state principle and its underlying philosophy of social and economic justice serve to limit the constitutional state in its subscription to individual freedom and liberty. Fundamentally, the concepts of balance and proportionality should be adopted so as to maintain the steadiness between the enabling and limiting components of the social state principle in its interaction with the constitutional state.[197] The principle of proportionality has its foundation in the concept of the constitutional state and is therefore implicit in every provision of the Constitution.[198] Perhaps it could be said that the principles of proportionality and balance provide the link between the social state and the constitutional state.

Legislative commands are distinguishable from directive principles as objective legal norms relevant to the discussion of the state's developmental imperative. These can be described as "constitutional directives which force the legislator to act in a particular sphere".[199] Legislative commands do not guarantee any subjective constitutional rights but provide more concrete legal duties for the legislature than in the case of directive principles. In this regard, consideration should be given to the provisions regarding the public service. Section 195 clearly positions development[200] as central to the basic values and principles governing the public administration. It also provides for the enactment of national legislation to ensure the promotion of its development-oriented mandate.[201]

A legislative command is also relevant when dealing with the division and allocation of revenue to the national, provincial and local spheres of government. Section 214 provides that the division and allocation of revenue should be done through

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197 The constitutional model of state law is considered to be the basic model of Western social democracy. De Wet 1996:19 fn 8 referring to Stern 1987:3271.

198 Blaauw-Wolf 1999:181; Grimm 2007:386.

199 De Wet 1996:31.

200 Section 195(1)(c).

201 Section 195(3).

legislation, and that in this process, due consideration should be given to the developmental needs of provinces, local government and municipalities. In other words, whenever the state adopts a budget, the development of the economy as a whole should be taken into account, especially with regard to decisions about the allocation and expenditure of state income.[202]

The success of such state policies will depend on the implementation of the economic developmental objectives which raises the question of the enforceability of these directive principles and legislative commands. It is instructive to consider the enforceability of legislative commands and directive principles in German law.

The German courts have identified four ways in which legislative commands could be enforced, namely through a court's direct execution of a command; the issuing of a court order; issuing a court order declaring legislation in conflict with a constitutional directive; and applying legislative commands as interpretative guidelines.[203]

The German Constitutional Court has held that when the legislature neglects to comply with a specific constitutional command to effect legislation within a specified time period, the court can order any legislation in conflict with the legislative command as null and void and the legislative command will become operational in the entire legal system.[204] In instances where the Constitution provided no specific time frame for the enactment of relevant legislation, the court held that the legislature should comply within a reasonable time. What is considered to be a reasonable time should be determined with reference to all relevant circumstances, including the time needed for proper preparation and promulgation of the particular legislation.[205] However, since decisions to implement policies in execution of the constitutional developmental objectives and imperatives are mainly political and economic in nature, and are thus better suited to be taken by the legislature and the executive arms of state, the courts would have difficulty in directly

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202 With reference to the German law, see the interaction between the social state principle and section 109(2) of the Federal Constitution on budget policy. De Wet 1996:26.

203 De Wet 1996:72.

204 Ibid, with reference to BVerfGE 8, 210.

205 Ibid, at 73 with reference to BVerfGE 25, 167.

implementing legislative commands to this effect. A better way to effect the enforceability of legislative commands could be, after consideration of the relevant circumstances, by issuing a court order compelling the legislature's compliance.[206] As is the case with the direct execution of legislative commands by the court, issuing court orders also raises potential difficulties pertaining to deference to the legislative and executive arms of state. The courts, on finding that the legislature has neglected to execute its obligations, can issue a court order compelling the legislature to do so.[207]

In German law, the issue of standing is problematic, since anyone approaching the courts on grounds of enforceability of a legislative command has to frame the request as an infringement of a subjective right.[208] In the South African context, an individual may approach the courts for an order to enforce compliance with a legislative command if it can be proved that the individual has suffered a violation of his/her rights due to the legislature's non-compliance. However, the courts show much deference to the legislature's decisions concerning the allocation of resources and policy implementation due to the fact that a balancing act needs to be performed, between the interests of a vast number of groups and the limited means of the government. As De Wet suggests, this problem can be solved through the recognition of a court order in the public interest.[209] Economic development is in the public interest because it serves to develop the broader community and to promote the achievement of substantive economic equality. Indian law recognises limitations of fundamental rights where it serves the public interest as formulated in the directive principles of the Indian Constitution.[210] As also noted above, the issue of availability of resources and the discretion afforded in the allocation thereof, once again become relevant. A court order compelling the legislature to heed its obligations in terms of the developmental imperatives in the Constitution may not translate into any tangible relief or government action, unless the court order stipulates

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206 Ibid, at 74 with reference to BVerfGE 29, 268; BVerfGE 56, 55.

207 Ibid, at 75.

208 Ibid, at 76.

209 Ibid. An action in the public interest is recognised in section 38(c) and (d) of the Constitution of the Republic of South Africa.

210 De Villiers 1992:34.

specific guidelines and objectives for its execution. In appropriate instances, the courts could consider issuing structural interdicts to direct the legislature to execute its constitutional development imperatives. A structural interdict usually has the following elements: the court stipulates and declares the deficient nature of the government's conduct; the court issues an order to the government to comply with its obligation; the court orders the government to submit a report, within a specific time frame, detailing the steps it intends to take, to which the applicant is afforded an opportunity to respond to the contents of the report; upon a finding by the court that the report is satisfactory, the report is made an order of court.[211] The courts should once again refrain from assuming any strict supervisory role in issues of implementation, which should rather be left to the daily business of the executive arm of the government.[212]

In the third instance, in German law courts can deal with the issue of enforceability of legislative commands where legislation was enacted in such a manner so as to conflict with or undermine constitutional commands. This usually is the case when enacted legislation infringes subjective constitutional rights, for example equality, or where the legislature has acted outside the scope of its competencies or abused its competency.[213] If this is the case, the court may nullify the legislation[214] or declare it in conflict with the Constitution[215].

Lastly, legislative commands can be applied as interpretative guidelines where legislation is open for a variety of interpretations. Legislation will have to be interpreted in a manner consistent with legislative commands.[216]

The same four possibilities of enforcement by the courts applicable to legislative commands are in principle also applicable to the enforcement of directive principles.[217]

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211 Currie & De Waal 2005:218.

212 Ibid, at 219.

213 De Wet 1996:77.

214 Ibid, at 79-80.

215 Ibid, at 80-82.

216 De Villiers 1992:33, 34; De Wet 1996:82-83.

217 De Wet 1996:83.

However, directive principles lack the normative concreteness which is necessary for enforceability. Directive principles are less clearly defined and much more comprehensive in content than legislative commands, and this makes the establishment of non-compliance by a court difficult. De Wet avers that, although it would be difficult for the courts to enforce directive principles in the same way as legislative commands, this should not be dismissed as an impossibility. She argues as follows:

> "If the state organs — especially the legislator — have not executed a directive principle for a considerable period of time, even though the circumstances are such that it is clear to everyone that state action is imperative, or if state organs are acting in conflict with the directive principle in some other way, the court can force the legislator to execute the objective properly."[218]

Directive principles could be especially effective as interpretative guidelines in the South African context. When courts deal with issues regarding the achievement of economic equality and justice, the constitutional developmental objective should be considered when evaluating the effectiveness, fairness and rationality of legislative measures or other policy instruments so enacted and implemented.

Tenable support for this contention can be found in Indian law. South African courts[219] have on occasion referred to Indian jurisprudence in the adjudication of constitutional rights and it is instructive to briefly refer to a few points here. Firstly, when considering the limitation of a fundamental right, directive principles are considered due to the fact that the public interest, as formulated in the directive principles, may justify such limitation.[220] Secondly, De Villiers makes the following statement:

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218 Ibid, at 84.

219 *S v Makwanyane*; *Soobramoney v Minister of Health, KwaZulu-Natal*; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851 (CC); *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 4 SA 877 (CC); 1995 10 BCLR 1289 (CC).

220 *State of Bombay v F N Balsara* AIR 1951 SC 318; 1951 SCR 682. Available at http://www.commonlii.org/in/cases/INSC/1951/38.html (accessed on 22 June 2010).

> "It is clear from the Constitution that the directive principles do constitute legal norms which are of relevance to the judiciary. These norms cannot be enforced by court action or at an individual's instigation, *but they provide a framework for understanding the intention of the legislature and may justify certain restrictions on fundamental rights which otherwise would not have been possible*."[221]

Legislation in Indian law is interpreted against the background of a general presumption that legislative and other state action has as its objective the implementation of the directives.[222]

Directive principles as interpretative guidelines imply that the directives form part of the framework within which constitutional rights adjudication would take place.[223] They serve to reinforce the state's obligation to take positive steps to realise the objectives of the Constitution and the rights contained therein. Thus, when the courts deal with measures pertaining to economic or social issues, they should bear in mind that, together with all relevant considerations, the Constitution carries within it a developmental objective or imperative which should be considered by the government in its day-to-day work.

Although directive principles are vague and pose more difficulties for judicial enforcement than legislative commands, the latter can be said to pose problems of their own. For example, legislative commands with very concrete content could result in the politicisation of the Constitution. Political parties with adequate support could use legislative commands to further party-political ideologies and disregard the fact that the Constitution is the platform of broad political consensus. Continuous constitutional amendments to align legislative directives with party-political agendas could create constitutional instability. This is counterproductive and ignores the fact that the constitutional interpretation and legislative implementation of the rights contained

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221 De Villiers 1992:37 (original emphasis, footnotes omitted).

222 Ibid.

223 Ibid, at 31.

therein, together with their judicial enforcement, should be adaptable and context-specific, based on the particular issues at hand.[224]

It can thus be concluded that the Constitution is development-oriented, not only from the perspective of subjective constitutional rights which urge the state to promote economic development for the betterment of its citizens' lives, but also through an objective legal norm which urges economic development. There is thus a definite obligation on the state to shape society and the economy[225] in a way which enables the improvement in the lives of individuals and groups so as to achieve a fuller realisation of human dignity. With regard to directive principles pertaining to social and economic rights, as found in both German and Indian law, it has been said that these require the state to actively involve itself in the social and economic spheres of society.[226] The same can then be said of the South African Constitution's developmental directive principles. The state must act to effect and promote development. It should therefore actively promote macro-economic and fiscal policies that will grow and enhance trade and industry, provide a suitable arena for optimal economic growth whilst still maintaining economic and fiscal stability.

It should also provide the necessary infrastructure to facilitate this growth. The same applies to areas indirectly related to development, namely employment,[227] education, health care, housing,[228] social security,[229] environmental affairs and the myriad of other areas involved in establishing a growing, well-balanced, properly and adequately regulated and prosperous economy.[230]

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224 De Wet 1996:85.

225 Kommers 1991:865.

226 De Villiers 1992:33.

227 Development is to a certain extent touched on in the Basic Conditions of Employment Act and the Employment Equity Act.

228 See for example the Development Facilitation Act 67/1995, Housing Development Agency Act 23/2008.

229 See for example Advisory Board on Social Development Act 3/2001; National Development Agency Act 108/1998.

230 For example, see the importance of economic development in the provisions of the Competition Act.

4.2.6 Public administration in section 195 of the Constitution

The public administration will have both a direct and indirect role to play regarding the government's broad-based black economic empowerment programme. It will be directly involved in driving the implementation of the programme by the operation of section 10 of the B-BBEE Act, which explicitly requires all organs of state to consider the Codes of Good Practice issued in terms of the B-BBEE Act when dealing in procurement activities. This aspect was discussed in detail in Chapter 3 above. The public administration will also indirectly aid the process of B-BBEE due to the fact that the programme is part of achieving the overall remedial and transformative objectives of the Constitution. Public administration is directly tasked in section 195 with developmental and transformative directives in order to achieve the fundamental objectives of the Constitution.

With the advent of the new South Africa, the new government inherited a public service sector that was as much a reflection of the apartheid-legacy as any other part of the South African landscape. One of the ANC government's primary objectives was the reform of the public sector, with the aim of aligning it with the new state goals of democracy, developmentality and the commitment to a human rights culture.[231] In the South African Government's White Paper on the Transformation of Public Service — being the conceptual framework for transformation in the South African public service — the situation was described as follows:

> "On its accession to power the Government of National Unity inherited a society marked by deep social and economic inequalities, as well as by serious racial, political and social divisions."[232]

The vehicle through which much of the necessary political, fiscal, social and economic transformation was to be delivered to the people was indeed the public sector

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231 Cameron & Tapscott 2000:81.

232 White Paper on the Transformation of Public Service: Chapter 1, Introduction para 1.1.

— thus the need for transformation in and of the service as a whole.[233] As is clear from the White Paper on the Transformation of Public Service, service delivery and economic growth were viewed as key objectives from government's side.[234] This comprehensive need for transformation is emphasised by the inclusion of provisions in the Constitution that deal specifically with public administration.[235] This need for legislative transformation into a "coherent, representative, competent and democratic instrument for implementing government policies and meeting the needs of all South Africans" was one of the first objectives set out by the government after 1994.[236] The deep division between public administration under the apartheid-era government and public administration under the new democratic government was highlighted by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[237] in the following statement:

> "The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently."[238]

More recently, in the case of *Van der Merwe and Another v Taylor and Others*, Mokgoro J, for the Court, described the vision of public administration under the new dispensation as follows:

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233 Ncholo 2000:87; Bardill 2000:104; Russell & Bvuma 2001:241.

234 Cameron & Tapscott 2000:84.

235 Constitution of the Republic of South Africa: Chapter 10.

236 White Paper on the Transformation of Public Service: Chapter 1, Introduction para 1.1.

237 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC); 1999 10 BCLR 1059 (CC).

238 Ibid, para 133.

> "Section 1 of the Constitution, read with s 195, indeed sets high standards of professional public service ... It requires ethical, open and accountable conduct towards the public by all organs of State. These are basic values for achieving a public service envisaged by our Constitution, which requires the State to lead by example. … In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the Constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past. Section 195 envisions that a public service reminiscent of that era has no place in our constitutional democracy. The remissness on the part of the respondents is not conducive to the current efforts of public service transformation."[239]

Public administration, as part of the executive branch of government,[240] includes every sphere of government, various organs of state, as well as state boards and public enterprises, and is responsible for the implementation of the policies and programmes of this part of the government.[241] The first in the processes of rationalisation and reconstruction of the public service sector involved the establishment of at least 155 national and provincial departments in terms of the Public Service Act.[242]

The importance of the public sector in the realisation of the broad transformative vision of the Constitution and a society based on social justice[243] is underlined by the inclusion of specific provisions and clauses in Chapter 10 of the Constitution. The part played by public administration in this area of transformation was described by Mokgoro J in *Van der Merwe and Another v Taylor and Others*:

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239 *Van der Merwe and Another v Taylor and Others*: paras 71-72.

240 White Paper on the Transformation of Public Service: Chapter 1, Introduction para 1.1. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*: para 133.

241 Constitution of the Republic of South Africa: section 195(2)(a), (b), (c). Devenish 2004: para 323; Ruiters 2006:127. See also *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2008 3 SA 91 (E); 2006 8 BCLR 971 (E): para 2.

242 Public Service Act, Proc 103/1994: section 7(2) and (3), and Schedule 1 and 2.

243 Kauzya (2002: para 1) argued that this is indicative of the government's commitment to social justice.

"The democratic approach to public service accountability is broadly based in comparison with the past. Read together with s 195(1) of the Constitution, the public service policy of *Batho Pele* requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the Constitution. In the past accountability was focused on the reporting by State parties to Parliament and not to the public. In those days even if the public was to approach courts for relief, the courts' hands were tied by the principle that they could not interfere with executive action unless gross unreasonableness was alleged."[244]

The public service is also bound to the foundational constitutional values and principles which mean that they are committed to the achievement of social justice, freedom and equality.[245]

Section 195 of the Constitution provides a set of basic principles and values that governs the public administration. No similar provision was contained in the interim Constitution, although section 212 of the interim Constitution did provide an interlude to these new provisions.[246] These principles and values are a total reversal of the principles

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244 *Van der Merwe and Another v Taylor and Others*: para 71 fn 81.

245 White Paper on the Transformation of Public Service: Chapter 1, Introduction para 1.1. *Van der Merwe and Another v Taylor and Others*: para 72. For example, in *Moseneke and Others v Master of the High Court* the Court found that administrative systems which are rooted in racial discrimination "undermines attempts to establish a fair and equitable system of public administration" (para 21).

246 Interim Constitution of the Republic of South Africa: section 212. — (1) There shall be a public service for the Republic, structured in terms of a law to provide effective public administration.

(2) Such public service shall —

(a) be non-partisan, career-orientated and function according to fair and equitable principles;

(b) promote an efficient public administration broadly representative of the South African community;

(c) serve all members of the public in an unbiased and impartial manner;

(d) be regulated by laws dealing specifically with such service, and in particular with its structure, functioning and terms and conditions of service;

(e) loyally execute the policies of the government of the day in the performance of its administrative functions; and

(f) be organised in departments and other organisational components, and the head of such department or organisational component shall be responsible for the efficient management and administration of his or her department or organisational component.

(3) Employment in the public service shall be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for employment in such service.

of public administration prevalent before the 1994 elections.[247] The provisions refer to the democratic values that underlie the Constitution and set out nine values and principles[248] which would be specifically relevant to public administration under the new democratic dispensation. These include the following:

(a) Maintaining and promoting a high standard of professional ethics;[249]

(b) Promoting efficient, economic and effective use of resources;[250]

(c) A public administration which is development oriented;[251]

(d) Public service delivery which is provided in an impartial, fair, equitable manner without bias;[252]

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(4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.

(5) Subsection (4) shall not preclude measures to promote the objectives set out in subsection (2).

(6) Provision shall be made by law for a pension for a member of the public service by means of a pension fund or funds established by law, and members of the public service who are required by law to be members of a pension fund shall be entitled to fair representation on the body which manages the applicable fund.

(7) (a) In the event of changes to the law governing pension funds which prejudice a member of a fund, the real value of the accrued benefits of such member of a fund, and his or her beneficiary, as represented by the fund's actuarial liability towards the member or his or her beneficiary, shall be maintained.

(b) The retirement age applicable to a public servant by law as at 1 October 1993, shall not be changed without his or her consent.

(8) For the purposes of this section the public service shall include the permanent force of the South African National Defence Force referred to in section 226(1).

247 Van Wyk 1997:392. This is also emphasised by Mokgoro J in *Van der Merwe and Another v Taylor and Others*: para 71 fn 81.

248 See also *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others*: para 2; *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and Another* 2002 1 SA 342 (SE); 2001 9 BCLR 899 (SE): 356A – C (910-911).

249 Constitution of the Republic of South Africa: section 195(1)(a).

250 Ibid, section 195(1)(b).

251 Ibid, section 195(1)(c).

252 Ibid, section 195(1)(d).

(e) Public service must respond to people's needs and encourage members of the public to participate in policymaking;[253]

(f) Public administration which is accountable;[254]

(g) Providing timely, accessible, and accurate information to the public and thereby fostering transparency;[255]

(h) Cultivating good human resource management and career development practices in order to maximise human potential;[256]

(i) Providing a public administration which is broadly representative of the South African people, with employment and management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.[257]

These principles and values import into the public administration transformative, reconstructive and developmental objectives. The transformation of the public sector was grounded in the RDP and was one of the key medium- and long-term projects to implement economic and social reform and empowerment. Paragraph (i) in particular displays clear connections to the transformative values underlying the Constitution in general and the substantive equality provision of section 9 of the Constitution in particular. These are in stark contrast to the principles underlying the public administration pre-1994, which were aimed at reinforcing and facilitating the policies of apartheid.[258] Policies of affirmative action in appointments made in the public administration sector are therefore governed by section 195, specifically section 195(1)(h) and (i), and section 9 of the Constitution. Affirmative action in the public sector with the objective of redressing past injustice will have to be weighed against the

253 Ibid, section 195(1)(e).

254 Ibid, section 195(1)(f).

255 Ibid, section 195(1)(g).

256 Ibid, section 195(1)(h).

257 Ibid, section 195(1)(i).

258 Van Wyk 1997:392.

need to provide an efficient, economic and effective use of resources. In *Nakin v The MEC, Dept. of Education, Eastern Cape Province and Another* it was stated as follows:

> "Fairness in public employment may conceivably have a different content to that in the private sector, for reasons relating to constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service."[259]

Whether this balance has been achieved, or not, has been the subject of critical debate. The implementation of affirmative action programmes in the public sector has been partially blamed for the massive skills shortages experienced at all levels of government, the under-spending of budgets in critical areas such as the provision of housing, and the roll-out of anti-retroviral programmes for sufferers of human immunodeficiency virus (HIV) and AIDS.[260]

It is instructive to consider the case of *Kimberley Girls' High School and Another v Head, Department of Education, Northern Cape Province and Others*[261] especially with regard to the role of affirmative action in the public sector, and in light of the fact that the public administration has an obligation to present an institution which is representative of the South African people, and to redress the disadvantages of the past, an aspect which plays a central role in section 195 of the Constitution. This case serves to illustrate the way in which section 195 influences the day-to-day workings of the spheres of government. It concerned the review of the process of short listing, recommendation for and appointment of educators in terms of sections 6 and 7 of the Employment of Educators Act.[262] The Head of the Department of Education in the Northern Cape had declined to follow the recommendation for appointing an educator because of the school governing body's failure to take into account the need to redress past injustices stemming from racial discrimination. Section 6(3)(b)(v) and section 7(1) of the Employment of Educators Act provide for the appointment of teachers, but also stipulate that remedial measures should be afforded the necessary weight. In terms of section 6(1)(b), the head

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259 *Nakin v The MEC, Dept. of Education, Eastern Cape Province and Another*: para 34.

260 Ruiters 2006:129-130.

261 2005 5 SA 251 (NC); 2005 1 All SA 360 (NC).

262 Employment of Educators Act 76/1998.

of department has the power to appoint teachers, but only on the recommendation of a school's governing body.[263] The head of department may only on limited grounds decline to follow the governing body's recommendation.[264] Section 6(3)(b)(v) and section 7(1) of the Employment of Educators Act provide that in the appointment of teachers, due regard should be given to equality, equity and other democratic values and principles which are contemplated in section 195(1) of the Constitution. The Court found that these provisions placed a positive obligation on the head of department and that any finding to the contrary would result in the role of such head to be that of merely rubberstamping appointments.[265] The Court found that the head of department was within his or her powers to, objectively and independently, ascertain whether a recommendation had paid due regard to democratic values and principles, and to then accept or decline the recommendation.[266]

The above concerns transformation in terms of the composition of the public service itself. Transformation, however, is also required in the way it operates. The delivery of public services before 1994 was unbalanced. The new public administration provisions therefore not only seek to transform the public administration's composition of employees, but also to balance the skewed provision of services to different groups of the South African population, and therefore contribute to the necessary social, economic and political transformation of South Africa. This in turn produced the following changes: a change in the legacy of pre-1994 public service to one of power-sharing among different cultural and language groups; change in service delivery where all groups receive the same quality of service, with substantively equal and fair resource allocation, especially for implementation of programmes in previously neglected and disadvantaged communities. These radical changes require in turn extensive institutional-culture and policy changes, which call for the transformation of the

263 Section 6(3)(a).

264 Section 6(3)(b).

265 *Kimberley Girls' High School and Another v Head, Department of Education, Northern Cape Province and Others*: para 15.

266 Ibid, para 21.

traditional public service structures whilst entailing programmes of alternative service delivery by means of privatisation and public private partnerships.[267]

A further extension of the allocation requirement, involving ways to remedy the under-provision of services in the past, would involve service delivery. This could be called affirmative service delivery through the substantially fair allocation of resources.

Delivery of services and infrastructure are to be effected through the public administration sector. For example, poverty-relief measures, taking the form of payment of social and other grants,[268] are the responsibility of the Department of Social Development. Delivery of much-needed infrastructure development will be executed through the programmes designed and implemented by the public administration, irrespective of whether these will take the form of the Department's own projects or projects undertaken as part of public-private partnerships. The modes of development and expansion referred to above are critical for achieving economic growth, which is crucial to the achievement of the objectives set out in the B-BBEE initiative.

Policy objectives for broad-based black economic empowerment were listed in the Strategy Document[269] and these will be used as the yardstick against which successful implementation of the strategy will be measured. They included the following: —

- Increased ownership of land and other productive assets, improved access to infrastructure, increased acquisition of skills, and increased participation in productive economic activities in under-developed areas including the 13 nodal areas identified in the Urban Renewal Programme and the Integrated Sustainable Rural Development Programme.

- Accelerated and shared economic growth.

- Increased income levels of black persons and a reduction of income inequalities between and within race groups.

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267 See discussion on privatisation and PPPs as empowerment initiatives in Chapter 3 above.

268 Social Assistance Act 13/2004.

269 Strategy for B-BBEE: para 3.3.

Section 195(3) of the Constitution provides that national legislation should be enacted as a means to ensure that the values and principles enumerated in the Constitution are promoted. This was duly followed by the enactment of the Public Service Act 1994.[270] Section 196 of the Constitution[271] provides for the appointment of a Public Service Commission with certain powers and functions regulated by the Public Service Commission Act.[272] The Public Service Commission is, *inter alia*, specifically tasked with promoting the values and principles enumerated in section 195 of the Constitution throughout the whole public sector, as well as with monitoring and evaluating compliance with these values and principles.[273]

In *Chirwa v Transnet Limited and Others*[274] the Constitutional Court found that section 195 is an interpretative tool but does not constitute an independent ground of action.[275] This clearly links the provisions of section 195 of the Constitution with the discussion of directive principles as objective constitutional norms which steer state action, particularly public administration action, in the direction of development and transformation.

4.2.7 Socio-economic rights in the Constitution

There is a close interrelationship between the right to equality and dignity and the social and economic rights provided in the Constitution. This interconnectedness also extends to the transformative nature of the Constitution and its commitment to social and economic justice, which clearly provides the founding principles for all affirmative and remedial measures, including the government's B-BBEE programme. B-BBEE is therefore also an important means to facilitate access to the enjoyment of socio-economic

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270 Public Service Act, Proc. 103/1994.

271 Read with section 3 of the Public Service Act, Proc. 103/1994.

272 Public Service Commission Act 46/1997.

273 See sections 196(4)(a) and 196(4)(e), as well as section 196(4)(b), (c), (d), (f), (g) for other specific functions and powers.

274 *Chirwa v Transnet Limited and Others* 2008 4 SA 367 (CC); 2008 3 BCLR 251 (CC).

275 Ibid, para 76.

rights and should be evaluated for its contribution in this respect. A discussion of the constitutional social and economic rights provisions is therefore also informative for the broader study of black economic empowerment.

The South African Constitution provides for a number of social and economic rights, the inclusion of which could only be termed a radical and liberal approach to constitution writing. What are generally labelled second and third generation rights are provided for in the Bill of Rights[276] and include the right to housing, health care, food, water and social security, particular provisions for the rights of children, and rights pertaining to an environment that is not harmful to health or well-being.[277] These rights do not only, as in the case of first-generation political and civil rights, prevent state interference and infringement on the individual's rights, but place positive obligations on the state to facilitate change and provide basic social goods.[278] There is a strong relation between the inclusion of these rights in the Constitution and transformative constitutionalism.[279] The reason for this is that in light of our history and the underlying values and principles set out in the Constitution, and in order to fulfil the transformative ideals underlying the Constitution, it would be incongruous to create a society based on human dignity, freedom and equality without also transforming the provision of basic socio-economic goods and services. The way in which the Constitutional Court's socio-economic jurisprudence developed is testament to the transformative role of the Bill of Rights in addressing deeply entrenched societal inequality.[280]

This transformative component is also clear when considering that the state is expressly bound to "respect, protect, promote and fulfil the rights in the Bill of

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276 Constitution of the Republic of South Africa: Chapter 2.

277 Ibid, sections 24, 26, 27, 28. The complete provisions of social, cultural and economic rights are section 22 (freedom of trade, occupation and profession), section 23 (labour relations), section 24 (environment), section 25 (property and land), section 26 (housing), section 27 (health care, food, water and social security), section 28 (children's rights), section 29 (education), section 30 (language and culture), section 31 (the rights of cultural, religious and linguistic communities), and section 35(2)(e) (the socio-economic rights of persons deprived of liberty).

278 Young 2005:549; Currie & De Waal 2005:567; Van der Walt 2002:76; Liebenberg 2006:6; Sunstein 2001:123-124.

279 See discussion in para 4.2.2 above.

280 De Vos 2001a:52; Christiansen 2007a:30.

Rights."[281] The duties to respect, protect, promote and fulfil socio-economic rights, under section 7(2) of the Constitution, can be explained as follows: The "duty to respect" largely accounts for the negative obligation on the state to refrain from any conduct or law to infringe upon a person's enjoyment of socio-economic rights, albeit directly or indirectly.[282] The "duty to protect" is viewed as especially targeting the more vulnerable groups in society in that the state has to take legislative and other measures to protect these groups' rights, also through the provision of effective remedies.[283] The "duty to promote" is regarded as a part of the duty to fulfil socio-economic rights, which duty requires positive measures to be taken to ensure access to rights if still lacking, or to provide services directly when groups are unable, due to reasons beyond their control to gain access to such services.[284]

In *Government of the Republic of South Africa and Others v Grootboom and Others*, Yacoob J, writing for the Court, alluded to this interrelatedness as follows:

> "Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."[285]

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281 Constitution of the Republic of South Africa: section 7(2).

282 Chapman 2002:46; Liebenberg 2003 *et seq*:33–6.

283 Chapman 2002:46; Liebenberg 2003 *et seq*:33–6.

284 Chapman 2002:47; Liebenberg 2003 *et seq*:33–7. See United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) General Comment 12: para 15; General Comment 14: para 37; General Comment 15: para 25. South Africa has not yet ratified the International Covenant on Economical, Social and Cultural Rights (ICESCR) and this is thus not binding on South African domestic law. But see also *S v Makwanyane*: para 35 where the use of these as interpretive tools in terms of section 39(1)(b) of the Constitution was clearly set out.

285 *Government of the Republic of South Africa and Others v Grootboom and Others*: para 23.

This interrelatedness between first-, second- and third-generation human rights is acknowledged not only by various academics,[286] but also in international human rights instruments.[287]

Although it has generally been accepted that the inclusion of socio-economic rights in the Constitution involves both positive and negative obligations on the government,[288] the exact ambit of the positive obligations placed on the government by these provisions has generally caused more debate than that of the negative obligations. It is clear that any right contained in the Constitution, including socio-economic rights, are justiciable.[289] What has been the subject of criticism relating to the South African courts' socio-economic rights jurisprudence is the content given to these rights or the definition of the core minimum of these rights, the measure of deference shown to the legislature and executive branches of government, and the type of orders issued in these cases. It is instructive to briefly review the earlier cases that were dealt with by the Constitutional Court concerning social and economic rights, because any attempt at successfully achieving economic empowerment is futile if basic needs are not provided for. The Constitutional Court's treatment of these issues will give an indication of the progress and possible future efficiency of the government's service delivery — the precursor to successful implementation and achievement of good education, skills development, job creation and general economic empowerment. Providing for people's basic needs gives them the necessary and fundamental security to meaningfully and actively participate in economic activities.[290] It is also true that the legacy of apartheid and its racially discriminatory policies resulted in a situation where groups of persons who were

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286 See, for example, Liebenberg 2003 *et seq*:33–1.

287 International Covenant on Economical, Social and Cultural Rights.

288 *Government of the Republic of South Africa and Others v Grootboom and Others*: para 34. See also Currie & De Waal 2005:571; Liebenberg 2003 *et seq*:33–17; De Vos 1997:78.

289 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*: para 78. In *Government of the Republic of South Africa and Others v Grootboom and Others*: para 20 Yacoob J made the following statement: "While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the *Certification* judgment." (footnotes omitted) See also *Minister of Health and Others v Treatment Action Campaign and Others*: para 25.

290 Liebenberg 2006:10.

previously excluded from meaningful economic participation now form the majority of the most needy in South African society. The addressing of social and economic rights issues and the Constitutional Court's treatment thereof, consequently involves the direct invocation of a large group of beneficiaries under the B-BBEE policy.

The first major case heard by the Constitutional Court on socio-economic rights was *Soobramoney v Minister of Health, KwaZulu-Natal* which dealt with the provisions of section 27 of the Constitution. The applicant in this case was an unemployed man in the final stages of chronic renal failure. His condition was irreversible, but regular renal dialysis could have prolonged his life. Due to budgetary and resource constraints dialysis treatment was only provided for patients who were eligible for kidney transplants. The applicant suffered from a heart condition which made him ineligible for a kidney transplant. The applicant sought a court order directing the provincial hospital to provide him with ongoing dialysis treatment and interdicting the Minister of Health, KwaZulu-Natal from refusing him admission to the renal unit of the hospital. His claim was based primarily on section 11 (right to life) and section 27(3) (the right to emergency medical treatment) of the Constitution. The Constitutional Court also considered section 27(1) and 27(2) of the Constitution. Essentially, the Constitutional Court had to define the ambit of the right to health care as provided in the Constitution. Emphasising the particular historical milieu in which the Constitution has to function as well as its transformative tenets, Chaskalson P, for the Court, stated the following:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[291]

[291] *Soobramoney v Minister of Health, KwaZulu-Natal*: para 8.

When answering the question as to the core obligations which these provisions impose on the state, the Court seems to have conflated subsections (1) and (2) of these provisions[292] and defined the ambit of social and economic rights with reference to available resources. Chaskalson P observed the following:

> "What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed."[293]

Davis[294] is critical of the rather hesitant approach taken by the Court, especially after it strongly emphasised the constitutional commitments earlier in its judgment. It could be said that the Court *in casu* adopted a standard of review that amounted to no more than mere rationality. The Court showed great reluctance to engage with these difficult issues, stating that a "court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to

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[292] Consider the relevant parts of the text of sections 26 and 27 of the Constitution:

26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) …

27 Health care, food, water and social security

(1) Everyone has the right to have access to —

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

[293] *Soobramoney v Minister of Health, KwaZulu-Natal*: para 11.

[294] Davis 2008:692.

deal with such matters."[295] This was the interlude to the Court's rejection of a minimum core obligation and its selective placing of the emphasis on the reasonableness of measures taken by the state.[296] Regarding the Court's approach to section 27(3) and the provision for emergency medical treatment, Van der Walt criticised the Court's handling of the matter. The approach taken renders emergency medical care subject to the same availability of resource criterion, despite it being separately provided for in the Constitution's text.[297]

The second opportunity for the Constitutional Court to test the ambit of social and economic rights was *Government of the Republic of South Africa and Others v Grootboom*. This case concerned one of South Africa's most critical social issues, namely the State's obligation to provide housing.[298] The respondents *in casu*, who themselves had been on the waiting list for low-cost housing for years, invaded private land which was earmarked for low-cost housing development. The group, of which at least half were children, erected shelters from which they were forcibly evicted. Following the eviction they erected shelters on a sports field with whatever they could muster because most of their building material and belongings had been destroyed during the eviction. The court *a quo*[299] held that there had been no violation of the right to adequate housing in terms of section 26 of the Constitution, but found that there was a violation of section 28(1)(c) in terms of which children had the right to shelter.

On the correct interpretation to be given to section 26, the Constitutional Court stated that section 26(1) and 26(2) should be read together and that subsection (1) provides the delineation of the scope of the right. Both positive and negative obligations are provided in this section and the Court interpreted subsection (1) to include an implied negative obligation on the "State and all other entities and persons to desist from

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295 *Soobramoney v Minister of Health, KwaZulu-Natal*: para 29.

296 See *Government of the Republic of South Africa and Others v Grootboom*: para 33; Liebenberg 2003 *et seq*:33–10.

297 Van der Walt 2002:80.

298 *Government of the Republic of South Africa and Others v Grootboom*: para 1.

299 *Grootboom v Oostenburg Municipality and others* 2000 3 BCLR 277 (C).

preventing or impairing the right of access to adequate housing".[300] This negative obligation was again touched upon in *Minister of Health and Others v Treatment Action Campaign and Others* and the likeness in drafting style between section 26 and 27 makes the interpretation given to section 26 in *Government of the Republic of South Africa and Others v Grootboom* applicable to section 27.

Regarding the positive obligation that section 26 placed on the state, the Court found that section 26(2) expressed the positive obligation in the right, but also sets out the limits of this obligation.[301] The Court used the concept of reasonableness as the criterion to determine whether the state had complied with its obligation to take "measures, within its available resources, to achieve the progressive realisation of this right."[302] The ambit of this positive duty of the state was qualified in terms of three key elements, namely (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".[303] In order to assess the reasonableness of measures adopted by the state, particular attention should be paid to the poor and most vulnerable in society. Although declining to define a minimum core obligation for social and economic rights, the Court did admit that in the case of the most vulnerable groups in society, the state would have failed the reasonableness criterion if it did not consider the needs of these desperate groups in society. Put another way, those who were denied the enjoyment of rights and whose needs and enjoyment were most imperilled when viewed within its historical context, had to be given recognition when measures which aim for the realisation of these rights are designed.[304] The Court rejected the idea of a minimum core obligation contending that it would be too difficult to formulate due to a variety of factors[305] and the diverse needs presented[306] in any particular case. Although the Court rejected the idea of a minimum core, this very

300 *Government of the Republic of South Africa and Others v Grootboom*: para 34.

301 Ibid, para 38.

302 Constitution of the Republic of South Africa: section 26(2).

303 *Government of the Republic of South Africa and Others v Grootboom*: para 38.

304 Ibid, paras 33, 36, 44. See also De Vos 2001a:57; De Vos 2002:26; Davis 2008:693.

305 Ibid, para 32 (for example, "income, unemployment, availability of land and poverty").

306 Ibid, para 33. See also Liebenberg 2003 *et seq*:33–24.

concept in international law is defined in relation to the needs of the most vulnerable in society.[307] It was held that it would require a great deal of information to be placed before the Court in order for it to judicially enforce a core minimum. The Court did, it is contended here, import an implied minimum core to the right to access to housing in the manner in which it assessed reasonableness.

The Constitutional Court had opportunity to apply its reasonableness criterion in *Minister of Health and Others v Treatment Action Campaign and Others* where it was asked for an order to instruct the government to make the antiretroviral drug — Nevirapine — available in all public hospitals and clinics and not only in the limited number of research and training sites. At the time of the application, the drug was only available at two testing sites in each province. Nevirapine was a treatment for the prevention of mother-to-child transmission (MTCT) of HIV, and was of proven efficacy. The applicants in the court *a quo* contended that the restrictions on the provision of treatment were unreasonable conduct on the part of the state. The second issue was whether the government had an obligation in terms of section 27 and 28 of the Constitution to, and had therefore to be ordered to, plan and implement an effective, comprehensive and progressive programme to prevent MTCT of HIV.[308] The government raised a number of objections to the request to increase the availability of the drug. It contended that the restrictions on the availability of Nevirapine were necessary so as to enable it to evaluate its efficacy with the prospect of introducing a future nationwide project. It was argued that there were doubts about the efficacy of the drug when not administered as part of a "comprehensive package" which would include advice services, counselling, monitoring of progress, etc.[309] Secondly, an objection was raised which related to the possible development of resistance to the drug which would impact the efficacy of Nevirapine and other antiretroviral medicines in the future.[310] In the third instance there seem to have been issues about the safety of the drug.[311] Lastly, it was

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307 Ibid, para 31.

308 *Minister of Health and Others v Treatment Action Campaign and Others*: para 5.

309 Ibid, para 51.

310 Ibid, para 52.

311 Ibid, para 53.

argued that the public health system lacked the capacity to deliver the comprehensive programme as requested by the Treatment Action Campaign.[312]

The Constitutional Court therefore had to make a determination of whether the state's programme of limiting the availability of the drug was reasonable in the circumstances, and thus in compliance with its obligation under the Constitution, or not.[313] The Court considered each of these objections and in light of the evidence found that none held water.[314] The Court applied the reasonableness test it developed in *Government of the Republic of South Africa and Others v Grootboom* which requires that measures or programmes implemented should expeditiously and effectively aim at the progressive realisation of the constitutional rights, within the broader framework of the state's financial means for implementation. It also requires measures to be comprehensive, coherent, balanced, and flexible, with clearly stated objectives and responsibilities for the government which should provide the necessary resources for implementation. Measures should also be able to adequately cater for crisis situations.[315] It was held *in casu* that "[t]he policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites."[316] Furthermore it was most likely the poor and vulnerable members of society who were being excluded from treatment by the policy because the people living outside the area in which treatment is available suffer most.[317] The Court found the government's policy to be inflexible in that it denied mothers and newborn children access to potentially lifesaving treatment. This was held to be in breach of the government's obligations under section 27 of the Constitution.[318]

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312 Ibid, para 54.

313 Ibid, para 25.

314 Ibid, paras 57-64.

315 *Government of the Republic of South Africa and Others v Grootboom*: paras 39-44, 46, 66, 68, 82.

316 *Minister of Health and Others v Treatment Action Campaign and Others*: para 67.

317 Ibid, para 70.

318 Ibid, para 80.

Once again the Court was asked to accept the notion of a minimum core of socio-economic rights. Arguments placed before the Court in this regard were summarised as follows by the Court:

> "In the case of ss 26 and 27, however, rights and obligations are stated separately. There is, accordingly, a distinction between the self-standing rights in ss 26(1) and 27(1), to which everyone is entitled, and which in terms of s 7(2) of the Constitution '*(t)*he State must respect, protect, promote and fulfil', and the independent obligations imposed on the State by ss 26(2) and 27(2). This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a Court."[319]

The argument thus contends that there is a freestanding positive obligation in terms of section 26(1) and 27(2) and a further limited positive obligation placed on the state by section 26(2) and 27(2). The Court rejected this argument and preferred a narrow textual approach to the issue. The argument of the *amicus* failed because it did not show regard to the textual link between section 26(1) and 26(2) — and section 27(1) and 27(2) — in the Constitution, and the interpretation afforded to these in the cases of *Soobramoney* and *Grootboom*.[320] The Court further stated that on a purposive reading of the relevant sections it would not conclude any differently. It continued that "[i]t is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it acts reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis."[321]

The cautious approach taken by the Court when dealing with socio-economic rights is evident when considering how the Court conflates the substantive right with the limiting qualification that the state must take reasonable measures, within its available resources, in order to achieve a progressive realisation of the right.[322] The Court's

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319 Ibid, para 28.

320 Ibid, para 29.

321 Ibid, para 35.

322 Davis 2008:698.

rejection of the core minimum obligation of each right relates to its formulation of the enquiry. The ambit of the right is made wholly dependent on the availability of resources. This level of deference to the way in which the legislature and executive choose to distribute available resources could border on merely enquiring into the rationality of the measure.

De Vos argues that section 26(1) and 27(1) provide independent and autonomous rights which are subject to limitation only under the second part of the enquiry. He argues that social and economic rights adjudication would require the courts to perform a three-stage analysis. Firstly, the litigant has to show that the duty in issue to respect, protect, promote or fulfil a right was not complied with. Secondly, the analysis will consider whether reasonable legislative or other measures had been taken, and thirdly consideration might be given to the general limitation clause in section 36 of the Constitution.[323] Davis[324] and Bilchitz[325] envisage at least a two-part enquiry in which the first step is to determine the core meaning of the right, and the second, to evaluate the reasonableness of the government's measures to achieve the progressive realisation of the core content.

Adopting an approach whereby the meaning of socio-economic rights is largely dependent on the reasonableness criterion begs the question as to how reasonable the reasonableness criterion actually is. When viewing the Comments issued in terms of the International Covenant on Economic, Social and Cultural Rights, it emerges that every obligation and right has a *clear* content, with a measure of immediate effect included in order to move expeditiously and effectively towards the realisation of the rights. The reasonableness test as adopted by the South African Constitutional Court lacks this immediacy in its obligations.[326] It also, at least to a certain extent, removes the individual's claim to the provision of these social and economic services and goods and

323 De Vos 1997:93.

324 Davis 2008:699.

325 Bilchitz 2003:9.

326 See Davis 2008:699; Bilchitz 2003:9.

reduces the litigant's claim to the state's adoption of reasonable programmes,[327] which essentially reduces the Court's inquiry to an administrative law-like analysis.[328] The Court seems to choose to rather adjudicate the state's programmes than the individual's rights. This administrative law approach reduces the transformative potential of social and economic rights litigation.[329] It has also been argued that individual relief would actually serve to quicken the transformative impact of the inclusion of social and economic rights in the Constitution.[330]

As was mentioned earlier, the Court has been very cautious in regard to the type of order issued against the state. This can also be ascribed to the deferential approach to adjudication which the Court has taken in the past. It has been argued that the Court has to assume some sort of supervisory jurisdiction.[331] In *Minister of Health and Others v Treatment Action Campaign* the Court was critical of the lower court's order for submission of the revised policy to the Court. It was stated that although the Court had such powers, it was deemed unnecessary *in casu* to believe that the government would not comply with the court order as issued.[332] Pillay[333] illustrated the actual necessity of such a supervisory role by the Court when discussing the failed expectations that were effected by having no supervision when recounting the actual efforts made by the government in the aftermath of the judgment in *Government of the Republic of South Africa and Others v Grootboom*.

Also related to the level of deference shown by the Court, is the fact that even unqualified rights[334] are not fully enforced, but rather treated in the same manner as

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327 Christiansen 2007a:35; Yeshanew 2008:11.

328 Pieterse 2006:120.

329 Ibid.

330 Liebenberg 2006:29, 34.

331 Pillay 2002:13-14; Bilchitz 2003:23-24; Pieterse 2004:415-416; Swart 2005:223-224.

332 *Minister of Health and Others v Treatment Action Campaign and Others*: para 129.

333 Pillay 2002:17.

334 When referring to an unqualified right, what is meant here is a right which does not have the added internal limitation which is provided with the addition of the phrase "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

internally qualified rights. Whereas the rights to, for example, housing or health care, are internally qualified and limited, the right to education or children's welfare rights are not similarly limited. Yet, the Court awards these rights the same treatment. In the *Grootboom* case the Court held that section 28 created no independent socio-economic right. This very narrow interpretation of the Constitution has been imputed to pragmatic considerations and deference to the democratic processes of prioritising needs at legislative and executive level.[335] On the Court's reading, the children's rights only placed positive duties on the state once children are no longer under the care of their parents (thus removed from their care). These unlimited rights or absolute rights would therefore have to be limited with reference to the general limitation clause in section 36 of the Constitution, but the Court does not follow that path. This is partly viewed as the Court's response to traditional criticism to the inclusion of social and economic rights in a Constitution due to the justiciability problem thereof. On the other hand, ignoring textual differences and unqualified rights could be seen as the Court's way of accommodating problems regarding remedy concerns,[336] which also possibly best explains the Court's refusal to engage with the minimum core notion of social and economic rights.

The Constitutional Court has lately adopted a more integrated approach to social and economic rights adjudication. The interrelatedness of the different rights contained in the Bill of Rights and the role played by the founding constitutional values and principles have received greater emphasis. The interaction or interrelatedness between different provisions in the Bill of Rights is particularly clear when looking at the Court's most recent attempts at adjudicating on matters of socio-economic relevance in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*.[337] In this case the Court had to decide on the constitutionality of the omission of the words "or permanent resident" after the word

335 Sunstein 2001:129.

336 Christiansen 2007b:383.

337 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

"citizen" in section 3(c) of the Social Assistance Act.[338] The Court held that the exclusion of permanent residents from the social assistance programmes seriously impaired their dignity and was a breach of the right to equality in section 9 of the Constitution.[339] The Constitutional Court therefore mainly focused their enquiry in terms of the right to equality and dignity as opposed to merely on the right to social security in section 27(1)(c) of the Constitution. In *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others*[340] the Constitutional Court similarly dealt with issues of the right to property while also showing sensitivity to the levels of poverty and homelessness prevalent in the community affected. It attempted to reach a balance between the right to property and social and economic rights in the Constitution.

The interrelationship between the right to equality and social and economic rights[341] is fundamental to the rationale which links this discussion to the wider topic of this thesis, with its focus on the constitutional framework for economic empowerment. In *Soobramoney v Minister of Health, KwaZulu-Natal* Chaskalson P underlined the strong link between the provision of socio-economic rights and the transformative ideals of the South African Constitution, and also emphasised the interrelationship between the Constitution's foundational values of dignity, equality and freedom, and socio-economic rights.[342] The legacy of apartheid was the creation of socio-economic inequality which in turn created a severely unequal economy. A strong connection is also created between the provision for social and economic rights and the right to equality in section 9 of the Constitution.[343] Socio-economic inequality and the achievement of equality provide the contextual basis for the design and implementation of the B-BBEE programme. These programmes, established by the government and private sector role players, do not only

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338 Social Assistance Act 59/1992.

339 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: paras 76, 77.

340 *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 5 SA 3 (CC); 2005 8 BCLR 786 (CC).

341 See De Vos 2002:28-29; Liebenberg & Goldblatt 2007:338-341. See also *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: para 42.

342 *Soobramoney v Minister of Health, KwaZulu-Natal*: para 8.

343 See also De Vos 2001a:53.

contain a socio-economic development element, but also strive to give meaning to the ideals behind the statement. The creation of a society based on human dignity, equality and freedom is central to both the obligation of the government to provide social and economic services and the programmes that aim to economically empower previously excluded persons and groups. Without providing for basic housing, health care, education, food, water, social security, and other social and economic rights, the right to equality and dignity in the Constitution will have virtually no value. By the same token, all affirmative action measures implemented by the government in order to remedy the inequality which was the legacy of years of apartheid will have no substantial meaning.

This issue is therefore critical to the broader discussion in this thesis because of the interrelatedness of values underlying the Constitution, and the social and economic rights provided for,[344] and the interrelatedness between the right to equality and dignity and the social and economic rights provided for. Finally it is important to bear in mind the specific provisions made for social and economic development in the B-BBEE programme.

4.2.8 The right to equality

One of the most unambiguous provisions in the Constitution,[345] which empowers the government to enact black economic empowerment legislation, is the right to equality in section 9, specifically section 9(2), which authorises legislative and other measures designed to protect or advance persons or groups which suffered disadvantage as a result of unfair discrimination. In order to consider section 9(2) as an enabling provision, it will firstly be necessary to analyse the concept of equality and define the right to equality as provided in section 9. The concept of equality will be explained with reference to the equality jurisprudence of Canada and the United States. The fact that a determination of discrimination lies at the heart of the concept of equality, compels a consideration of

344 See *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: para 40.

345 Constitution of the Republic of South Africa.

discrimination. The type of equality specifically envisioned in the South African Constitution will be identified, as well as the way in which the Constitution sets out to achieve this equality. This process will inevitably entail certain steps, i.e. remedial measures, to be taken to achieve equality. The process of black economic empowerment is one of the fundamental remedial measures necessitated by the Constitution's commitment to equality. However, affirmative action as a remedial measure in terms of section 9(2) will be analysed, not only because of its remedial function, but also because it is one of the components of the government's broad-based black economic empowerment strategy. Equality as an objective value or principle will be discussed in this section.

4.2.8.1 The concept of equality

Equality-related provisions and legislation are generally viewed as advancing the liberal view of the state and law, which consists of three fundamental principles, namely neutrality, individualism, and the promotion of autonomy.[346] A study of the development of ideas of equality reveals that different notions of equality can be identified.[347] The different concepts of equality are interconnected and interrelated. This may be illustrated by observing Wentholt's explanation of the connection between the individual-regarding equality/group-regarding equality paradigm and the formal equality/substantive equality paradigm:

> "In a formal approach to equality, affirmative action infringes the right of each individual to be treated equally. Therefore, derogations should be interpreted strictly. In such an approach it is difficult to justify affirmative action, for affirmative action does not take individual characteristics but rather group characteristics into account (being a woman, a member of an ethnic minority group etcetera). So, [affirmative action] is contradictory to the condition of not infringing an individual right. ... In a substantive approach affirmative

346 Fredman 2001:154.

347 Cf, however, Westen (1982:539-540 fn 8) who argues that there is only one formal notion of equality with the different kinds of equality being the substantive variations thereof. There are as many substantive types of equality as there are criteria used to compare people or groups.

> action is not seen as an exception to the concept of discrimination but as a component of the principle of equality that forces the establishment of equality as a result."[348]

With specific relevance to the South African situation, equality can be seen in a formal or a substantive context. The Aristotelian concept of equality — that persons who are alike (similarly situated) should be treated alike — is a formal, and mostly procedural, concept of equality, also called legal formalism.[349] One of the first developments in liberalism was the idea that all citizens would have equal basic political rights.[350] This formal equality, or equality before the law, grounds the element of neutrality of the liberal state vision.[351] A formal approach is based on a general presumption of "sameness".[352] This requires consistency in treatment — likes should be treated alike — and it is this consistency which in turn renders fair results.[353] Formal equality stands separate from the socio-economic, political, intellectual, moral, historical, etc. contexts in which people live.[354] Its basic premise is that inequality is arbitrary and irrational — fairness requires consistency.[355] In the sense that formal equality is still very relevant and necessary today, it forms part of the rule of law.[356] The rule of law ensures that nobody is above the law, irrespective of his or her status in society, irrespective of his or her power.[357] The law is applicable to everyone in a consistent or fair manner, which once again emphasises the neutrality of the law.

Substantive equality seeks to have a meaningful impact on the lives of people irrespective of social standing, race, gender, etc.[358] It does not require identical

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348 Wentholt 1999:60. This was also quoted in Morgan-Foster 2003:80.

349 The term "legal formalism" is used by Albertyn & Goldblatt 2007 *et seq*:35–6.

350 Hughes 1999:17.

351 Fredman 2001:154.

352 Wentholt 1999:54; Honoré 1962:86. Although Honoré does qualify this point by saying that uniformity of rule is but one dimension of fairness.

353 Barnard & Hepple 2000:562; Fredman 2001:154.

354 See for example, *Lavoie v Canada* [2002] SCC 23, 2002 CarswellNat 406.

355 Albertyn & Goldblatt 2007 *et seq*:35–6; Fredman 2002:16.

356 Hughes 1999:32 fn 60.

357 Ibid, at 32-33.

358 Ibid, at 7 fn 1, 33; Fredman 2002:128.

treatment, and the principle of equality is not breached if classifications or differentiation appropriately distinguish between groups or people who are not alike or not similarly situated.[359] The recognition of the importance of difference between individuals or groups is acknowledged in Raphael's formulation of difference, as referred to by Hughes, to the effect that "[e]qual distribution of the means to enjoy basic needs or the equal opportunity for self-development means, therefore, an 'equitable, not an arithmetically equal, distribution'."[360] This recognition of the possibility of differential treatment being applied to achieve equality has been hailed as possibly one of the most important aspects of substantive equality.[361]

Classification[362] is a central element in establishing equality. Because all laws, in the interest of effective governance,[363] necessarily entail some sort of differentiation or classification, it has become necessary to identify which classifications are offensive and in breach of the principle of equality.[364] Using the presumption of "sameness", a difference in treatment is acceptable only if it is based on objective and reasonable grounds sufficiently relevant to the legal norm.[365] Justification of the exception of sameness is therefore crucial when following the formal approach to equality.[366]

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359 Hogg 2007:616; Wentholt 1999:54.

360 Hughes 1999:18, quoting from DD Raphael *Problems of Political Philosophy* rev ed 1976 at 185.

361 Ibid, at 38.

362 For a discussion of the term "legal classification", i.e. the process of defining a class or group to which a law applies or not, see Tussman & tenBroek 1949:344-345.

363 Discussing the problem of classification and the burdens placed on some members of a community with the object of promoting the general good, see Tussman & tenBroek 1949:343 and the passage quoted from *Barbier v Connolly* 113 U.S. 27, *31, 5 S.Ct. 357, **359 (1884).

364 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); 1997 6 BCLR 759 (CC): paras 17, 24; *Minister of Finance and Another v Van Heerden*: para 163; *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143; 1989 CarswellBC 16: para 13; Hogg 2007:615-616; Currie & De Waal 2005:230; Albertyn & Goldblatt 2007 *et seq*:35–17; Fredman 2002:66; Fallon 2004:111-112; Stephens & Scheb 2003:722; Rossum & Tarr 2003:465.

365 Wentholt 1999:54; Greschner 2001:302.

366 See opinion of Sachs J in *Minister of Finance and Another v Van Heerden*: para 142. See also Wentholt 1999:55.

Formal equality has been criticised as being too general and not providing enough guidance in determining what would constitute an infringement of equality.[367] It should be pointed out that the general dominant legal standard in terms of which comparisons are made to determine equality is usually in itself fraught with systemic stereotypes.[368] The apparent search for neutrality only masks the enforcement of the dominant culture and undermines the second ground principle of liberal equality law, namely individualism.[369] For example, women who seek equality of treatment are compared to their male counterparts and no attempt is made to criticise the traditional stereotypical thinking about the roles each play in society. Formal equality is said to treat difference as an exception and a disadvantage, looking to ignore difference, and therewith create strong pressures of conformity.[370] What is even more disconcerting though is the fact that insistence on neutral treatment may actually mask existing prejudice and constitutes an indirect discrimination towards a group of people.[371] A formal concept of equality has been defined as an "abstract prescription of equal treatment for all persons, regardless of their actual circumstances".[372] This again illustrates the presumption of sameness. The emphasis on a neutral measure of treatment illustrates another shortcoming of formal equality, i.e. a failure to redress past discrimination by offering remedial action, because affirmative action measures are regarded as a form of discrimination. The only solution to discrimination is to remove the offending rule and extend identical rights and treatment to everyone. This in turn only serves to perpetuate patterns of systemic inequality. On the other hand, it fails to explain why removal of one group's benefits to comply with a complaining group's lack thereof is not an adequate solution. "Sameness of treatment" can mean equally bad or equally good treatment, as long as it is always symmetrical in nature.[373] Formal equality does not recognise that neutral treatment, sameness of treatment, may weigh more heavily on some members of society or may indeed fail to

367 Hogg 2007:617; Fredman 2002:8, 126.

368 Wentholt 1999:57-58.

369 Fredman 2001:154; Fredman 2002:16.

370 Wentholt 1999:57; Fredman 2001:154-155; Fredman 2002:9.

371 Fredman 2001:155; Hughes 1999:25.

372 Albertyn & Goldblatt 2007 *et seq*:35–6.

373 Fredman 2002:8, 127.

provide the same benefit, based on personal characteristics or an intersection between various characteristics.[374] It is important to understand that with a formal notion of equality, differential treatment in the form of affirmative measures is allowed, but not required.[375]

On the other hand, substantive equality rejects the "general norm" concept of one mainstream norm or standard to which people have to conform or measure up to.[376] So, whereas formal equality bases its exclusions on difference, substantive equality aims to legitimate difference, or, put differently, strives for the affirmation of difference.[377] One of the core aspects of substantive equality is "affirmation". Another is the recognition of difference and the rejection of this "general norm" idea.[378] Substantive equality provides a framework for analysis within which differing views within groups can also be accommodated. This flexible characteristic removes the general hierarchical character which seems to govern traditional thinking about majority-minority relations.[379]

The way in which formal equality works can briefly be illustrated with reference to the early development of the Canadian equality provisions and the application by the Canadian courts of the "similarly-situated" test of equality. Canada has an extensive history of dealing with the value of equality in a social, political and legal sense.[380] Earlier equality jurisprudence can be divided into roughly two broad categories, namely case law decided under the Canadian Bill of Rights,[381] and a variety of anti-discrimination legislation adopted by the different provinces.[382] These legislative

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374 Hughes 1999:33.

375 Wentholt 1999:56.

376 Hughes 1999:25.

377 Ibid, at 20.

378 Ibid, at 26.

379 Ibid, at 35.

380 Ibid, at 21.

381 The Canadian Bill of Rights, S.C. 1960, c. 44; R.S.C. 1985, Appendix III.

382 Leading the field was Ontario in 1951 with The Fair Employment Practices Act, ch. 24, 1951 S.O. (Ont.). Within five years other provincial legislatures, for example Manitoba, Nova Scotia, New Brunswick, British Columbia, and Saskatchewan adopted similar legislation. After The Fair Employment Practices Act, Ontario followed up with the Fair Accommodation Practices Act, ch. 24, § 2, 1954 S.O. (Ont.), which declared that "no one can deny to any person or class of persons the

attempts, of a piecemeal and uncoordinated nature, later gave way to the adoption of human rights codes which served as a consolidation and strengthening of the then existing anti-discrimination legislation.[383] Although these codes prohibited discrimination in a number of areas, including employment, public accommodation, residential and commercial real estate, and advertising, it failed to provide the envisaged protection to disadvantaged groups.[384] Subscribing to a formal notion, equality was seen to be achieved when different groups achieved identical treatment, with the courts subscribing to the so-called "similarly-situated" test for equality — similarly situated persons had to be treated similarly and differently situated persons required different treatment. An enquiry into possible discrimination was merely a procedural enquiry without the taking into account of any systemic or entrenched patterns of discrimination and inequality. Once discriminatory treatment was established, it had to be replaced with identical treatment in order to fulfil the requirement of procedural equality.[385]

Section 1 of the Canadian Bill of Rights[386] contained its equality provision. The Bill of Rights had no constitutional status but influenced the Constitution's interpretation because of the jurisprudence developed under it.[387] From 1970 to 1979 the Canadian Supreme Court decided 10 cases under section 1 of the Bill of Rights. Nine cases held that the particular instance constituted no infringement of the "equality before the law" or "equal protection of the law" guarantees.[388] The Supreme Court strongly emphasised the

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accommodation, services or facilities usually available to members of the public". For a detailed discussion on the development of anti-discrimination legislation see the website of the Canadian Human Rights Commission at http://www.chrc-ccdp.ca/en/index.asp (accessed on 12 February 2008). See also Mahoney 1992:237-238; Hughes 1999:21.

383 For example, Ontario repealed most of its non-discrimination legislation with the Ontario Human Rights Code S.O. 1961-62, c. 93, to be administered by the Ontario Human Rights Commission, in 1962. See Ontario Anti-Discrimination Commission Amendment Act, ch. 63, 1960-1961 S.O. 261 (Can.). See also Hughes 1999:21.

384 The legislation failed to address, for example, wide remuneration discrepancies between men and women and women continued to dominate lower-level jobs such as secretarial jobs, nursing and teaching jobs. See Mahoney 1992:237-238; Hughes 1999:21.

385 See Mahoney 1992:239; Albertyn & Goldblatt 2007 *et seq*:35–6.

386 The Canadian Bill of Rights, S.C. 1960, c. 44; R.S.C. 1985, Appendix III.

387 Hogg 2007:606; Mahoney 1992:234; L'Heureux-Dubé 2002:364.

388 Only in the case of *R v Drybones* [1970] S.C.R. 282; 1969 S.C.R. LEXIS 22 did the Supreme Court find that a statutory provision was in breach of section 1(b) of the Bill of Rights. This case

"valid federal objective" served by a law when deciding on the validity of the distinctions drawn by it.[389]

In *Attorney General of Canada v Lavell*[390] two native women challenged section 12(1)(b) of the Indian Act, R.S.C. 1970, c. I-6, as rendered inoperative by section 1(b) of the Canadian Bill of Rights, 1960 (Can.), c. 44, denying them the right to equality before the law.[391] This section provided that if Indian women marry outside of their race they lose their Indian status. When Indian men married outside their race, however, they retained their status and full Indian status was conferred on their spouse and children. The result of this provision was that when Indian women married non-Indian men they were required to leave their reserve, could not own property on the reserve and had to dispose of any property held at the time of the marriage. They could be prevented from inheriting property and could not partake in band business. Their children were refused access to their community's cultural and social amenities. Even in the case of divorce, separation or widowhood, women could be prevented from returning to their reserves. Furthermore, they could not be buried on the reserves with their ancestors.

The Supreme Court found that this did not constitute a violation of the sex equality rights.[392] The reasoning was that section 1 provided merely a procedural guarantee of and equality before the law and not a substantive equality.[393] The Court held[394] that the term "equally before the law" in section 1(b) of the Bill of Rights merely meant "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land". Therefore, all Indian women had to be treated the same. They could not be treated the same as Indian men because they were in fact not the same. The relevant provision thus constituted no violation of equality before the law or equal

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concerned section 94(b) of the Indian Act, R.S.C. 1952, c. 149 which provided that it is an offence for an Indian to be intoxicated off a reserve. See Hogg 2007:606; Mahoney 1992:235.

389 Hogg 2007:619.

390 *Attorney-General of Canada v Lavell; Isaac v Bedard* [1974] S.C.R. 1349; 1973 S.C.R. LEXIS 96.

391 Ibid, at 1353.

392 Ibid, at 1372.

393 Ibid, at 1373.

394 Ibid, at 1367.

protection of the law.[395] The Court did not consider the inherent unfairness or adverse impact this had on women.[396]

Bliss v Attorney General of Canada[397] concerned the issue of pregnancy discrimination. The Court had to decide on the validity of a legislated benefit provision in the Unemployment Insurance Act.[398] Section 30(1) of the Unemployment Insurance Act provided for a 10-week prerequisite period of employment before pregnant women could qualify for the unemployment benefits. Non-pregnant women and men had to comply with less demanding qualifications. The disadvantageous effects of this provision were further exacerbated by the fact that pregnant women were barred from receiving ordinary benefits, even if they were able and willing to work, for 15 weeks surrounding the birth.[399] The Supreme Court of Canada had to consider whether the disadvantageous and differential treatment of section 46 was rendered inoperative by section 1(b) of the Canadian Bill of Rights.[400] The Court held that there had been no breach of section 1(b) of the Canadian Bill of Rights and that equality before the law was not denied the claimant.[401] Section 46 merely defined the qualifications required for the entitlement to benefits and did not involve the denial of equality of treatment in the administration and enforcement of the law.[402] With regard to the contention of discrimination based on sex, the Court followed a very formalistic approach. It failed to consider the components or consequences of sex as a ground of discrimination.[403] The Court agreed with the reasoning of the Federal Court of Appeal and quoted the following from its judgment:

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395 Ibid, at 1373.

396 Mahoney 1992:235.

397 *Bliss v Attorney General of Canada* [1979] 1 S.C.R. 183; 1978 CarswellNat 147.

398 The Unemployment Insurance Act (Can.), 1971, 1970-71-72, c. 48, ss. 46 and 30(1).

399 In terms of section 46 of the Unemployment Insurance Act (Can.), 1971, 1970-71-72, c. 48.

400 *Bliss v Attorney General of Canada*: para 1.

401 Ibid, para 18. See also Hendry 2002:155; Porter 2005:150.

402 Ibid, para 18.

403 Mahoney 1992:236.

> "Assuming the respondent to have been 'discriminated against', it would not have been by reason of sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women."[404]

The way in which the formal concept of equality negatively impacted on the rights of women should be clear from the brief discussion of the cases of *Bliss* and *Lavell* above.

The Canadian Bill of Rights was superseded by the Canadian Charter of Rights and Freedoms.[405] The Canadian Supreme Court has applied and built on the human rights jurisprudence developed under the Bill of Rights.[406] Canada now embraces a substantive notion of equality, as clearly illustrated by the Supreme Court's rejection of the formalistic "similarly situated" test in *Andrews v Law Society of British Columbia*.[407] The notion of substantive equality, still central to the Court's equality jurisprudence, and placing the emphasis on the recognition and accommodation of difference, was formulated as follows by McIntyre J in *Andrews v Law Society of British Columbia*:

> "In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In

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404 *Bliss v Attorney General of Canada*: para 15 (quoting the judgment of Pratte J at p 213 of *Bliss v Canada (Attorney General)*, 77 D.L.R. (3d) 609, [1978] 1 F.C. 208, 16 N.R. 254, 1977; CarswellNat 93, 1977 CarswellNat 93F, 78 C.L.L.C. 14,136 (Fed. C.A. Jun 02, 1977)).

405 Constitution Act, 1982, pt. I (Canadian Charter of Human Rights and Freedoms), being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11. For a discussion of the circumstances surrounding the enactment of the Charter of Human Rights and Freedoms, see Porter 2005:145-192; L'Heureux-Dubé 2002:363-375; Grabham 2002:642.

406 Mahoney 1992:243.

407 *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143; 1989 CarswellBC 16.

other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[408]

In one of its more recent decisions on the issue, the Supreme Court in *Law v Canada (Minister of Employment and Immigration)*[409] stressed the conclusion in the *Andrews*[410] case that some instances would require formal distinctions in treatment in order to achieve equal treatment in the substantive sense. This highlighted the fact that equality is a comparative concept, with the main consideration being the impact of the law on the affected individual or group resulting from their inclusion or exclusion from its application.[411] A determination of equality will have to take place within the broader contextual framework.

Looking back over the development in the Canadian equality jurisprudence, it can be concluded that equality, set against the purpose of section 15, is defined on the basis of discrimination.[412] The right to equality in section 15 of the Charter of Rights is said to have been breached if "discrimination" occurred. This definition of discrimination, being central to an individual's entitlement to equality, is formulated in three steps:[413]

(a) Firstly determine whether the impugned law differentiates between the claimant and other comparable persons, which causes disadvantage;

(b) In the second place it stands to be determined whether the differential treatment was based on one or more of the section 15 listed and analogous grounds; and

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408 Ibid, at para 8.

409 *Law v Canada (Minister of Employment & Immigration)* [1999] 1 S.C.R. 497; 1999 CarswellNat 359: para 15.

410 *Andrews v Law Society of British Columbia*: para 8.

411 The Court referred to the judgment delivered by McIntyre J in *Andrews* (paras 7-9) where the concept of equality was discussed.

412 Hughes 1999:28. The primary purpose of section 9 of the Constitution of the Republic of South Africa is to prohibit unfair discrimination and to remedy the results thereof. See *Brink v Kitshoff NO*: para 42 (decided on the grounds of section 8 of the Interim Constitution of the Republic of South Africa).

413 See also discussions by Hendry 2002:161-165; McAllister 2003:52-53; Hogg 2007:621.

(c) Determine whether the differential treatment resulted in substantive discrimination, an impairment of the claimant's dignity, imposing disadvantage, which brings into play the purpose of section 15(1) of the Charter.[414]

It is cautioned that this analysis should not be applied in a formalistic fashion, but rather in a contextual and purposive way.[415] This is clearly an approach based on substantive equality, as is confirmed by the judgement of Iacobucci J in *Law v Canada*,[416] in revisiting the *Andrews* decision. When considering the Canadian Supreme Court's statement on the purpose of section 15, and thus its definition of equality, equality has a moral basis and entails "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[417]

It is very clear that the value of dignity plays an integral role in any attempt to analyse the right to equality.[418] This fact is reiterated by the often cited passage of the Supreme Court of Canada from *Egan v Canada*:[419]

> "Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as

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414 This analysis was formulated by the Supreme Court of Canada in *Law v Canada (Minister of Employment & Immigration)*: paras 39, 88, as a synthesis of the Court's previous formulations of this discrimination analysis beginning with the *Andrews*-case. This analysis was again applied in the case of *Lovelace v Ontario*, (sub nom. Lovelace v Ontario) [2000] 1 S.C.R. 950, 2000 CarswellOnt 2460: para 53. The third element of the test can also be formulated as inquiring into the impugned measure's compliance with the purpose of the Charter, which incorporates the concept of dignity into the test. See O'Connell 2008:278.

415 *Law v Canada (Minister of Employment & Immigration)*: para 88.

416 Ibid, para 25.

417 Ibid, para 16. See also Hughes 1999:24, 40-41.

418 This view of the centrality of dignity in the equality jurisprudence ties in closely with the South African equality case law. See *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC); 1997 6 BCLR 708 (CC): para 41, where *Egan v Canada* [1995] 29 C.R.R. (2d) 79, [1995] 2 S.C.R. 513 was cited with approval. See also *Minister of Finance and Another v Van Heerden*: para 116.

419 *Egan v Canada* [1995] 2 S.C.R 513, 1995 CarswellNat 6.

second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

…

To summarize, at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the *Charter* when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration."[420]

In response to the problematic issues that could arise when viewing equality laws as based on the traditional grounds of state neutrality, individualism, and the promotion of autonomy, various legislatures and courts have endeavoured to formulate other values or grounds for the equality principle.[421] Fredman[422] formulated an approach to equality based on four sets of values as an alternative to merely considering neutrality, individualism and promotion of autonomy. These values are individual dignity and worth, restitution, redistribution and democracy, although these values may be considered to be complimentary to the liberal equality approach.[423] As is also discussed below with regard to the South African equality jurisprudence, the value of dignity is seen to inform a more substantive approach to equality. In *Law v Canada*[424] the Court made it clear that the value of dignity "infuses all elements of the discrimination analysis" and therefore also the understanding of equality. When considering dignity as a fundamental value underlying the right to equality, it is possible to overcome one of the problems encountered with neutral and consistent treatment as constitutive of equality. Treating two people equally badly would still satisfy the consistency and neutrality elements of equality. The same applies when an employer removes the benefits of one group of

420 Ibid, paras 36, 39.

421 Fredman 2002:16.

422 Fredman 2001:155; Fredman 2002:16.

423 Ibid.

424 *Law v Canada (Minister of Employment & Immigration)*: para 54 as per Iacobucci J.

employees to put them on the same plane as another group previously worse off for not enjoying the same benefits. Fredman argues that it is in this respect that the value of dignity and individual worth bridges the divide, because a removal of benefits or bad treatment does not serve the advancement of the group or individual's dignity.[425]

The value of dignity has, however, also been criticised.[426] It has been said to "narrow the ambit of substantive equality",[427] or is considered to be too individualistic in its analysis and therefore loses sight of the social context within which a discrimination analysis should be made.[428] Hogg[429] has described the human dignity element — imported into the Canadian equality jurisprudence through *Law v Canada* — as "vague, confusing and burdensome to equality claimants". Other writers have referred to dignity as being too broad and malleable a concept to provide meaningful answers to questions regarding discrimination.[430] When dignity is applied in equality jurisprudence it often highlights the conflict between the interpretation of dignity and autonomy or free choice.[431]

Reflecting on the progress made on the road to equality in Canadian society, Hughes is adamant that the commitment to a broad and substantive notion of equality has never been completely absent from Canadian jurisprudence, but that the achievement of this equality has been an uneven process, a movement towards an increase in qualitative and quantitative equality.[432]

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425 Fredman 2001:155.

426 For background on the philosophical and historical development of the idea of dignity, see Grant 2007:304-305.

427 Fudge 2007:241.

428 Grabham 2002:654-655.

429 Hogg 2007:630-631.

430 Greschner 2001:312. See also O'Connell 2008:271.

431 O'Connell 2008:280. See also *Gosselin c Québec (Procureur général)* [2002] 4 S.C.R. 429; 2002 CarswellQue 2706.

432 Hughes 1999:24.

4.2.8.2 The right to equality in section 9 of the South African Constitution

The Constitutional Court's case law on equality has from the outset been very clear regarding any attempt to give meaning to the right to equality. This should always be made with the necessary reference to the historical perspective and the core underlying values of the Constitution.[433] When attempting to define the type of equality provided for in section 9 of the Constitution,[434] an appropriate starting point is the founding provisions of the Constitution. Equality and the achievement of equality in the South African context involves more than mere individual or group entitlement. The Constitution addresses equality far more profoundly, as it constitutes a core fundamental value.[435] Section 1 of the Constitution depicts South Africa as a "sovereign democratic state founded on … [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms[,] [n]on-racialism and non-sexism". Section 7(1) describes the Bill of Rights as the cornerstone of South African democracy. The Bill of Rights

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433 *Brink v Kitshoff NO*: para 40; *Prinsloo v Van der Linde and Another*: paras 23-25; *City Council of Pretoria v Walker*: para 26; *Minister of Finance and Another v Van Heerden*: para 26.

434 Constitution of the Republic of South Africa.

Section 9 – Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

435 Constitution of the Republic of South Africa: section 1. See *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); 2002 9 BCLR 986 (CC): para 17; *Botha and Another v Mthiyane and Another* 2002 1 SA 289 (W); 2002 4 BCLR 389 (W): para 67; *Minister of Finance and Another v Van Heerden*: paras 22, 72. See also Andrews 2005:1160.

provides for a detailed and substantive approach to equality which includes freedom from unfair discrimination as well as positive measures aimed at advancing equality.[436]

The specific importance of the right to equality and its place at the very heart of the South African Constitution has always been clearly underlined in case law.[437] In *Fraser v Children's Court, Pretoria North, and Others*[438] Mahomed DP stated it as follows:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '. . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'."[439]

Section 9 of the Constitution does not foresee a merely negative or passive concept of equality.[440] Its purpose is to both prohibit unfair discrimination, and to permit positive remedial measures to redress the impact of this discrimination.[441] Formal equality would only have required the extension of the same rights and entitlements to all individuals. The mere removal of discriminatory legislation would have resulted in everyone being equal because everyone is an equal bearer of rights. This does not account for existing patterns of inequality, a point which is clarified through the reasoning of Ackermann J in *National Coalition for Gay & Lesbian Equality v Minister of Justice*:

> "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

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436 Albertyn & Goldblatt 2007 *et seq*:35–1.

437 For example, see *Brink v Kitshoff NO*: para 33: "Equality has a very special place in the South African Constitution."; *Satchwell v President of the Republic of South Africa and Another*: para 17.

438 1997 2 SA 261 (CC); 1997 2 BCLR 153 (CC).

439 *Fraser v Children's Court, Pretoria North, and Others*: para 20.

440 *National Coalition for Gay & Lesbian Equality and Another v Minister of Justice and Another*: para 16.

441 *Brink v Kitshoff NO*: para 42. See also Albertyn & Goldblatt 2007 *et seq*:35–31; De Wet 1995a:41.

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."[442]

In the South African historical context in particular, identical treatment will render particularly unsatisfactory results.[443] On the other hand substantive equality requires that every group or individual's social and economic conditions be examined so as to conclude whether equality exists or not.[444] Substantive equality has been called an "engine that moves a racist society towards one underpinned by non-racialism and democracy".[445] A nuanced substantive equality principle is grounded in the correct understanding of the interconnectedness of sameness and difference.[446]

In South African equality jurisprudence there is a strong emphasis on the specific distinction between formal and substantive equality with a clear rejection of formal equality, i.e. identical treatment in all circumstances.[447] Formal equality fails to recognise indirect discrimination and perpetuates existing inequality. Substantive equality aims to eradicate existing systemic inequalities. It also provides the framework within which government policy and legislation are analysed to determine compliance with the constitutional principles.[448] The specific importance of subsection 9(2) is not only to underline the principle of substantive equality,[449] but also to import a further aspect of substantive equality, namely remedial equality.[450] Although section 9(2) is

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442 *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 60. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*: para 74.

443 *President of the Republic of South Africa and Another v Hugo*: para 41 Goldstone J remarked as follows: "We need, therefore, to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."

444 Currie & De Waal 2005:233.

445 Andrews 2005:1164.

446 Hughes 1999:40; Andrews 2005:1163.

447 *Botha and Another v Mthiyane and Another*: para 67; *Minister of Finance and Another v Van Heerden*: para 26.

448 Hughes 1999:35; *Minister of Finance and Another v Van Heerden*: para 22.

449 *City Council of Pretoria v Walker*: para 112.

450 A similar function is attributed to section 15(2) of the Canadian Charter of Rights and Freedoms in *Lovelace v Ontario*: para 93; *R v Kapp* 2008 CarswellBC 1312, 2008 SCC 41, J.E. 2008-1323 (S.C.C. Jun 27, 2008): para 37.

primarily the vehicle for remedial measures, the whole of section 9 carries the spirit of remedial equality.[451] In *National Coalition for Gay & Lesbian Equality v Minister of Justice* Ackermann J stated that section 9 clearly suggests substantive and remedial concepts of equality, noting that:

> "Substantive equality is envisaged when s 9(2) unequivocally asserts that equality includes 'the full and equal enjoyment of all rights and freedoms'. The State is further obliged 'to promote the achievement of such equality' by 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination', which envisages remedial equality."[452]

According to Currie and De Waal a commitment to substantive equality requires an equality of outcome which by implication means tolerating disparity of treatment in the achievement of this goal of equality.[453] The unambiguous commitment of the Constitution to substantive equality has repeatedly been vocalised in case law.[454] Moseneke J echoed this stance in the following statement in *Minister of Finance and Another v Van Heerden*:

> "As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.
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> …
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> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic under-privilege, which still persist."[455]

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451 *Minister of Finance and Another v Van Heerden*: para 75. See also Grant 2007:321-322.

452 *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 62.

453 Currie & De Waal 2005:233.

454 Andrews 2005:1163.

455 *Minister of Finance and Another v Van Heerden*: paras 26-27 (footnotes omitted).

A contextual approach should be adopted when determining the unfairness of remedial measures or discriminatory measures and this should always be based on the commitment to substantive equality.[456] In *Daniels v Campbell NO and Others*[457] the Court underlines the constitutional goal of achieving substantive equality. In *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*[458] the Court refers to section 9 as a guarantee for the achievement of substantive equality which would ensure that everyone, including those who previously suffered unfair discrimination, live in an egalitarian society.[459]

The values underlying the right to equality are what define the right. In South Africa the prominent value underlying the right to equality is dignity.[460] The same is true for the Canadian equality jurisprudence.[461] The importance of dignity as a basis of the right to equality was pointed out in *President of the Republic of South Africa and Another v Hugo*:[462]

> "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

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456 Ibid, para 27. See also Albertyn & Goldblatt 2007 *et seq*:35–75.

457 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC): para 22.

458 *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: paras 49-50.

459 Ibid, para 50.

460 Albertyn & Goldblatt 2007 *et seq*:35–7, 35–8 & 35–9; Cowen 2001:34; Grant 2007:299, 300.

461 *Law v Canada (Minister of Employment & Immigration)*: para 53. However, the Supreme Court of Canada in *R v Kapp* (paras 21-22) criticised the use of dignity when adjudicating equality claims. It was stated that dignity is too abstract and subjective to have useful application when determining whether or not discrimination is present. It was further stated that dignity does not succeed in its role as a philosophical enhancement of the right to equality.

462 *President of the Republic of South Africa and Another v Hugo*: para 41.

should not be forgotten or overlooked. In Egan v Canada L'Heureux-Dubé J analysed the purpose of s 15 of the Canadian Charter (which entrenches the right to equality) as follows:

> 'This Court had recognised that inherent human dignity is at the heart of individual rights in a free and democratic society: Big M Drug Mart Ltd [(1985) 13 CRR 64] at 97 . . . (per Dickson J (as he then was)). More than any other right in the Charter, s 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within s 15 of the Charter means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'"[463]

Dignity is defined as an attribution of equal moral worth and the right to be treated with equal concern and respect, and this provides the link with equality. Dignity gives equality its moral, substantive underpinning,[464] and assists in distinguishing discrimination from unfair discrimination.[465] The Constitutional Court has developed a contextual understanding of dignity which concentrates on appreciating group-based and individual systemic political inequality, but also encompasses the removal of material disadvantage and inequality.[466] Dignity is pliable enough to accommodate issues of status or recognition, which guarantees equal participation and inclusion in society, but which also remedies inequalities and disadvantage related to it.[467] Dignity is also the main consideration when the Court has to decide whether differentiation on unlisted

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463 Goldstone J, at para 41, quotes from *Egan v Canada* (1995) 29 CLR (2d) 79 (sic).

464 Ackermann 2000:541; Fredman 2002:18.

465 *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC): para 79; *Prinsloo v Van der Linde*: para 41. See also O'Connell 2008:278.

466 See *National Coalition for Gay & Lesbian Equality v Minister of Justice*; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); 2000 1 BCLR 39 (CC). Dignity as grounds for the eradication of economic and material inequality was emphasised in the relation to socio-economic rights. See Albertyn & Goldblatt 2007 *et seq*:35–10.

467 Albertyn & Goldblatt 2007 *et seq*:35–12, 35–13.

grounds would amount to discrimination.[468] Dignity, therefore acts to expand the scope of the equality right.[469]

More recently the value of substantive equality has become more prominent in equality jurisprudence, specifically with regard to positive measures and restitutionary equality.[470] The value of equality is what extends the right to equal protection and benefit of the law and the right to non-discrimination to a positive commitment to social justice.[471] According to Albertyn and Goldblatt, the *Van Heerden* case was probably the first to recognise the relationship between the value of, and right to equality.[472] It encompasses positive steps to remove material inequality through economic redistribution.

In conclusion, a firm commitment to substantive equality underlies section 9 of the Constitution. Some elements of formal equality can be found in section 9(1) which guarantees equality before the law and equal protection and benefit of the law, guaranteeing against arbitrary classifications,[473] and guaranteeing procedural equality.[474] Moreover, as noted above, formal equality in this sense still has an important role today. At the heart of substantive equality lies the capacity of the right to equality to evolve, develop and reflect a changing society and its realities.[475] The South African substantive equality has strong elements of transformative, remedial, redistributive and restitutionary equality. Transformative substantive equality is the element which supports the ongoing

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468 Ackermann 2000:546. *Prinsloo v Van der Linde and Another*: paras 31, 33; *Harksen v Lane NO and Others* 1998 1 SA 300 (CC); 1997 11 BCLR 1489 (CC): para 47.

469 O'Connell 2008:277, 284-285. O'Connell argues that in both Canada and South Africa, it is unclear whether the concept of dignity adds anything substantive to the Courts' reasoning when dealing with equality cases. Dignity as a guiding principle in both Canadian and South African equality jurisprudence has been criticised. See Grant 2007:301; Hogg 2007:630-631; Grabham 2002:654-655; Fudge 2007:241.

470 Albertyn & Goldblatt 2007 *et seq*:35–13.

471 *Minister of Finance and Another v Van Heerden*: paras 24-25; Albertyn & Goldblatt 2007 *et seq*:35–13.

472 Albertyn & Goldblatt 2007 *et seq*:35–13.

473 Ibid, at 35–15.

474 Ibid, at 35–23.

475 Hughes 1999:33.

transformation process, and thereby to eventually realise the society envisaged in the Constitution. Remedial substantive equality foresees measures to remedy the past injustice and inequality of status and systemic indignity. Substantive equality as a vehicle to drive redistribution and restitution seeks to remedy economic injustice and disadvantage. The achievement of equality ideally hopes to fulfil the South African Constitution's vision of a society based on social justice.[476]

4.2.8.3 Achievement of equality

4.2.8.3.1 General background to remedial measures

It has long been clear that the effect of prohibiting direct or indirect discrimination is very limited if the overall objective is the achievement of equality. This has led to legislatures attempting to develop equality legislation in a new direction, namely the promotion of equality through positive or remedial steps. For example, in Britain the Race Relations Amendment Act 2000 places a positive duty to promote racial equality on public authorities.[477] In South Africa various legislative and other measures contain provisions to effect this positive duty to promote equality, for example the Employment Equity Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, etc.

A right to equality should be more than simply an anti-discrimination provision and should create a framework in which issues of inequality could be defined and addressed.[478] A positive duty goes beyond remedying past wrongs. It requires change through encouragement, accommodation or structural transformation.[479] The premise underlying legislated positive duties to promote equality is that on the whole there should be a movement away from individual, fault or intent-based claims for equality. The

476 See Preamble to the Constitution of the Republic of South Africa.

477 Fredman 2001:146.

478 Porter 2005:152.

479 Fredman 2002:123.

obligation to promote equality should be carried by the best placed organisation/person/group.[480] In contrast to this, the US Supreme Court held that in order for a government body to employ valid affirmative preferences, it should be able to prove that it has in the past been implicated in specific patterns or incidents of discrimination, either through a failure to act, or wrongful action perpetuated by the body itself.[481] The obligation to promote equality arises when systemic discrimination is evident. This is in line with one of the tenets of a liberal vision of the state, namely individualism. The obligation of positive action only accrues to individuals who carry the responsibility for discrimination.[482]

Fredman[483] outlines certain characteristics for positive duties or remedial measures. Firstly, it is important to have certain identified objectives which are the aim of remedial measures, for example removal of prejudice, redistribution of skewed distribution of resources, or the accommodation of diversity. Secondly, the remedial process should be constantly evolving, it should entail constant monitoring of results and changes to strategies in response to the changing dynamics of the process and the level of effectiveness achieved.[484]

The way in which remedial measures and, in particular the positive measures, are accommodated in different jurisdictions are discussed below.[485] It is necessary at this stage to state that accommodation of this nature depends very strongly on the specific notion of equality subscribed to by the particular jurisdiction.

Inequalities that exist as a result of years of apartheid manifest themselves in a variety of forms. The task of remedying these disparities and inequalities will be achieved by designing and implementing a variety of measures and programmes. The

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480 Ibid, at 122.

481 See approach taken by the US Supreme Court in, for example, *Regents of the University of California v Bakke* 438 U.S. 265, 98 S.Ct. 2733 (1978) and *City of Richmond v J.A. Croson* 488 U.S. 469, 109 S.Ct. 706 (1989).

482 Fredman 2002:127.

483 Ibid, at 123.

484 Ibid, at 123-125.

485 See below para 4.3.8.3.3.

vast dimension of this task should not be underestimated. To illustrate this Albertyn and Goldblatt[486] quote the following passage by former Chief Justice Arthur Chaskalson:

> "In 1996 when the Constitutional Assembly adopted a Constitution for South Africa we were one of the most unequal societies in the world. We had recently emerged, almost miraculously, from a repressive and undemocratic legal order, and had embraced democracy. The past hung over us and profoundly affected the environment in which we were living. The great majority of our people had been the victims of a vicious system of racial discrimination and repression which had affected them deeply in almost all aspects of their lives. This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid and those who had not. In the contrast between those with land, and the millions of landless people; between those with homes and the millions without access to adequate housing; between those living in comfort and the millions without access to adequate health facilities, clean water and electricity, between those with secure occupation and the millions who were unemployed or had limited employment opportunities."[487]

In the opinion of Sachs J in *Minister of Finance and Another v Van Heerden*, "redress is not simply an option, it is an imperative".[488]

The substantive concept of equality in the South African jurisprudence was outlined above. Regarding the distinction between formal and substantive concepts of equality, it can be said that both these notions aim to achieve the same object, namely the elimination of the divide between the powerful and the powerless. Formal equality would seek to curtail power whereas substantive equality rather aims to remove disadvantage.[489] It is the way in which this is achieved that makes substantive equality the only meaningful option. Substantive equality accommodates measures taken to achieve equality as an extension of equality and not as an exception thereto. This was established in the Constitutional Court's earliest equality judgements while considering the provisions of

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486 Albertyn & Goldblatt 2007 *et seq*:35–2.

487 This piece was quoted from "Equality as a Founding Value of the South African Constitution" *Oliver Schreiner Lecture* University of the Witwatersrand (February 2001). I have been unable to obtain a copy of this lecture.

488 *Minister of Finance and Another v Van Heerden*: para 137.

489 Hughes 1999:38.

the interim Constitution.[490] In stating the role of the equality provision in remedying historical inequality and disadvantage, O'Regan J stated in *Brink v Kitshoff NO*:

> "The drafters [of the Constitution] realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4)."[491]

It was also made clear that mere identical treatment would not, in the South African context, be adequate and that the South African concept of unfair discrimination should include an understanding that until the goal of an equal society had been reached, identical treatment would not always be possible.[492] The mere removal of discriminating legislation or policies would not suffice to put an end to systemic discrimination — it would have to be remedied.[493]

The South African Constitution does not merely allow for positive measures, it mandates the achievement of this substantive equality. In *Minister of Finance and Another v Van Heerden* Moseneke J stated with reference to sections 1(a) and 7(1) of the Constitution:

> "The Constitution commands us to strive for a society built of the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom."[494]

This duty is imposed on all state organs, as stated in *Minister of Finance and Another v Van Heerden*:

> "[The Constitution] confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to

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490 Interim Constitution of the Republic of South Africa. This was also confirmed in later case law, for example *Minister of Finance and Another v Van Heerden*: para 95.

491 *Brink v Kitshoff NO*: para 42. Statement made with reference to section 8 of the Interim Constitution of the Republic of South Africa, which was the predecessor of section 9 of the Final Constitution of the Republic of South Africa.

492 *President of the Republic of South Africa and Another v Hugo*: para 41.

493 *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 60.

494 *Minister of Finance and Another v Van Heerden*: para 22.

protect and promote the achievement of equality — a duty which binds the judiciary too."[495]

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* it was observed that:

> "The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our 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'. [Preamble of the interim Constitution] 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."[496]

In the next section remedial measures, as provided for in section 9 of the South African Constitution, will be discussed.

4.2.8.3.2 Section 9(2) and the *Van Heerden* case

The Constitutional Court has been very clear that the five subsections of section 9 form a unit which should be viewed as seeking to attain a cumulative, interrelated and indivisible approach to the achievement of equality.[497] A full understanding of the Constitution's notion of equality "requires a harmonious reading of the provisions of s 9".[498] This also implies that remedial or restitutionary equality does not solely fall within

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495 Ibid, para 24 (footnotes omitted). The necessity of remedial measures was also recognised in earlier cases, for example *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 60.

496 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*: para 74.

497 *Minister of Finance and Another v Van Heerden*: paras 28, 95.

498 Ibid, para 28.

the domain of section 9(2), and can also come into play in the section 9(3) analysis.[499] As discussed below, this is, however, not the approach eventually taken by the Court.[500]

Textually section 9(2) is divided into two parts. Firstly, section 9(2) of the Constitution provides that "equality includes the full and equal enjoyment of all rights and freedoms" and, secondly, that remedial measures may be taken to promote the achievement of equality. In *National Coalition for Gay & Lesbian Equality v Minister of Justice*[501] these two parts were interpreted as stating an unequivocal commitment to firstly, substantive equality and, secondly, remedial equality. Section 9(2) of the Final Constitution, generally known as the "affirmative action clause",[502] is a very specific statement on the Constitution's commitment to substantive equality. By explicitly authorising remedial measures, it places their validity, if in conformity with the internal requirements, beyond doubt.[503] Arguably, the battles surrounding affirmative action policies in the United States probably contributed to the inclusion of this clause,[504] and also the inclusion of section 15(2) of the Canadian Charter.[505]

The interrelationship between section 9(2) and 9(3) remained unclear until the Constitutional Court had its first opportunity to adjudicate a matter on section 9(2) in *Minister of Finance and Another v Van Heerden*. At issue in this case were the provisions of rule 4.2.1 of the Political Office-Bearers Pension Fund. This fund aimed to provide retirement benefits for parliamentarians who were elected in the 1994 general

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499 *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 62 per Ackermann J. See also Grant 2007:321-323.

500 See also Pretorius 2009:400.

501 *National Coalition for Gay & Lesbian Equality v Minister of Justice*: para 62.

502 *South African Police Service v Public Service Association*: para 71; Rautenbach 2005:173; Rautenbach 2001:628.

503 As is Article 2(4) of the Equal Treatment Directive, Directive (EEC) 76/207 [1976] OJ L39/40.

504 See *Minister of Finance and Another v Van Heerden*: para 147 per Sachs J. Andrews 2005:1159.

505 Constitution Act, 1982, pt. I (Canadian Charter of Human Rights and Freedoms), being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11. Peirce 1993:265; Hendry 2002:174.

election. It created a differentiated employer-contribution scheme based on three groups of beneficiaries for a limited period of five years.[506]

Remarking on the difference between section 9(2) and 9(3), Mokgoro J stated in *Van Heerden* that the difference lies in different foci of the goal it seeks to achieve.[507] Section 9(2) focuses on the achievement of equality and section 9(3) on discrimination. She stated that "[s]ection 9(2) is forward looking and measures enacted in terms of it ought to be assessed from the perspective of the goal intended to be advanced",[508] but added that this does not mean "that the interests of those not advanced by the measure must necessarily be disregarded. However, the main focus in s 9(2) is on the group advanced and the mechanism used to advance it."[509]

The reason for placing the greater emphasis on the achievement of equality in this instance is that, due to there necessarily being some disadvantage to excluded groups, maintaining the focus on the impact on the complainant would almost inevitably lead to the measure failing the constitutionality test. It would, however, seem that in certain instances of an extremely negative impact on the complainant, there could be room for judicial review of the measure. With regard to section 9(3), it was said that "[w]hen assessing a measure under s 9(3), the focus is on the group or person discriminated against. Here, the impact on the complainant and his or her position in society is of utmost importance."[510] Mokgoro J concludes:

> "Because of this distinction it is important that a measure purportedly enacted under s 9(2) fits properly within it. If measures are incorrectly defended under it, insufficient weight will be given to the position of the complainant. Conversely, if the equality

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506 The rules of the Political Office-Bearers Pension Fund differentiate between three categories of members. Members of category A were members under the age of 49 who did not also belong to the Closed Pension Fund (CPF). The CPF was a pension fund for members of Parliament and political office bearers who already held office before the 1994 elections. Category B members were also not members of the CPF, and were over 49. Members in category C were members of the CPF. The differentiated employer contribution rates provided the highest employer contributions to category B members and the lowest to category C.

507 *Minister of Finance and Another v Van Heerden*: para 78.

508 Ibid, para 78. Sachs J in his separate opinion agreed with this (at para 136).

509 Ibid, para 78.

510 Ibid, para 79.

> jurisprudence under s 9(3) is built into the test for s 9(2), the process of transformation, as envisaged by the Constitution, will be unduly hampered."[511]

The Court was in agreement that when a remedial measure complies with section 9(2), it offers a complete defence to a claim of unfair discrimination[512] and proper remedial measures do not attract the presumption of unfairness.[513] In order to determine compliance with section 9(2), the Constitutional Court identified three criteria against which an affirmative measure should be measured in order to determine the constitutionality thereof.[514] Moseneke J, writing for the Court, alluded to these criteria as follows:

> "It seems to me that to determine whether a measure falls within s 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."[515]

The first element concerns the targeted persons or groups. The groups advantaged by the remedial measure should be a group designated in section 9(2) — i.e. a group disadvantaged by unfair discrimination. The Court highlights the fact that, at times, the comparator analysis of the equality inquiry can become problematic. This arises from the fact that, within groups favoured by the measure in question, there may on occasion prove to be individuals who are in fact not disadvantaged, and the other way around. The Court is clear on the point that these exceptions, which may exist within groups that are either disadvantaged or advantaged by remedial measures, will not affect the legality or illegality of the disputed programme.[516] It stated that "[i]n the context of a s 9(2)

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511 Ibid, para 81.

512 Ibid, para 36. Reiterated by Sachs J at para 140 of the judgement. This is echoed by the finding on section 15(2) of the Canadian Charter of Rights and Freedoms made by the Supreme Court of Canada in *R v Kapp*: paras 39-40.

513 *Minister of Finance and Another v Van Heerden*: para 32.

514 Mokgoro J agreed with these at para 82. Ngcobo J agreed at para 108.

515 *Minister of Finance and Another v Van Heerden*: para 37.

516 For a similar finding by the Supreme Court of Canada concerning section 15(2) of the Canadian Charter of Rights and Freedoms, see *R v Kapp*: para 55.

measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion".[517] The main difference between the majority opinion and the minority opinions of Mokgoro and Ngcobo JJ reside in the application of this first element of the test.[518] Mokgoro J was not in agreement with the Court regarding the qualification that a majority of the advanced group should be previously disadvantaged. She argued that a measure should be more carefully crafted to pass as a section 9(2) restitutionary measure. The design of any ameliorative measure should not therefore simply involve a broad formulation of the advancement of previously disadvantaged groups, without proper consideration being given to the size of the group of beneficiaries who were not previously discriminated against.[519] She further stated:

> "I have cautioned that, in the context of s 9(2), great care must be taken to define the group because of the nature of the subsection and the advantage of not having to justify the measure on the part of the author of the remedial measure in invoking it. It is my view that the facts of this case are such that the measure is not one envisaged by s 9(2). The basis for this conclusion is that a *significant number of the beneficiaries* are not members of a category previously disadvantaged by unfair discrimination. There is a significant difference between a finding that a measure must be tightly crafted to fall under s 9(2) because of its specific requirements and the consequences which attach to that section and a finding that the existence of exceptional circumstances does not render an otherwise fair measure unfair."[520]

Ngcobo J agreed with the three elements of the test as set out in the majority opinion, but raised concerns about the first element, in that the group targeted by the impugned measure did not comply with this element, as stated in the following:

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517 *Minister of Finance and Another v Van Heerden*: para 40. The Court further stated that "[i]t is clear that the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned".

518 This division is highlighted by Sachs J at para 138 of his opinion in *Minister of Finance and Another v Van Heerden*.

519 *Minister of Finance and Another v Van Heerden*: paras 88-89.

520 Ibid, para 105 (own emphasis).

> "I doubt whether s 9(2) applies to the facts of this case. In particular, I doubt whether on the facts of this case the requirement that the measure must target persons or categories of persons who have been disadvantaged by discrimination has been met. The beneficiaries of the measure included persons who were not disadvantaged by past discrimination."[521]

In a separate opinion on the matter, Sachs J voiced his reservations concerning this type of analysis. He argued that a proper understanding of section 9(2) as part of the greater provision of the right to equality, coupled with a contextual inquiry, would avoid "preoccupation with formal technical exactitude".[522] The determining factors should not be the proportion of previously disadvantaged to previously advantaged included in the targeted group, but rather an inquiry — rational and objective — into the impact of the measure on the dignity of those affected.

Secondly, the programme has to be designed in such a way that it is reasonably capable of achieving the desired outcome of advancing these groups.[523] This necessitates the existence of a rational connection between the measure under review and the stated objective thereof. The Court clearly excluded any irrational measures, i.e. any measures which are not rationally connected with the object it seeks to achieve. However, the Court argued that requiring the state to show that remedial measures *will* achieve its said objectives would place too difficult a burden of proof on the state. The show of deference to the legislature's choosing of measures that would achieve more equality does not imply a rubberstamping of any measure labelled ameliorative. By allowing itself to raise questions in this regard it is not suggested that the Court would second-guess the legislature's authority and ability to make policy choices. It would merely present the Court with the opportunity to independently identify largely (or even grossly) ineffective policies which would provide a clear indication for the legislature that review of the programmes would be necessary. This would not amount to judicial activism but merely add to responsive governance.

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521 Ibid, para 108.

522 Ibid, para 146.

523 The Supreme Court of Canada in *R v Kapp* (para 49), found that the test to be applied for section 15(2) had to be one of rationality, therefore "there must be a correlation between the program and the disadvantage suffered by the target group".

The comparator analysis is again qualified in these circumstances; there is no onus of proof to show how one group was more advantaged than another group.[524] The judgement does not require the implementers of remedial programmes to show that the chosen programme was the least onerous way of achieving the objective. This was stated as follows:

> "The provisions of s 9(2) do not prescribe such a necessity test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity or purpose to prejudice or penalise others, and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved. The prejudice that may arise is incidental to but certainly not the target of remedial legislative choice."[525]

Albertyn and Goldblatt[526] suggest that the Court held that the test required no standard of necessity,[527] precision or proportionality. They highlight the fact that there is no necessity to establish that the objective would be achieved or to show that there might be a less onerous way to achieve such objective.

When the Court had to consider the negative impact on the disfavoured group, strong emphasis was placed on the fact that the pension benefits received by members of the disfavoured group was in fact still of a very generous nature.[528] Sachs J, in his separate opinion, highlighted the fact that Moseneke's judgement on section 9(2) does not exclude the concept of fairness.[529]

In light of the fact that Canadian equality jurisprudence has particular relevance for South Africa, it is noteworthy that in the recent Canadian case of *R v Kapp*,[530] the Supreme Court of Canada also held that when considering the object of ameliorative

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524 *Minister of Finance and Another v Van Heerden*: para 43.

525 Ibid.

526 Albertyn & Goldblatt 2007 *et seq*:35–37.

527 The Court did state in para 42 that "[s]ection 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective".

528 *Minister of Finance and Another v Van Heerden*: paras 53-54.

529 Ibid, para 140.

530 *R v Kapp*: para 25.

programmes there should be a rational connection between the said object and the means chosen to achieve it.[531]

The third element of the test of constitutionality concerns whether or not the programme or measure promotes the achievement of equality. In light of the Constitutional Court's equality jurisprudence, it could be argued that the type of equality it seeks to advance is substantive equality with fairness and proportionality at its centre. The Court, however, did not clearly articulate this in its judgement. The third requirement was explained as follows:

> "In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened."[532]

At this point, it would be appropriate to make certain observations regarding the Constitutional Court's argumentation in the *Van Heerden* case. Firstly, equality needs to reflect a dynamic nature both in process and content, and the question about whether or not an individual or group is experiencing discrimination, and whether their right to substantive equality has been infringed should demand a complex contextual analysis.[533] The danger of not examining groups, and differences within groups, properly, could lead to the imposition, be it intentionally or unintentionally, of the dominant view. It is necessary to ask all the obvious and not-so-obvious questions. The judiciary should take note that "[p]reexisting inequalities in power and resources can only be reproduced, not redressed, in a legal arena that treats all participants identically."[534] There seems to be no clear indication of what the situation would be if a lesser disadvantaged group is placed against a more disadvantaged group.

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531 Ibid, para 49.

532 *Minister of Finance and Another v Van Heerden*: para 44.

533 Hughes 1999:47.

534 Ibid, at 48 quoting Flagg, Barbara & Goldwasser, Katherine "Fighting for Truth, Justice, and the Asymmetrical Way" 1998 76(1) *Washington University Law Quarterly* 105-112, at 109.

Secondly, the lack of consideration given to comparative equality case law is not explained by Moseneke J who merely referred to the dangers posed by importing US equality jurisprudence,[535] whilst ignoring relevant Canadian jurisprudence. At the time of the judgement in the *Van Heerden* case, the standing legal position of dealing with affirmative action measures under section 15(1) and 15(2) of the Canadian Constitution was that these two subsections should be seen as being absorbed into each other.[536] Affirmative action was therefore not exempt from discrimination analysis under section 15(1). Although it is submitted that this approach is more correct when considering the constitutionality of remedial measures, the Supreme Court of Canada changed its approach in June 2008 when it had another opportunity to assess measures deemed ameliorative in *R v Kapp*. It would be interesting to see whether the South African Courts take note of these developments in the Canadian equality law when next dealing with issues relating to affirmative action. The Court also did not give any consideration to the legislative history of section 9(2) in their judgement.[537]

Moseneke J considered remedial measures to be "integral to the reach of our equality protection"[538] and emphasised how section 9(1) and 9(2) are complementary to each other in their contribution to the achievement of the constitutional equality vision. It is also stated on numerous occasions in the rest of the judgement that section 9 should be read, understood and interpreted as a holistic provision. The judge, however, failed to pull that argumentation through in his reading of section 9(2) and 9(3), which exactly comprises the "cumulative, interrelated and indivisible"[539] argument so strongly proposed by Sachs J in his separate opinion.

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535 *Minister of Finance and Another v Van Heerden*: para 29.

536 This was the approach articulated in *Lovelace v Ontario*.

537 See Pretorius 2009:408. The author refers to Tonio Gas *Affirmative Action in der Republik Südafrika unter Berücksichtigung verfassungsvergleichender Bezüge* (2001) at 127-131, 230-231 and notes that the "legislative history could have pointed the court in a different direction. He (Gas) refers to deliberations of the Constitutional Assembly (Constitutional Assembly. Minutes of Meeting of Theme Committee 4. Fundamental Rights. Monday 12 June 1995 (at 09h00), 4.4-4.6), which indicate an understanding that affirmative action would be subject to scrutiny under s 9(3) and the limitation clause." Pretorius 2009:408 fn 55.

538 *Minister of Finance and Another v Van Heerden*: para 30.

539 Ibid, para 136 *et seq*.

It could be said that the Court, in the majority opinion, obscured the precise division between the tests it proposed. When Moseneke J discussed the facts of the case against the test set out for determining the constitutionality of the pension fund scheme, he gave consideration to factors which strongly resemble factors to be considered under the determination of unfairness of discrimination as provided in *Harksen v Lane*. The Court stated it as follows:

> "In my view, we are obliged to look at the scheme as a whole. We must bear in mind its history of transition from the old to the new 1994 Parliament; the duration, nature and purpose of the scheme; the position of the complainant and the impact of the disfavour on the respondent and his class."[540]

The Court went on to emphasise the restricted nature of the measures under review, as well as the fact that the measures would be implemented for a limited time only. This is supported by the minority judgement of Mokgoro J when she states:

> "Many of the factors that Moseneke J advances in his judgment in support of his contention that the differentiation in the POBF is an acceptable restitutionary measure are, in my view, relevant to the fairness of the measure."[541]

This would then actually work to confuse the test between measures passing muster under section 9(2) and section 9(3), bringing factors belonging to one or the other into play. This in turn strengthens the statement that section 9 should not be compartmentalised, and undoubtedly imports fairness into the section 9(2) analysis. It is unclear in what circumstances a measure would impact too harshly on the complainant's rights so as to neutralise the remedial purpose thereof. The Court has left the question open.

Remedial equality is at the heart of the whole of section 9. The overlap in considerations pointed out by Sachs J *in casu* further strengthens the fact that fairness cannot be completely eradicated from a section 9(2) inquiry. The remedial qualities of impugned legislation are considered when determining fairness under section 9(3).

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[540] Ibid, para 45.

[541] Ibid, para 96.

Dignity and equality are both foundational values in the Constitution, and therefore colour all inquiries into Bill of Rights issues. Dignity should therefore also deserve consideration in section 9(2) cases on both sides of the action. The Court has the instruments to balance the impact of impugned affirmative measures on the complainant and the interests of the broader society. Dignity as a value is considered from an individual and group perspective.

The object of ameliorative action will no doubt weigh heavily in tilting the scale towards the validity of a measure based on the relative impact on the dignity of an individual versus the dignity of a group advantaged by the measure. *In casu* the Court gave consideration to the impact of the pension fund rules on the dignity of the complainants and correctly found the impact to be of no consequence. However, this dimension should, in cases involving greater factual and situational complexity, give the Court the opportunity to make nuanced value judgements. The Court could in future cases give more consideration to the interplay between different factors in evaluating the validity of remedial measures.

According to Grant[542] dignity is a particularly suitable concept to advance the actual achievement of substantive equality. The author refers to the four broad objectives of substantive equality set out by Fredman, namely, "to break the cycle of disadvantage experienced by some groups within society, to promote respect for dignity by providing redress for stigma and stereotyping; to positively affirm the identity of individuals within society; and to facilitate full participation in society."[543] She then argues that dignity as both an individual and group concept can be helpful when aligning these aims within equality jurisprudence.[544]

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542 Grant 2007:328.

543 Grant drew these broad objectives from Fredman, 'The Future of Equality in Britain', Equal Opportunities Commission, Working Paper Series, No 5, 2002.

544 In actions concerning affirmative action measures brought since the Court's holding it would seem that the courts have not given the decision much weight. See *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 26 ILJ 765 (LC); 2005 6 BLLR 539 (CC); *Kimberley Girls' High School and Another v Head, Department of Education, Northern Cape Province and Others*; *Du Preez v Minister of Justice and Constitutional Development & Others* 2006 5 SA 592 (EqC); 2006 9 BCLR 1094 (SE); *Baxter v National Commissioner, Correctional Services & Another* 2006 27 ILJ 1833 (LC); 2006 9 BLLR 844 (LC); *Willemse v Patelia NO &*

4.2.8.3.3 Remedial measures — affirmative action

(a) Introduction

Affirmative action is one of the remedial measures envisaged as a means to achieve substantive equality in South Africa. In the following discussion the concept of affirmative action will be placed in a broader international framework. To achieve this, a brief overview of affirmative provisions in some of the most important United Nations documents will help to place it in a broader equality and human rights context. These international human rights instruments do not only form the basis of most human rights codes worldwide, but are also specifically important to the South African perspective, an aspect which will become clearer from the discussion below. After reflecting on the objectives of affirmative action, a broad definition of affirmative action will be suggested. Subsequent to this background discussion, the approach of two other jurisdictions will be briefly considered. These are the United States of America and Canada. This specific selection of countries will highlight the different approaches taken by the courts when deciding on the requirements for the validity of affirmative action measures, but will also elucidate the different objectives regarding affirmative action in each of these countries. Different levels of scrutiny are applied when evaluating

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Others 2007 28 ILJ 428 (LC); 2007 2 BLLR 164 (LC). It does seem as if the High Court and Labour Court interpret section 9(2) and the *Van Heerden* case as applicable to cases brought directly under section 9(2) and not to instances covered by the Employment Equity Act or the Promotion of Equality and Prevention of Unfair Discrimination Act. The Court continues to analyse matters of affirmative action, albeit arising from issues concerning affirmative appointments or promotions, on the established body of case law which includes cases like *Public Servants Association of South Africa v Minister of Justice* 1997 3 SA 925 (T); 1997 5 BCLR 577 (T); *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* 2000 21 ILJ 1119 (LC) (see references in *Willemse v Patelia NO & others*; *Baxter v National Commissioner, Correctional Services & Another*), and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others* 1998 19 ILJ 285 (LC); 1997 11 BLLR 1438 (LC). The situation on matters of retrenchments is not clear. See *Thekiso v IBM South Africa (Pty) Ltd* 2007 28 ILJ 177 (LC); 2007 3 BLLR 253 (LC); *PSA obo Karriem v SAPS & Another* 2007 28 ILJ 158 (LC); 2007 4 BLLR 308 (LC). Courts consider *Dudley of City of Cape Town* 2004 25 ILJ 305 (LC); 2004 5 BLLR 413 (LC) to be authoritative for finding that as a person has no individual right to affirmative action, it follows that a person cannot claim a discrimination when affirmative action was not considered in selection of candidates for retrenchment.

affirmative measures, and different types of measures are acceptable in different jurisdictions. This discussion will by no means serve as an exhaustive analysis of affirmative action under the United Nations human rights instruments, or affirmative action in the United States of America and Canada. The discussion aims merely to illustrate the different approaches to the concept, and to highlight possible links to the South African approach or guidelines from which the South African jurisprudence could draw. It is also specifically relevant due the influence which these approaches have exerted on the very framework of equality in South Africa.

The United States played a definitive role in the negotiations before the adoption of the Universal Declaration of Human Rights in the aftermath of World War II.[545] The fight against racial segregation in the US and early equality case law, specifically *Brown v Board of Education*,[546] was both influenced by and in turn influenced the development of human rights worldwide, with particular regard to the relevant formulations in later United Nations human rights conventions.[547] These international human rights instruments, for example, the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, created a framework for the provision adopted in the South African Constitution.[548]

Affirmative action is currently one of the most debated human rights issues.[549] No court has been able to finally and clearly provide a resolution to the question on the appropriate relationship between affirmative action and equality.[550] Any discussion of affirmative action should begin with a broad overview of United Nations documents on human rights. In the South African context this is particularly purposeful[551] because of

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545 Goldstone & Ray 2004:108.

546 *Brown v Board of Education* 347 U.S. 483, 74 S.Ct. 686 (1954).

547 For a discussion on the influence of *Brown v Board of Education* on international developments, see Goldstone & Ray 2004:105-120. See further, Barrie 1996 *et seq*:1B-10 – 1B-10(1).

548 See for example, Barrie 1996 *et seq*:1B-13, 1B-77.

549 Ginsburg & Merritt 1999:253-254.

550 Pretorius 2001:405.

551 See also Ackermann 2000:539; Stephens & Scheb 2003:731 (on the particular controversy surrounding affirmative action in the United States).

the Constitution's provision that international law has to be considered when interpreting the Bill of Rights,[552] a consideration supported by the various references to these documents in our case law.[553]

One of the founding documents of contemporary human rights discourse is the Universal Declaration of Human Rights (the Declaration).[554] In the Declaration, affirmative action has a twofold rationale, which also presents a link to a possible definition of the concept. Firstly, affirmative action is accommodated in the repeated endorsement of the principle of equality which flows throughout the Declaration. This can be found in the Preamble[555] where "the equal and inalienable rights of all members of the human family"[556] and "the equal rights of men and women"[557] are recognised. Article 1 states that "all human beings are born free and equal in dignity and rights".[558] Article 2[559] confirms everyone's equality and reads "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind". Article 7[560] states the non-discrimination principle and provides equality before the law and equal protection of the law.[561] The aim of the Declaration is to ensure that provisions of

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552 Constitution of the Republic of South Africa: section 39(1). See also Barrie 1996 *et seq*:1B-13, 1B-77.

553 For example, *Brink v Kitshoff NO*: para 34; *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC): para 99; *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: para 51 fn 57; *Hoffmann v South African Airways* 2001 1 SA 1 (CC); 2000 11 BCLR 1211 (CC): para 51 fn 43.

554 Universal Declaration of Human Rights, General Assembly Resolution 217A, UN GAOR, 3rd Session, part 1, UN Doc A/810 (1948) (hereinafter UDHR): The Preamble, at 71. This was the first international human rights instrument. See Barrie 1996 *et seq*:1B-11.

555 UDHR: The Preamble, at 71-72.

556 Ibid, at 71.

557 Ibid, at 72.

558 Ibid, article 1 at 72. For a discussion of the importance of the concept of human dignity in international human rights instruments, see Grant 2007:302-303.

559 UDHR: article 2 at 72.

560 Ibid, article 7 at 73.

561 Article 7 has been replicated in different Constitutions, but with varying formulations. See section 9(1) of the Constitution of the Republic of South Africa: "Everyone is equal before the law and has the right to equal protection and benefit of the law."; The Constitution Act, 1982: Schedule B, Part I: Canadian Charter of Rights and Freedoms, section 15(1): "Every individual is equal before and

equality and other civil rights strive to be more ambitious by providing for effective remedies in cases of violation.[562] The fact that *effective* remedies are provided for means that, against the background of the long history of discrimination and inequality, it can be argued that some form of positive governmental action is mandated.[563]

The second rationale for affirmative action in the Declaration is to be found in the commitment to and provision for socio-economic rights.[564] The specific social and economic provisions of the Declaration propose an obligation for the state to investigate and identify discrepancies in the standard of living of different groups in society and to address marked degrees of inequality and disadvantage.[565]

Two international conventions which directly resulted from the Declaration are mentioned here as further background to the discussion of affirmative action. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination[566] endorsed affirmative action measures as a means of advancing racial equality and for the advancement of previously disadvantaged racial groups.[567] Article 1 states that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or

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under the law and has the right to the equal protection and equal benefit of the law without discrimination … "; Constitution of India 1949, part III, article 14. Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."; Unites States Constitution Amendment 14, section 1, which states in relevant part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws .... "; Basic Law for the Federal Republic of Germany (German Constitution) 1949, article 3(1) provides: "All persons shall be equal before the law."

562 UDHR: article 8 provides that "[e]veryone has the right to an effective remedy … for acts violating the fundamental rights" which rights are provided for in the nation's constitution or other legislation.

563 Ginsburg & Merritt 1999:255.

564 UDHR: article 23(1) and (2), at 75: "1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work." Article 25, at 76, provides for a "standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services …". Article 26, at 76, affirms that "[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages".

565 Ginsburg & Merritt 1999:256, 258.

566 General Assembly Resolution 2106A, UN GAOR, 20th Session, Supp No 14, UN Doc A/6014 (1965): 47 (hereinafter ICRD).

567 See article 1(4) of the ICRD.

ethnic groups … shall not be deemed racial discrimination". Article 2(2) places an obligation on states to take affirmative measures if circumstances so warrant it.[568] This Convention was of particular importance to the drafters of the South African Constitution in their quest to define a clear view of equality.[569]

The Convention on the Elimination of All Forms of Discrimination Against Women[570] followed in 1979. This Convention addresses the stereotypical roles assigned to women and directs states to take "all appropriate measures"[571] to eliminate prejudices based on the idea of inferiority or on the stereotyped roles for men and women[572] and furthermore calls for education to achieve "recognition of the common responsibility of men and women in the upbringing and development of their children".[573] Employment discrimination and the elimination thereof are addressed in article 11 of the Convention. Article 2 of the Convention states a broad condemnation of sex discrimination and directs states to take positive measures to counter that bias.[574] With the emphasis on the temporary nature of the measures, article 4 expressly shields affirmative action programmes against attacks based on the possible discriminatory nature thereof. It provides that the "[a]doption … of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the … Convention."[575] Andrews[576] points out that the affirmative action provision in section 9(2) of the South African Constitution was modelled on these two Conventions.

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568 See Barrie 1996 *et seq*:1B-28.

569 Andrews 2005:1163.

570 General Assembly Resolution 34/180, UN GAOR, 34th Session, Supp No 46, UN Doc A/34/46 (1979): 193 (hereinafter CEDAW).

571 CEDAW: article 5.

572 Ibid, article 5(a).

573 Ibid, article 5(b).

574 Also see CEDAW: article 3.

575 Ibid, article 4(1) and (2). Ginsburg & Merritt placed particular emphasis on the temporary nature of these measures. See Ginsburg & Merritt 1999:260 fn 31. Also see opinion of Ginsburg J in *Grutter v Bollinger* 539 U.S. 306, *344, 123 S.Ct. 2325, **2347 (2003).

576 Andrews 2005:1159-1160.

As in the case of CEDAW, the ICRD also stresses the temporary nature of affirmative action measures. The racial distinctions of affirmative measures are permitted "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."[577] An investigative duty can be read into the provision of article 2(2) as it instructs states to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[578]

The object of affirmative action is to redress discrimination, historic deprivations of equality, as well as the lingering effects thereof. Examples of these are the legacy of slavery in the US, the caste system in India and apartheid in South Africa.[579] Affirmative action should not only be seen as a means to redress past inequalities, but was also conceived as a method by means of which economic and social well-being of disadvantaged groups could be advanced. Affirmative action is an active and dynamic force which plays a powerful role in the redistribution of social wealth.[580] Disadvantaged groups include women, racial minorities, persons born into groups or communities disproportionately affected by poverty, unemployment, and ill health. Affirmative action is therefore employed to promote equality in the civil/political rights sense, but also to advance the second-generation social and economic rights.[581]

In light of the above, affirmative action can be defined in ways which reflect its civic or political components, but also in a socio-economic sense. Ginsburg and Merritt[582] define affirmative action as "any program that takes positive steps to enhance

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577 ICRD: article 1(4).

578 The proviso regarding the temporary nature of the measures is repeated in article 2(2): "These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." Also see Ginsburg & Merritt 1999:261.

579 Ginsburg & Merritt 1999:254.

580 Morgan-Foster 2003:73.

581 Ginsburg & Merritt 1999:254.

582 Ibid, at 254-255.

opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life". This dual object of affirmative action is explained by looking at how the Universal Declaration of Human Rights encompasses civil/political rights on the one hand and economic/social rights on the other. Affirmative action is placed between these two categories, "at the intersection". Fredman defines[583] affirmative action as the

> "deliberate use of race- of gender-conscious criteria for the specific purpose of benefiting a group which has previously been disadvantaged or excluded on grounds of race or gender. Its aims range from providing a specific remedy for invidious race or sex discrimination, to the more general purpose of increasing the participation of groups which are visibly under-represented in important public spheres such as education, politics, or employment. In its strongest form …, it requires that individual members of the disadvantaged group be actively preferred over others (who may be equally or even better qualified), in the allocation of jobs, promotion, training, university places, and other similar benefits."

(b) Comparative overview

The purpose of this section will be to give a brief overview of the equality and affirmative action jurisprudence in Canada and the United States. As was discussed above, equality is not a one-dimensional concept and different countries ascribe different contents to the concept of equality. This analysis will briefly consider equality jurisprudence, but will mainly focus on the accommodation of remedial programmes within the specific concept of equality. In other words, the way in which affirmative action fits into the constitutional framework of equality by either being an exception to or an extension of the right to equality. In all of the studied legal systems, provision is made for affirmative action irrespective of the specific concept of equality subscribed to. The value of a comparative study on affirmative action lies therein that not only does it find application in various jurisdictions, but it is almost always politically charged and

583 Fredman 2002:126.

jurisprudentially complicated.[584] Affirmative action generally refers to all the measures or policies undertaken which allows for the preferential treatment or for programmes which aim at the advancement of disadvantaged groups.

Although all the individual countries studied employ affirmative measures, they differ widely in respect of the provision thereof, the way in which they are designed, employed, the scope of application, and the tests applied to determine the validity of these measures. The equality provisions in the South African and Canadian[585] Constitutions contain specific affirmative action provisions. The Fourteenth Amendment of the US Constitution[586] does not expressly provide for affirmative action, but these measures can be accommodated under section 5 of the Fourteenth Amendment.

Varying levels of judicial scrutiny of affirmative action measures are allowed in the different states. Affirmative action programmes are held to different standards in the different jurisdictions, possibly with the most stringent scrutiny in the United States.[587] The way in which the courts in each of these countries adjudicate the validity or invalidity of specific remedial programmes will be evaluated and then briefly compared with the treatment of the issues in other jurisdictions. The purpose of this will be to

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584 Morgan-Foster 2003:73.

585 The Constitution Act, 1982: Schedule B, Part I: Canadian Charter of Rights and Freedoms.

Section 15 – Equality Rights.

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

586 Unites States Constitution Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

…

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

587 Morgan-Foster 2003:75.

attempt to formulate tests or frameworks of analysis. This will be implemented to judge the value of the test formulated by the South African Constitutional Court in *Minister of Finance and Another v Van Heerden*, as well as make predictions about the way in which affirmative action would probably be interpreted in future.

These jurisdictions were chosen on the basis of the positive and negative aspects evident in the equality jurisprudence of each country. Identifying both these positive and negative features will assist in making recommendations as to how this test could be refined and developed.

(b.1) Affirmative action in the United States

In the United States the term "affirmative action" was historically used in the late 19th and early 20th centuries to describe the remedial orders issued by the court against defendants.[588] The first official reference to affirmative action as it is understood today appeared when President JF Kennedy signed Executive Order 10925,[589] which required government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin", on March 6, 1961.[590]

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588 See Ginsburg & Merritt (1999:261 fn 37) where the authors notes the following examples: *Taylor v Taintor* 83 U.S. (16 Wall.) 366, 375 (1872); *City of Galena v Amy* 72 U.S. (5 Wall.) 705, 708 (1866); *Phelps Dodge Corp v NLRB* 313 U.S. 177, 188 (1941).

589 Executive Order 10925 *Establishing the President's Committee on Equal Employment Opportunity*. March 6, 1961. Exec. Order No. 10,925, 1961 WL 8178 (Pres.Exec.Order), 26 FR 1977: section 301.

590 Starks 2004:368-369. See also Ginsburg & Merritt 1999:262 fn 38: "Kennedy's order built upon a non-discrimination order issued by President Franklin Roosevelt during World War II. See Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943). Roosevelt's order prohibited "discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin" and directed agencies involved with defense production vocational and training programs to "take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin." … Broad language in the order's preamble, proclaiming "the duty of employers and labor organizations … to provide for the full and equitable participation of all workers in defense industries," hinted at efforts in the direction of affirmative action but embraced neither those words not the full concept." See also Stephens & Scheb 2003:731; Schuwerk 1972:726.

The US Supreme Court's decision in *Brown v Board of Education of Topeka, Kansas II*[591] left the question as to specific measures to implement school desegregation unanswered[592] (the specifics of guaranteeing that school authorities comply with *Brown I* and constitutional principles were left to lower courts). What can possibly be identified as one of the first affirmative action or remedial measures ever implemented was the dismantling of the dual education system following *Brown II*. In *Green v County School Board of New Kent County, Virginia*[593] the US Supreme Court stated the positive obligation in strong terms:

> "[*Brown II*] clearly charged [school boards] with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. … The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts."[594]

One such measure was the transportation of students to schools not necessarily close to their homes in order to effect the desegregation of schools. The US Supreme Court held in *Swann v Charlotte-Mecklenburg Board of Education*[595] that transportation of students, as well as other measures including clustering of schools, abolition of one-race schools, and the redrawing of school attendance lines, were acceptable remedial tools[596] to achieve this objective.[597]

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591 *Brown v Board of Education of Topeka, Kansas II* 349 U.S. 294, 75 S.Ct. 753 (1955). See also the decision in *Green v County School Board of New Kent County, Virginia* 391 U.S. 430, 88 S.Ct. 1689 (1968).

592 See discussion in Banks 2004:42.

593 391 U.S. 430, 88 S.Ct. 1689 (1968).

594 At 391 U.S. 430, *437-*438, 88 S.Ct. 1689, **1694 (1968) (own emphasis).

595 *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 91 S.Ct. 1267 (1971).

596 Also called racial balance measures. See Bell 1980:531.

597 At 402 U.S. 1, *30, 91 S.Ct. 1267, **1283 (1971). For further discussion of this case and the actual span of the remedies upheld, see Klarman 1991:299-301. For criticism of its limited impact and the subsequent reversal of opinion by the US Supreme Court in *Milliken v Bradley* 418 U.S. 717, 94 S.Ct. 3112 (1974) and *Dayton Board of Education v Brinkman* 433 U.S. 406, 97 S.Ct. 2766 (1977), see Bell 1980:526-527.

The first real progress in response to affirmative measures mandated in Executive Orders 11246[598] and 11375[599] came during the term of President Nixon (1969-1974). In 1969 the Nixon government[600] implemented the Revised Philadelphia Plan.[601] In terms of the Plan, government contractors in Philadelphia were required to set definite goals and timetables for hiring minority workers in the construction industry. Failure to comply could result in the loss of government contracts. Albeit controversial, the Plan survived both public criticism and legal challenges in the 1970's.[602] The Plan's success has been ascribed to the fact that it set goals instead of rigid quotas and required employers to make good faith efforts to reach these goals, with the emphasis on the process of attaining rather than attainment itself.[603] Although the plans were monitored by government it did leave individual contractors with considerable discretion. Another reason for the Plan's survival is that instead of merely providing remedial justice, it also succeeded in its attempt to create economic equity. Ginsburg and Merritt[604] argue that the Philadelphia Plan was actually a response to the crisis relating to the economic well-being of minority Americans. Instead of creating a more expansive welfare programme, the Nixon government opted to expand job opportunities for minority Americans, which would then lead to an increased standard of living.

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598 Executive Order 11246 *Equal Employment Opportunity*. September 24, 1965. Exec. Order No. 11,246, 1965 WL 7913 (Pres.Exec.Order), 30 FR 12319, 30 FR 12935.

599 Executive Order 11375 *Amending Executive Order No 11246, Relating to Equal Employment Opportunity*. October 13, 1967. Exec. Order No. 11,375, 1967 WL 7772 (Pres.Exec.Order), 32 FR 14303. Ginsburg & Merritt 1999:263 fn 41: Johnson had previously issued an order, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), superseding Kennedy's original order. Exec Order No. 11246 did however incorporate substantive parts of the Kennedy order. Together with Exec Order No. 11375, which added sex to the list of protected classes, Exec Order No. 11246 has remained the basis of federal affirmative action programmes.

600 President Nixon, together with Secretary of Labour, George Shultz, Assistant Secretary Arthur Fletcher, and then Labour Solicitor Laurence Silberman, was responsible for the issuing of the Plan.

601 The Revised Philadelphia Plan was based on the earlier plan devised by the Office of Federal Contract Compliance and the Philadelphia Federal Executive Board in 1967.

602 See Schuwerk 1972:743-750.

603 Ginsburg & Merritt 1999:263; Schuwerk 1972:741.

604 1999:264.

Illustrative of the need that exists for remedial policies, Ginsburg and Merritt use statistical data reported in the 1995 UN Development programme.[605] Some of the examples of inequality in the US used by the authors are the following: if white Americans and black Americans are taken as separate countries, white Americans lead the world in terms of well-being,[606] whereas black Americans are ranked 27th in the world. Hispanic Americans only come in at the 32nd place. The conclusions drawn in the UN report is that "full equality [is] still a distant prospect in the United States, despite affirmative action policies and market opportunities".[607] Similar comparisons made on a worldwide scale between men and women reveal the same discrepancies in equality.[608] The authors conclude from the inequalities revealed by the report that if the provisions of the Universal Declaration of Human Rights[609] are taken seriously, affirmative governmental action is demanded. These discrepancies could not possibly have existed if some forms of discrimination had not, and do not still exist in these societies. The US Supreme Court has steadfastly held that affirmative action as a general remedial tool to combat societal discrimination is impermissible.[610]

In *Adarand Constructors, Inc v Frederico Pena, Secretary of Transportation, et al*,[611] Ginsburg J in her dissenting statement highlighted the effects of past discrimination still present in the US:

> "The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. … Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with

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605 See Ginsburg & Merritt 1999:257 fn 13 for reference to the United Nations Development Programme, Human Development Report 1995, at 22 (1995).

606 Well-being is a term used to describe the combination of life expectancy, educational achievement, and income.

607 UN Development Programme, Human Development Report, 1995:22.

608 For examples of this see Ginsburg & Merritt 1999:257.

609 Specifically article 25 and article 23 of the UDHR.

610 Tushnet 2004a:160.

611 *Adarand Constructors, Inc v Frederico Pena, Secretary of Transportation, et al* 515 U.S. 200, 115 S.Ct. 2097 (1995).

> identical resumés, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[612]

As noted above, the constitutionality of affirmative action programmes or measures in the US depend largely on the judicial interpretation of the Constitution's promise of "equal protection of the laws".[613] Affirmative action as a distributive policy instrument in the US is focused on three main areas, namely employment, government contracts, and higher education.[614]

One of the more difficult problems that arise for affirmative action measures in the US is the appropriate level of scrutiny under which it should be reviewed to determine its constitutionality. At issue is whether affirmative action should be seen as a general policy to advance previously disadvantaged minority groups, or whether it should be reviewed in the same way as reviewing classifications based on race, where blacks form the disadvantaged groups. When race-based classifications were deemed suspect it was in reaction to instances where minority groups were at a disadvantage because of the classification.[615] These classifications have to be *necessary* to promote a *compelling governmental interest* in order to survive judicial scrutiny and a finding of constitutionality. Thus, when affirmative action suits come before court, these involve a challenge to race-based classifications, the difference being that the prejudiced parties are white and not part of previously disadvantaged minority groups.[616] The US Supreme

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612 At 515 U.S. 200, *273-*274, 115 S.Ct. 2097, **2135 (1995) (footnotes omitted).

613 Unites States Constitution Amendment 14, section 1. See for example, Klarman 1991:213-319; Stephens & Scheb 2003:734; Rossum & Tarr 2003:465; Ginsburg & Merritt 1999:265; Tushnet 2004b:654.

614 Stephens & Scheb 2003:731.

615 Fallon 2004:123.

616 Tushnet 2004a:159.

Court has consistently held that affirmative action programmes — as race-based classifications — are constitutionally suspect and thus triggers strict judicial scrutiny. The test for determining the constitutionality of affirmative action programmes in the US is measured under the same scrutiny as any other classification based on race. This means that although these measures are designed to advance groups which were previously the victims of invidious discrimination, these measures are presumed unconstitutional and have to pass the strict scrutiny test. Therefore, it has to be proven that these are the only measure/s capable of advancing a compelling state interest.[617]

Klarman[618] argues that the decision in *Regents of the University of California v Bakke*[619] shows a clear rejection of the political process theory (*Carolene Products*[620]) in favour of the relevance theory of equal protection jurisprudence in terms of which race should not have any relevance in any governmental decision-making processes. Fallon[621] regards this rejection of anything but strict scrutiny for the review of affirmative action programmes as a reflection of judicial judgement about fundamental fairness.

The US Supreme Court has had great difficulty in dealing with affirmative action. When the issue reached the Court for the first time in the 1970's, it took two attempts[622] by the Court before it could proffer an opinion and even then a very slight and splintered one. This occurred in the case of *Regents of the University of California v Bakke*. The case concerned the admission policy of the medical school of the University of California at Davis. In terms of this policy, 16 places out of the total class of 100 were reserved for minority groups, which included students from Black, Latino, Asian, and Native American heritage.[623] The admissions process for these minority students entailed a

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617 Hogg 2007:609.

618 Klarman 1991:311.

619 *Regents of the University of California v Bakke* 438 U.S. 265, 98 S.Ct. 2733 (1978).

620 *United States v Carolene Products Co.* 304 U.S. 144, 58 S.Ct. 778 (1938).

621 Fallon 2004:125.

622 *DeFunis v Odegaard* 416 U.S. 312, 94 S.Ct. 1704 (1974) and *United Jewish Organizations of Williamsburgh, Inc. v Carey* 430 U.S. 144, 97 S.Ct. 996 (1977). See also Klarman 1991:309; Ginsburg & Merritt 1999:265; Tushnet 2004a:160 fn 5.

623 At 438 U.S. 265, *275, 98 S.Ct. 2733, **2740 (1978).

separate process from the rest of the students and also a set of less stringent requirements regarding their test scores and grade average points.[624] Bakke's application was rejected twice and he filed suit claiming that the admissions programme excluded him on the basis of race which was in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, and Section 601 of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in any federally funded programme.[625]

The Court was severely split in its decision with nine Justices rendering six opinions. Justice Lewis Powell[626] was the single decisive vote and wrote the Court's opinion. Holding that affirmative action was permissible under the Equal Protection Clause only if the measure was necessary to promote a compelling governmental interest or objective, the question arises as to what objective could possibly be compelling enough so as to justify a classification based on race. Justice Powell recognised two objectives that could be compelling enough for affirmative measures to be constitutional. The first is the need for amelioration and possible elimination of specifically identified[627] past discrimination by the institution seeking to implement the affirmative action programme.[628] However, he held that the objective should not be to remedy general societal discrimination.[629] The second possible compelling interest is an institution of higher education's interest in attaining a diverse student body.[630] A diverse student body would serve to enhance the educational experience and serve the quality of academic freedom.[631] That being said, Justice Powell held that affirmative action measures should

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624 Ibid.

625 Ibid, at 438 U.S. 265, *277-*278, 98 S.Ct. 2733, **2742 (1978).

626 This holding by Powell J is in line with his symmetrical view of equality. Judgement delivered by Brennan J (White, Marshall, and Blackmunn JJ concurring) only called for heightened scrutiny. Thus, dispute between symmetrical view (Powell requiring strict scrutiny all around) and asymmetrical view (Brennan J calling for asymmetrical substantive view requiring heightened scrutiny).

627 See also *City of Richmond v J.A. Croson* 488 U.S. 469, 109 S.Ct. 706 (1989). Affirmative action could therefore not be used to remedy societal discrimination.

628 *Regents of the University of California v Bakke*: 438 U.S. 265, *307, 98 S.Ct. 2733, **2757.

629 Ibid. Justice Powell describes these effects of "societal discrimination" as "an amorphous concept of injury that may be ageless in its reach into the past".

630 Ibid, at 438 U.S. 265, *311-*312, 98 S.Ct. 2733, **2759.

631 Fallon 2004:126; Ginsburg & Merritt 1999:265.

be narrowly tailored to achieve their purpose. Powell was very strongly opposed to the use of stringent quotas and held these to be constitutionally impermissible. Race could only be considered as one of several relevant factors with the emphasis on individual consideration. He stated:

> "In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> …
>
> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."[632]

Justice Powell rejected the minority set-aside programme of the Medical School at the University of California at Davis, based on the fact that its programme was too sweeping in the achievement of its purpose and this constituted a denial of the individual rights as guaranteed in the Fourteenth Amendment.[633]

Justice Powell's opinion is therefore the original source of the diversity rationale in the US. This diversity rationale echoes the language of the Universal Declaration of Human Rights. The right to education as enumerated in article 26 of the Universal Declaration of Human Rights provides that "[t]echnical and professional education shall be made available and higher education shall be equally accessible to all on the basis of merit". The term "merit" is further defined in connection with higher education to embrace, among other factors, the pursuit of a diverse student body. The Universal Declaration of Human Rights in article 26(2) calls for education to "promote

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632 *Regents of the University of California v Bakke*: 438 U.S. 265, *317-*318, 98 S.Ct. 2733, **2762 (footnotes omitted).

633 Ibid, at 438 U.S. 265, *319-*320, 98 S.Ct. 2733, **2763.

understanding, tolerance and friendship among all nations, racial or religious groups". In other words, this is viewed as one of the founding principles of the diversity rationale as applied by the US Supreme Court when testing the constitutionality of affirmative action measures in tertiary education.[634]

The next opportunity for the US Supreme Court to deal with affirmative action was the 1980 case of *Fullilove v Klutznick*.[635] This case was widely hailed as a positive development in affirmative action jurisprudence.[636] At issue was the 10 percent set-aside created by the "minority business enterprise" or "MBE" provision of the Public Works Employment Act of 1977. In terms of this congressional legislation, 10 percent of federal grants for public works had to be reserved for minority-owned businesses. Provision was also made for an administrative waiver of the set-aside requirement in cases where it would not be feasible.[637] Action was brought by a group of non-minority business owners claiming that the set-aside provision violated their rights under the equal protection component of the Fifth Amendment.[638] The challengers claimed that it placed an additional financial burden on non-minority owned businesses. The broad remedial powers of Congress were acknowledged[639] and the US Supreme Court upheld the validity of the set-asides of 10 percent of *federal funds* for preferential procurement which aimed at achieving equal economic opportunities for minorities. The US Supreme Court upheld the programme due to the objective set out by government, being to remedy present effects of past discriminatory practices, and the promotion of the country's general welfare.[640]

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634 Ginsburg & Merritt 1999:256 fn 12.

635 *Fullilove v Klutznick* 448 U.S. 448, 100 S.Ct. 2758 (1980).

636 Days 1987:454.

637 *Fullilove v Klutznick*: 448 U.S. 448, *468, 100 S.Ct. 2758, **2769 (1980).

638 Ibid, at 448 U.S. 448, *453-*455, 100 S.Ct. 2758, **2762-**2763 (1980).

639 Ibid, at 448 U.S. 448, *483, 100 S.Ct. 2758, **2777 (1980).

640 See opinion of Chief Justice Burger at 448 U.S. 448, *473-*474, 100 S.Ct. 2758, **2772 (1980): "In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U.S. Const., Art. I, § 8, cl. 1. This Court has recognized that the power to "provide for the . . . general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers. Buckley v. Valeo, 424 U.S. 1, 90-91, 96 S.Ct. 612,

In *City of Richmond v J.A. Croson*[641] the US Supreme Court considered a 30 percent set-aside programme favouring minority business enterprises implemented by the City Council of Richmond, Virginia. The plan was challenged as violating the equal protection clause of the Fourteenth Amendment. The US Supreme Court with a clear majority[642] affirmed that race-based affirmative action programmes had to be reviewed under strict scrutiny.[643] The programme was struck down as a violation of Fourteenth Amendment. O'Connor J, for the Court, required narrow tailoring[644] and proof of actual previous discrimination by the City itself.[645]

The difference in approach between *Fullilove v Klutznick* and *City of Richmond v J.A. Croson* should be seen as reflected in the special deference to, and trust shown in, Congress's ability to pass legislation to correct societal wrongs caused by past discrimination, as opposed to state and local government's discretion in attempting to heal these wrongs. As a further example of this, in *Metro Broadcasting, Inc. v Federal Communications Commission*[646] the US Supreme Court applied what can be called an intermediate level of scrutiny. It was held that strict scrutiny was not applicable because the federal government had a special dispensation to make race-based preferences.[647] The case concerned two federal affirmative action programmes which aimed to increase

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668-669, 46 L.Ed.2d 659 (1976); United States v. Butler, 297 U.S. 1, 65-66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."

641 *City of Richmond v J.A. Croson* 488 U.S. 469, 109 S.Ct. 706 (1989).

642 By a vote of 6 to 3.

643 *City of Richmond v J.A. Croson*: 488 U.S. 469, *494, 109 S.Ct. 706, **722 (1989) Justice O' Connor stated that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification".

644 Ibid, at 488 U.S. 469, *507-*508, 109 S.Ct. 706, **729-**730 (1989).

645 Ibid, at 488 U.S. 469, *500, 109 S.Ct. 706, **725 (1989) and further. See also discussions by Fallon 2004:127; Klarman 1991:312-316; Rossum & Tarr 2003:470; *Adarand Constructors, Inc v Frederico Pena, Secretary of Transportation, et al* 515 U.S. 200, *221-*223,115 S.Ct. 2097, **2110 (1995). Rogers 2004:15 fn 51.

646 *Metro Broadcasting, Inc. v Federal Communications Commission* 497 U.S. 547, 110 S.Ct. 2997 (1990).

647 Ibid, at 497 U.S. 547, *564-*565, 110 S.Ct. 2997, **3008-**3009 (1990).

minority ownership of broadcast licenses. The US Supreme Court held that these programmes were substantially linked to the important governmental interest of increased diversity in broadcast-license ownership.[648] Thus, there was no violation of the Equal Protection Right of the Fifth Amendment.[649]

The US Supreme Court has become increasingly more sceptical of race-based affirmative action programmes and has consistently required proof of a compelling state interest in or need for the programme and a formulation of a plan that does not exceed necessary parameters in order to achieve the goal.[650] Illustrative of this is the case of *Adarand Constructors v Pena*. The claim was brought by Adarand Constructors who questioned the practice of Federal Government of giving contractors who were working for the government financial incentives to employ subcontractors from socially and economically disadvantaged backgrounds. It was claimed that this practice, and especially the use of race-based presumptions in the identification of such individuals, violated the equal protection component of the Fifth Amendment's Due Process Clause.[651] Against the background of *Fullilove v Klutznick*, *Metro Broadcasting, Inc. v Federal Communications Commission*, and *City of Richmond v J.A. Croson* O'Connor J, delivering the Court's judgement, held that *all* race-based classifications "must serve a compelling governmental interest, and must be narrowly tailored to further that interest".[652] Thus the Court reversed its own opinion that federal racial classifications triggered less stringent judicial review than classifications made by a state government.[653] Both state and federal remedial programmes, despite the existence of disadvantage stemming from racial discrimination, have failed constitutional scrutiny.[654] For the most

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648 Ibid, at 497 U.S. 547, *566, 110 S.Ct. 2997, **3009 (1990).

649 Ibid, at 497 U.S. 547, *597, 110 S.Ct. 2997, **3026 (1990).

650 Ginsburg & Merritt 1999:267.

651 For facts of the case, see *Adarand Constructors v Pena*: 515 U.S. 200, *204-*207, 115 S.Ct. 2097, **2101-**2103 (1995).

652 *Adarand Constructors v Pena* 515 U.S. 200, *235, 115 S.Ct. 2097, **2117 (1995). Note that the Court was much divided on the issue — the vote was 5 to 4.

653 As held in *Fullilove v Klutznick*; *Metro Broadcasting, Inc. v Federal Communications Commission*; *City of Richmond v J.A. Croson*.

654 Ginsburg & Merritt 1999:268-269.

part, the only affirmative measures that are still tolerated are programmes that serve the diversity rationale, although these have to be narrowly tailored to advance that objective.

After *Bakke* it was to be 25 years before the Supreme Court had another chance to decide on the diversity rationale. A Fifth Circuit Court of Appeals in Texas, however, denied the importance of the *Bakke* decision and the diversity rationale.[655] The Court held that the opinion of Justice Powell in *Bakke* was only his own isolated opinion, not joined by any of the other members of the Court. The Texas Court rejected criticism that it is overruling the Supreme Court on this issue, arguing that later judgements by the US Supreme Court itself could stand as evidence of the Court's own doubt regarding the correctness of the Powell opinion.[656]

In 2003, two affirmative action cases were brought before the US Supreme Court concerning admission policies at the University of Michigan. In *Gratz v Bollinger*[657] the applicant[658] was rejected by the University of Michigan's College for Literature, Science, and the Arts.[659] Despite being well qualified, she was not admitted to the University as a result of the way in which the points system of the University's Admissions Office was designed. In terms of this points system, candidates could receive a maximum of 150 points of which 110 points were based on the student's high school grades, standardised test scores, high school academic programme, on whether the student resided in the state of Michigan, and whether he/she had a familial alumni connection to the school. Twenty points were automatically awarded to students from under-represented racial or ethnic minority groups under a miscellaneous category.[660] The petitioners alleged that this use of racial preference was a violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964.

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655 *Hopwood v State of Texas* 78 F.3d 932 (5th Cir. 1996) (Tex.). See Rossum & Tarr 2003:472; Tushnet 2004a:161.

656 *Hopwood v State of Texas*: *944-*945.

657 *Gratz v Bollinger* 539 U.S. 244, 123 S.Ct. 2411 (2003).

658 There were two applicants who brought suit, namely Jennifer Gratz and Patrick Hamacher.

659 See discussion in Fallon 2004:106-109; Green 2004:455-461.

660 *Gratz v Bollinger* 539 U.S. 244, *255-*256, 123 S.Ct. 2411, **2419-**2420 (2003).

The case *Grutter v Bollinger*[661] concerned the admissions policy of the University of Michigan's Law School. Barbara Grutter was denied admission to the Law School. The Law School's admission policy was formulated with the object of identifying students with a strong probability of academic success, who would achieve success in the practice of law while also making diverse contributions to one another's well-being, and, broadly speaking, would add to the Law School's object — to seek "a mix of students with varying backgrounds and experiences who will respect and learn from each other".[662] In terms of this policy admissions officials had to consider different criteria. Firstly an applicant's academic performance was reviewed, but along with other criteria important to the Law School's educational objectives. The policy, aspiring to achieve diversity in order to add to the richness of everyone's education,[663] does not prescribe a specific type of diversity contribution. The Law School was however particularly committed to racial and ethnic diversity, especially with regard to students from groups who historically suffered under patterns of discrimination.

In both cases the US Supreme Court held that the appropriate standard for review of the challenged policies was strict scrutiny. Therefore, race-based classifications will pass challenges as to their constitutionality only if the classifications are narrowly tailored to further compelling governmental interests.[664] In *Gratz*, the Court held[665] that the undergraduate admissions policy did not meet the standard, but held in *Grutter*[666] that the Law School's policy did. Both these cases focused on the opinion of Justice Powell

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661 *Grutter v Bollinger* 539 U.S. 306, 123 S.Ct. 2325 (2003).

662 Ibid, at 539 U.S. 306, *314, 123 S.Ct. 2325, **2331 (2003).

663 Ibid, at 539 U.S. 306, *315, 123 S.Ct. 2325, **2332 (2003): "The policy aspires to 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts'."

664 *Grutter v Bollinger* 539 U.S. 306, *326, 123 S.Ct. 2325, **2337-**2338 (2003); *Gratz v Bollinger* 539 U.S. 244, *270, 123 S.Ct. 2411, **2427 (2003).

665 Decision was split 6 to 3. Chief Justice William H Rehnquist wrote the majority opinion, with Justices Kennedy, O'Connor, Scalia, Breyer, and Thomas concurring. Justice Souter filed dissenting opinion in which Justice Ginsburg joined in part. Justice Ginsburg filed dissenting opinion in which Justice Souter joined and Justice Breyer joined in part.

666 Decision was split 5 to 4. Justice Sandra Day O'Connor delivered the opinion of the Court, with Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist dissented and filed an opinion in which Justice Scalia, Justice Kennedy, and Justice Thomas joined.

in *Regents of the University of California v Bakke*, where the so-called diversity rationale was formulated as constituting a compelling governmental interest. In *Gratz*, Chief Justice Rehnquist, writing for the majority, held:

> "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program."[667]

The Court reiterated Justice Powell's emphasis on individualised consideration despite the race or ethnic minority status of the applicant. It was held that the University's undergraduate admissions policy made no provision for such individualised considerations,[668] therefore the automatic allocation of 20 points based on race effectively made race the decisive factor.[669] This was contrary to Justice Powell's finding in *Bakke*.[670]

In *Grutter*, the Court outlined what it deemed to be a narrowly tailored plan to achieve a diverse student body.[671] It held that in order for a race-conscious programme to be narrowly tailored it could not be regulated by a quota system. As held by Justice Powell in *Bakke*, race should only be a plus factor. The programme should never remove all competition from the admissions pool of students purely on the basis of race. An admissions programme should be flexible and non-mechanical in awarding weight to a variety of factors promoting diversity, of which race is but one. The Law School's individualised approach to the evaluation of every applicant complemented this flexible requirement. Although the Law School was committed to enrolling a "critical mass" of students from minority groups, race or ethnicity did not define the admissions programme. Race or ethnicity was not an automatic acceptance or rejection factor, because other factors involved in aiding the creation of a diverse student body were also

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667 *Gratz v Bollinger* 539 U.S. 244, *270, 123 S.Ct. 2411, **2427-**2428 (2003).

668 Ibid, at 539 U.S. 244, *271, 123 S.Ct. 2411, **2428 (2003).

669 Ibid, at 539 U.S. 244, *272, 123 S.Ct. 2411, **2428 (2003).

670 *Regents of the University of California v Bakke* 438 U.S. 265, *317, 98 S.Ct. 2733, **2762 (1978).

671 *Grutter v Bollinger* 539 U.S. 306, *334-*338, 123 S.Ct. 2325, **2342-**2344 (2003).

considered. What largely differentiated the Law School's programme from that of the undergraduate school (*Gratz*) is the fact that individualised consideration of each application ensured that race or ethnicity did not carry a fixed score.[672] Individual consideration or review of an application in the undergraduate admission process was the exception rather than the rule.

Narrow tailoring does however not require the exhaustion of all possible alternatives that would operate on a race-neutral basis. It requires that these alternatives be seriously considered in good faith.[673] The Court held the University's programme to be adequately narrowly tailored since it avoided causing undue harm to members of non-minority groups by guaranteeing individual consideration to every applicant. In the absence of the above considerations, the programme could have been deemed unconstitutional.[674]

The Court then added an important qualification to race-conscious programmes, specifically aimed at higher education, by noting that these policies would have a limited lifespan, as borne out in the statement made by Justice Sandra Day O'Connor: "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today".[675] This point was also made by Ginsburg J,[676] in a separate opinion, although she was cautious to avoid limiting the period to 25 years.

There has been criticism of the Court's deference to the University's judgement and the presumption of good faith. This is seen as incongruous when the governing standard is strict or close scrutiny.[677] Critics have attempted to offer alternative justifications for the continued use of race-based affirmative action measures. This has only become more

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672 See the analogy drawn with the "creamy layer" concept applied by the Indian Supreme Court in cases of affirmative action by Tushnet 2004b:656-657.

673 *Grutter v Bollinger* 539 U.S. 306, *339, 123 S.Ct. 2325, **2344-**2345 (2003).

674 Ibid, at 539 U.S. 306, *341, 123 S.Ct. 2325, **2345 (2003).

675 Ibid, at 539 U.S. 306, *343, 123 S.Ct. 2325, **2347 (2003). Banks (2004:33-34) argues that it is exactly this type reasoning that reiterates the urgent need for new legal theories to explain the necessity that still exist in the US education system for affirmative measures.

676 Ibid, at 539 U.S. 306, *344, 123 S.Ct. 2325, **2347 (2003).

677 Tushnet 2004a:163.

relevant in light of the statement of O'Connor J in *Grutter* regarding the time limits placed on tolerating diversity rationale for race-based measures in higher education. Critical of *Brown*'s promise, Bell has argued that although it may be viable in law, it has very little practical value for bringing about real equality in education.[678] Highlighting the ineffectiveness of racial balancing and anti-defiance measures in bringing about a discrimination-free environment, Bell suggests that racial integration in schools and a focus on educationally oriented remedies[679] are the only way to solve educational inequality.[680] Anderson[681] places the emphasis on racial integration as a forward-looking solution to racial discrimination. Instead of remedial measures as a solution for the consequences historically grounded race discrimination, integrative measures should be viewed as preventative of a similar discriminatory effect in the future.[682]

Despite the US Supreme Court's consideration of possible undue harm caused by race-conscious measures to members of non-minority groups,[683] the Court seems to take a very one-dimensional approach to fairness. Questions could be posed concerning the role of proportionality in the evaluation of race-based affirmative action measures. It is true that Courts in the US attempt to place the issue on a sliding scale of more or less intrusive by making use of strict and intermediate scrutiny and rational review. By examining the connection between the means and ends, and the closeness of this relation, rationality and reasonableness are reviewed. Yet the emphasis does not fall on the fairness of the measures or the particular intended object it seeks to achieve. An object is rather devised as being an interest in diversity, as is the case in higher education admission policy, or economic empowerment in the case of government procurement in order to lessen the strain on social security benefits.

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678 Bell 1980:519.

679 See opinion of Thomas J in *Grutter v Bollinger* 539 U.S. 306, *371, 123 S.Ct. 2325, **2361 (2003). Justice Thomas has been traditionally opposed to affirmative action programmes and spoke out strongly against the standard of education received by members of minority groups in schools.

680 Bell 1980:532-533. This is being tied to compensatory and distributional rationales for affirmative action, which are not constitutional justifications for affirmative action programmes in the US. See also Tushnet 2004b:662.

681 Anderson 2002:1195-1271.

682 Ibid, at 1197.

683 *Grutter v Bollinger* 539 U.S. 306, *341, 123 S.Ct. 2325, **2345 (2003).

In the opinion of Justice Antonin Scalia in *Grutter*,[684] the diversity rationale and the "critical mass" noted in the University of Michigan's educational objectives could not purely be considered of importance to educational institutions. He argued that private employers and civil service could also argue that there is a benefit in assembling a critical mass in their workforce, thereby justifying affirmative action programmes, which Scalia J refers to as racial discrimination.[685] In light of the impact of the *Bakke* decision on affirmative action programmes in private employment, it should be expected that the *Grutter* decision will have the same influential role to play in affirmative action programmes outside higher education.[686] Tilles[687] argued that the *Grutter* case expanded the diversity rationale through the interests deemed to be promoted by diversity in higher education. In *Bakke* the diversity focused on the improvement of the quality of education provided and this was also adopted in *Grutter* as one group of goals that diversity should achieve. However, in *Grutter*, a second group of interests are identified which is focused on the broader contribution made to society by the provision of a more diverse education. It is in this second societal diversity objective that the importance of *Grutter* with regard to public employment is identified.[688]

Considering affirmative measures employed voluntarily by private enterprises, courts have shown tolerance to these, but have nonetheless subjected them to strict scrutiny to ensure that they align with discrimination prohibitions.[689] For example, in *United Steel Workers of America v Weber*[690] the US Supreme Court upheld voluntary race-based programmes, and in *Johnson v Transportation Agency, Santa Clara County, California*[691] gender-based programmes instituted by this public agency were upheld,

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684 Ibid, at 539 U.S. 306, *347-*348, 123 S.Ct. 2325, **2349 (2003).

685 See also Tushnet 2004a:170.

686 Tilles 2004:456.

687 Ibid, at 458-460.

688 This influence on employment in the public sector was recognised in *Petit v City of Chicago* 352 F.3d 1111, C.A. 7 (Ill.), 2003 (7th Cir. Dec. 15, 2003). See Tilles 2004:460.

689 Ginsburg & Merritt 1999:269 fn 77.

690 443 U.S. 193, *208, 99 S.Ct. 2721, **2729 (1979).

691 480 U.S. 616, *640-*642, 107 S.Ct. 1442, **1456-**1457 (1987).

although these cases were litigated under Title VII of the Civil Rights Act, 1964.[692] Title VII of the Civil Rights Act, 1964 does not apply different levels of scrutiny to different types of classifications. It contains a prohibition against discrimination based on race, colour, religion, sex, or national origin.[693]

Gender-based affirmative measures have generally been less strictly scrutinised.[694] Cases in this regard were, for example, *Kahn v Shevin*,[695] *Weinberger v Wiesenfeld*,[696] *Califano v Goldfarb*,[697] and *Califano v Webster*.[698]

(b.2) Affirmative action in Canada

Canada has a fairly long history of affirmative action which originated in the early 1970's with the need to ensure adequate representation for French Canadians in public service.[699]

The Canadian Human Rights Act, which specifically provided for affirmative action measures, was enacted on 1st of March 1978.

Section 16(1) provides:

> "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be

692 Ginsburg & Merritt 1999:269 fn 77.

693 Tilles 2004:453.

694 Ginsburg & Merritt 1999:270-271.

695 416 U.S. 351 (1974).

696 420 U.S. 636, 637-39 (1975).

697 430 U.S. 199, 216-17 (1977).

698 430 U.S. 313 (1977).

699 Ruf 2004:145. A Royal Commission concluded that government did not provide adequate service to French Canadians and steps were implemented to ensure adequate representation in all government levels. In 1971 special French-language units were established within the civil service. These units were aimed at promoting the representation of French Canadians at higher levels of the civil service. The ideals of affirmative action became more central in the Public Service Commission and in 1978 a report provided that merit would only consist of one of five criteria for recruitment and promotion in the civil service.

> suffered by, or to eliminate or reduce disadvantages that are likely to be suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."

The Canadian Human Rights Commission is established by section 21 of the Act. The Act further sets out the duties and responsibilities of the Commission.

Sections 7 and 10 prohibited any individual acts of discrimination in employment or discriminatory employment policies or practices.[700] Ten grounds of discrimination are provided for.

Reviewing the development of equality jurisprudence over the 20 plus years since inception of section 15 of the Canadian Charter of Human Rights and Freedoms, Porter highlights the fact that all significant victories in equality case law placed special emphasis on the positive and social-rights aspects of the concept of substantive equality.[701] Despite having been presented with numerous opportunities,[702] the Supreme Court of Canada is criticised for its failure to adopt a positive obligation approach to the equality provision.[703] This means that the Court's conception of social rights equality is still grounded in an anti-discriminatory, under-inclusiveness basis.

When the Supreme Court of Canada formulated the definition of discrimination in *Law v Canada (Minister of Employment and Immigration)*, four contextual factors were advanced to determine whether substantive discrimination had occurred, in other words, whether the claimant's dignity had been impaired.[704] One of these factors[705] is the

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700 Ruf 2004:146.

701 Porter 2005:174.

702 *Auton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 3 S.C.R. 657; *Vriend v Alberta* [1998] 1 S.C.R. 493; 1998 CarswellAlta 210; *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CarswellBC 1939.

703 Porter 2005:185; Fudge 2007:236.

704 *Law v Canada (Minister of Employment & Immigration)*: paras 62-75.

705 The other factors listed by the Court in *Law v Canada (Minister of Employment & Immigration)* were pre-existing disadvantage (paras 63-68), the relationship between the ground upon which the claim is based and the nature of the differential treatment (paras 69-71), and the nature of the interest affected (paras 74-75). These do not however represent a closed list of factors for consideration (see para 62).

ameliorative purpose or effects of the disputed legislation.[706] Iacobucci J, delivering the judgement of the Court, quoted[707] with approval from *Eaton v Brant (County) Board of Education*[708] where the object of section 15(1) of the Charter was set out by the Supreme Court as being "…. not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society …".[709] The Supreme Court then concluded in *Law*[710] that affirmative measures which complied with section 15(1) would not likely be viewed as discrimination, because the dignity of a reasonable claimant, disadvantaged by affirmative measures, would not, in all likelihood, have been impaired. The Court stated the position as follows:

> "An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination."[711]

This is in line with the substantive approach to equality that was adopted in the Canadian jurisprudence.[712] It would therefore seem that affirmative measures which put previously advantaged individuals or groups at a relative disadvantage would not be deemed discriminatory. However, the Court qualified this by stating that it is possible for a situation to exist where remedial measures could possibly discriminate against persons

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706 *Law v Canada (Minister of Employment & Immigration)*: paras 72-73.

707 Ibid, para 72.

708 *Eaton v Brant (County) Board of Education* [1997] 1 S.C.R. 241, 1996 CarswellOnt 5035.

709 Ibid, para 66.

710 *Law v Canada (Minister of Employment & Immigration)*: para 72.

711 Ibid, para 72 (footnotes omitted).

712 *Andrews v Law Society of British Columbia*; *R v Swain* [1991] 1 S.C.R. 933; 1991 CarswellOnt 93: paras 78-80; *Eaton v Brant (County) Board of Education*: paras 66-67; *Law v Canada (Minister of Employment & Immigration)*.

excluded from their benefit, which would require the Court to consider justification under section 1 or the application of section 15(2). Iacobucci J stated it as follows:

> "At the same time, I would not wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others, requiring the court to consider justification under s. 1, or the operation of s. 15(2). The possibility of new forms of discrimination denying essential human worth cannot be foreclosed. This said, the ameliorative aim and effect of the law is a factor to be considered in determining whether discrimination is present. Conversely, where the impugned legislation does not have a purpose or effect which is ameliorative in s. 15(1) terms, this factor may be of some assistance, depending upon the circumstances, in establishing a s. 15(1) infringement."[713]

Section 15(2) provides:

> "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The question that arises is whether section 15(2) is an exception to or an extension of section 15(1).[714] It has been argued that the specific inclusion of section 15(2) was a reaction to the difficulties experienced by the courts in the US when dealing with affirmative action programmes.[715] The Supreme Court of Canada first had occasion to address the issue of the interrelationship between section 15(1) and 15(2) in *Lovelace v Ontario*.[716] Before this, section 15(2) had been an interpretative aid in the development of the Court's equality jurisprudence.[717] As in the case of section 9(2) of the South African Constitution, section 15(2) firstly serves as an underlining of equality as a

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713 *Law v Canada (Minister of Employment & Immigration)*: para 73.

714 Hogg 2007:654.

715 Hendry 2002:174; Peirce 1993:265; Hogg 2007:655 fn 255; Grabham 2002:643. *Lovelace v Ontario*: para 105.

716 *Lovelace v Ontario*: paras 93-108.

717 See *Andrews v Law Society of British Columbia*: para 16. Discussion in *Lovelace v Ontario*: paras 94-95.

substantive concept, as opposed to formal equality,[718] thus confirming that affirmative action measures would be an extension of, rather than an exception to, the right to equality.[719] In Canadian equality jurisprudence, there is strong emphasis on the twofold purpose of section 15(1) of the Charter. This subsection not only serves to prevent discrimination, but also to ameliorate conditions for the disadvantaged in society. In *Law* Iacobucci J, writing for the Court, stated it as follows:

> "It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. … Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society."[720]

This sentiment also appears in *Eaton v Brant (County) Board of Education*,[721] where Sopinka J stated that the "purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society".[722] The ameliorative purpose of section 15(1) is also established by the discrimination analysis adopted by the Supreme Court in *Law* and followed ever since: the ameliorative purpose or effect of the impugned law is considered as part of the contextual analysis in order to establish substantive discrimination (impairment of dignity).[723]

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718 *Lovelace v Ontario*: para 93.

719 L'Heureux-Dubé 2002:369.

720 *Law v Canada (Minister of Employment & Immigration)*: para 51.

721 *Eaton v Brant (County) Board of Education*: para 66.

722 See also *Lovelace v Ontario*: para 93.

723 See *Vriend v Alberta* [1998] 1 S.C.R. 493; 1998 CarswellAlta 210; *Granovsky v Canada (Minister of Employment & Immigration)* [2000] 1 S.C.R. 703; 2000 CarswellNat 760.

It would seem that *Lovelace v Ontario* confirms that the section 15(1) substantive discrimination analysis applies to both cases where discrimination is alleged, but also to cases brought by excluded groups concerning ameliorative legislation or affirmative action programmes. Iacobucci J, for the Court, stated that the case under review "… represents an opportunity for this Court to confirm that the s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs".[724]

This naturally culminates in the Court's finding that section 15(2) aids in the interpretation of section 15(1) and serves as confirmation thereof.[725] These two subsections and their interpretative interdependence add to the coherent nature of the Canadian Charter of Rights and Freedoms as a working document.[726] Section 15(2) does not have an independent function and does not establish a separate right. This would limit the concept of substantive equality and the purpose of section 15(1).[727] The Court concluded as to the manner in which questions regarding equality rights or affirmative action programmes should be addressed:

> "In summary, at this stage of the jurisprudence I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, as already stated, we may well wish to reconsider this matter at a future time in the context of another case."[728]

The Court did, however, leave the question open for future deliberation and this meant that all programmes or legislation viewed as possibly affecting an individual or group's fundamental right to equality are subjected to a contextual and purposive analysis. This contrasts with the approach taken by the South African Constitutional Court in *Minister of Finance and Another v Van Heerden*. It can be argued that the

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724 *Lovelace v Ontario*: para 61.

725 Ibid, para 105.

726 Ibid, para 106.

727 Ibid, paras 106, 107.

728 Ibid, para 108.

Court's decision in *Van Heerden* took little or no time to make a purposive analysis, which would have placed stronger emphasis on an element of fairness.

The *Lovelace* decision has however also been criticised. Grabham[729] labels the Supreme Court's decision as regressing into formal equality and likened the arguments offered by the Court to those levelled in *Bliss v Attorney General of Canada*. This is attributed to the Court's overemphasis of the legislative purpose instead of the effect thereof. This criticism was addressed at the next opportunity the Court had to rule on ameliorative programmes.

In 2008 the Supreme Court of Canada had another occasion to assess this situation. This concerned the case of *R v Kapp*. The Court seems to have shifted the emphasis somewhat. Whereas the purpose of section 15(1) was both preventative and ameliorative, and section 15(1) served as a test for both discrimination and ameliorative affirmative measures, the Court rephrased this finding slightly in *R v Kapp*. McLachlin CJ and Abella J, writing for the Court, stated the following:

> "The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures."[730]

This is again emphasised later on in the judgement, noting that the two subsections work together towards the goal of substantive equality.[731] The Court formulated a test to determine whether affirmative or ameliorative programmes fulfil the internal requirements of section 15(2).[732] This test focuses on three key terms contained in section 15(2), namely the object of the programme, the amelioration of conditions, aimed at disadvantaged groups or individuals. The judgement is careful to leave the door open

729 Grabham 2002:659-660.

730 *R v Kapp*: para 25 (emphasis in the original).

731 Ibid, para 37.

732 Ibid, para 42.

for further development and refinement of this test, stating that it should be seen as providing "a basic starting point" with room for further refinement.[733]

When considering the *object* of a law or programme, it is stated that the purpose of the law or programme, rather than its effect, will be conclusive for the test, although this does not mean that government can shield an unnecessarily discriminatory programme from review by merely framing it as an ameliorative programme.[734] The Court stated the following:

> "Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach …"[735]

In order to determine whether the programme was intent on improving conditions of disadvantaged groups or individuals, the Court provides that there should be a rational connection between the type of programme and the ameliorative goal it seeks to achieve. This was stated as follows:

> "Analysing the means employed by the government can easily turn into assessing the *effect* of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives."[736]

In applying this criterion to the case at hand the Court found it unnecessary to view this programme as the most effective means in order for it to be protected under section

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733 Ibid, para 41.

734 Ibid, para 46.

735 Ibid, para 48.

736 Ibid, para 49.

15(2). The test merely requires that there be a correlation between the programme or law under review and the disadvantage experienced by the group targeted by it.[737]

A second issue surrounding the object of an ameliorative or affirmative programme or law is whether amelioration should be its sole object or whether it could be one of a number of objects. The Court found no justification for requiring that a law or programme should serve a solely remedial goal.[738]

The Court then turned to the second aspect of its section 15(2) analysis, namely the requirement that the programme should *ameliorate* conditions for the disadvantaged. Several difficulties that could be encountered with the meaning of "amelioration" are highlighted and the Court offers some points of consideration. Firstly, "amelioration", by necessity, will exclude any law or programme which is "designed to restrict or punish behaviour".[739] Secondly, although the focus of the inquiry should not be the effect of the programme, a complete absence of an ameliorative prospect could put the programme in a suspicious light.[740]

The last part of the section 15(2) analysis concerns the term "disadvantaged". The Court refers to the interpretation adopted in earlier cases and concludes the following:

> "'Disadvantage' under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination."[741]

The Supreme Court of Canada's conclusion in the case of *R v Kapp* is substantively similar to the decision of the South African Constitutional Court in *Minister of Finance and Another v Van Heerden*. In both cases, the basic approach is that affirmative action programmes are exempted from the substantive discrimination enquiry. Whereas the

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737 Ibid, para 60.

738 Ibid, para 51.

739 Ibid, para 54.

740 Ibid.

741 Ibid, para 55.

Canadian Court initially argued that ameliorative measures should be adjudged within the broader framework of a discrimination analysis,[742] in other words within the context of section 15(1), it reversed course in *R v Kapp* and now considers an ameliorative measure which passes the section 15(2) test as *ipso facto* compliant with section 15(1).[743] This approach, as is the case with the approach in *Van Heerden*, is devoid of any considerations of fairness or proportionality. It also fails to add to a coherent reading of the Constitution as a whole and of section 15 (Canadian Constitution) or section 9 (South African Constitution) respectively. It cannot therefore provide any satisfactory answers to complicated questions raised by affirmative action programmes in general.

In conclusion it could be said that the United States' approach to affirmative action illustrate the devastating effects of a formal approach to equality and affirmative action programmes. It also highlights the dangers of an overly deferential stance to legislative authority. The diversity rationale which is propounded by the US Supreme Court does however hold merit. There is value in embracing diversity, not only in institutions of learning, but in all facets of society, including business enterprises.

4.2.9 Section 217: Public procurement

During the apartheid-era, government procurement benefited mainly white-owned businesses which served to marginalise the business interests of black entrepreneurs and further entrenched the economically skewed dispensation which divided the country's population along racial lines. Public procurement spending by the government has the potential to play an important role in advancing the economic empowerment of historically disadvantaged and marginalised groups and advance the objective of creating an egalitarian society.[744] The Green Paper on Public Sector Procurement Reform in

742 The approach followed in *Lovelace v Ontario*.

743 Pretorius 2009:400.

744 Manchidi & Harmond 2002:13; Letchmiah 1999:15.

South Africa (Green Paper)[745] intended procurement reform to address economic growth, deracialise business ownership and provide valuable economic prospects for previously marginalised groups.[746] Rogerson[747] aptly describes public sector procurement as follows: "Public procurement was thus early identified as a tool to meet the goals of building as well as democratising the economy, meeting basic needs, developing the country's human resources, and helping to eradicate the legacies of apartheid." Government procurement has widespread economic significance and can be applied as a policy tool to serve the advancement of the broader constitutional objectives and principles.

The inclusion of a specific provision that deals with this issue in the Constitution[748] underscores the significance of public procurement. The constitutionality enjoyed by public procurement in South Africa is unique, but the use of government procurement as a policy instrument to advance social, economic and political objectives is by no means new.[749] Other uses include stimulating economic activity, protection of industry against foreign competition, job creation, environmental protection, etc.[750] In the United States especially, public procurement was used as a policy instrument to address racial and

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745 Ministry of Finance and the Ministry of Public Works. Green Paper on Public Sector Procurement Reform in South Africa: An Initiative of the Ministry of Finance and the Ministry of Public Works: April 1997. General Notice No 691 of 1997, Government Gazette No 17928, 14 April 1997 (hereafter Green Paper on Public Sector Procurement Reform).

746 See for example paras 3.2.5; 3.6.1 of the Green Paper on Public Sector Procurement Reform.

747 Rogerson 2004:185.

748 Constitution of the Republic of South Africa: section 217. See also Interim Constitution of the Republic of South Africa: section 187.

749 See Miller 1955:29; Arrowsmith 1995:235; McCrudden 1999:8-9; McCrudden 2007:2; Bolton 2004:621; Noon 2009:612. The use of procurement as a policy instrument has also been termed wealth distribution (Bolton 2006:194).

750 McCrudden 1999:7; Watermeyer (2000:230-231) referring to a study undertaken for the European Community in 1995. See also Arrowsmith, Linarelli & Wallace 2000:10-11.

gender equality,[751] but the Canadian government also used preferential federal procurement to promote business development in Aboriginal communities.[752]

The reasons why governments choose procurement as an instrument of social policy are partly a matter of principle and partly practical. Principally, the government is not merely a private actor when contracting for goods or services, but a public organ which has to serve the community's interests. Communities have valid stakes in contracting with entities that serve their broader interests. Conversely, the community has an interest in avoiding contracting with entities which engage in unacceptable practices (for example, companies which exploit labourers, etc.). Practically, evidence suggests that preferential procurement practices are successful in exercising control over corporate behaviour, especially where other regulatory mechanisms have proved comparatively weak or ineffective.[753]

The rationale behind the government sourcing goods and services from private entities is varied. This can mainly be attributed to the diverse types of goods and services needed by the government and the cost-effectiveness associated with procurement of such a wide variety of goods or services from the private sector instead of attempting to provide these internally. Sourcing from the private sector also supports the notion of a market economy and eventually aids in effective service delivery.

In South Africa, government procurement has also been identified as an important policy instrument to remedy economic injustice resulting from the racially discriminatory policies and practices of the apartheid government,[754] in a broader environment of

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751 Miller (1955:29) writes that "[p]olicies diverse in nature can be furthered through judicious use of a condition attached to a federal contract. It can enforce a prescribed standard, or prohibit certain activities, or favor one segment of society." See further discussion at 1955:49-52.

752 McCrudden 1999:8. See Treasury Board Contracting Policy Notice 1996-2, 27 March 1996: available at http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13706&section=text (accessed on 11 February 2009). (See also Procurement Strategy for Aboriginal Business (PSAB) available at http://www.ainc-inac.gc.ca/ecd/ab/psa/index-eng.asp (accessed 11 February 2009) and Nunavut Land Claims Agreement, article 24 available at http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/nla/nunav-eng.pdf (accessed on 11 February 2009)).

753 McCrudden 1999:9-11. These are by no means the only reasons why governments could choose preferential procurement as a policy tool. For other justifications, see Bolton 2007:253-254.

754 Green Paper on Public Sector Procurement Reform: para 3.2.4. Bolton 2007a:37.

fairness, equity, transparency, competitiveness and cost-effectiveness. Government procurement amounts to approximately 14 percent of the South African GDP[755] and would therefore naturally prove to be a powerful empowerment tool. In light of the fact that certain sectors of the population were unfairly excluded from participating in and benefiting from government procurement contracts in the past, it serves to promote economic justice and substantive equality to use programmes of preferential government procurement. Linking social objectives to government procurement could have positive effects on the economy as a whole,[756] as well as aid in the process of the achievement of social justice.[757] Furthermore, public procurement can assist in realising government developmental objectives.[758]

As part of the broad-based and comprehensive strategy for the achievement of black economic empowerment, an egalitarian society, and social and economic justice, preferential government procurement plays an essential role.[759] The importance of procurement as a policy tool to effect social and economic change is evident from its constitutionalisation. Section 217 of the Constitution brought about a vast change in the approach to procurement by the government. Whereas price had in the past been the determining factor, it is now but one of a number of factors to be considered, although cost-effectiveness remains a prominent consideration.[760] Section 217 now provides that

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755 Letchmiah 1999:15; Mkhize 2004:10.

756 Watermeyer 2000:230.

757 McCrudden 2007:2.

758 Sahle 2002:1.

759 This is clear from the prominent place of procurement in the B-BBEE Act.

760 *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others* 1999 1 SA 324 (CkH); 1997 4 All SA 363 (CkH): 351G–H (386). Pickard JP held as follows: "*The task of the tender board has always been and will always be primarily to ensure that government gets the best service and value for that for which it pays.* If that were not the prime purpose of the tender board and policy considerations were to override those considerations, the very purpose of the tender board is defeated and no tender board needs to exist. It would then be quite simple for government simply, on a basis of policy determination, to enter into contracts for whatever it required without intervention of a tender board. If the tender board loses sight of its prime purpose as stated hereinbefore it becomes a threat to government and serves little purpose." (Court's emphasis). See also *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board* 2001 2 SA 675 (C); 2001 5 BCLR 500 (C): para 13; *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others* 2002 3 All SA 336 (T): para 70. Green Paper on Public Sector Procurement Reform: paras 3.5.4–3.5.5 described the practice of accepting tenders only based on price as inflexible and exclusionary.

government procurement rests on five constitutional principles, which will be discussed below. This means that procurement which does not comply with the principles of cost-effectiveness, equity, transparency, fairness and competitiveness would be deemed unconstitutional.

4.2.9.1 Legislative and regulatory framework of procurement in South Africa

Section 217 of the Constitution provides as follows:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —
>
> (*a*) categories of preference in the allocation of contracts; and
>
> (*b*) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

In terms of this provision, all procurement is subject to the five constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness.[761] However, this does not preclude government from implementing policies of affirmative procurement which would give preference to certain persons or categories of persons in the allocation of contracts or the advancement or protection of previously disadvantaged persons or groups. This section does not place a legal obligation on the government to

[761] These are the general requirements for public procurement. See Penfold & Reyburn 2003 *et seq*:25-4.

make use of affirmative procurement, it merely allows for it. The obligation stems from the framework legislation enacted in terms of section 217(3), namely the PPPFA.[762]

The PPPFA provides the framework for the government's preferential procurement policies and transformation in procurement. In terms of section 5(1), the Minister may issue regulations to elucidate the framework set out in the Act, which was effected in 2001.[763] These regulations are currently in the process of being redrafted[764] to bring them into line with the provisions of the B-BBEE Act and the Codes of Good Practice[765] issued in terms thereof.[766] For example, the draft regulations amended the definition of beneficiaries contained in the current regulations to now reflect the same definition of "black people" as that set out in the B-BBEE Act.[767]

Other provisions which also apply to government procurement include section 33 of the Constitution, which deals with just administrative action and the Promotion of Administrative Justice Act, which was enacted to give effect to section 33. The reason for this is that it has been held that the tender process, albeit the decision to solicit tenders, the adjudication of tenders, or the granting of tenders, amounts to administrative action[768] as provided for in section 33 of the Constitution and the Promotion of

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762 Bolton 2007a:41.

763 National Treasury. 2001. Preferential Procurement Regulations, 2001 pertaining to the Preferential Procurement Policy Framework Act: No 5 of 2000. Government Notice No R725, Regulation Gazette No 7134, Government Gazette No 22549, 10 August 2001.

764 National Treasury. 2004. Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000): Draft Preferential Procurement Regulations, 2004. General Notice No 2174 of 2004. Government Gazette No 26863, 4 October 2004.

765 General Notice 112, Government Gazette No 29617, 9 February 2007.

766 Draft regulations were published for public comment in Government Gazette No 32489, 14 August 2009.

767 PPPFA 5/2000: Draft Preferential Procurement Regulations, 2009: Regulation 1. Published in Government Gazette No 32489, 14 August 2009.

768 Promotion of Administrative Justice Act: section 1. The definition of administrative action, when read with the definition of 'decision', consists of six elements, namely: (a) a decision of an administrative nature; (b) made in terms of an empowering provision; (c) not specifically excluded from the definition; (d) made by an organ of state or another body exercising a power or performing a public function; (e) which adversely affects rights; and (f) has a direct, external legal effect. Klaaren & Penfold 2008 *et seq*:63-60; De Ville 2003:38-58; Hoexter 2002:101-110.

Administrative Justice Act.[769] Consequently, the procurement process has to be lawful, reasonable, and procedurally fair, will be subject to judicial review, and parties will have the right to written reasons for decisions taken.

Aside from sections 217 and 33 of the Constitution, other constitutional provisions should be noted here as applicable to a discussion on preferential procurement. Section 32 provides for access to information held by the state or any person necessary for the exercise or protection of any right. Section 9 provides for a right to equality which is substantive in nature and allows for affirmative measures in order to achieve such substantive equality.

Apart from the PPPFA, different legislation also provides a further framework and effect to the constitutional provisions. These are the Public Finance Management Act,[770] the Municipal Finance Management Act,[771] and the Municipal Systems Act.[772] These are of secondary importance only since they merely refer back to the PPPFA and its Regulations.[773] The Prevention and Combating of Corrupt Activities Act[774] aims to prevent and combat corruption and corrupt activities which could occur in the procurement process.

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769 See *Claude Neon Ltd v Germiston City Council and Another* 1995 3 SA 710 (W); 1995 5 BCLR 554 (W): 719G–H (561-562); *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA): 552–553; *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 7 BCLR 907 (C): 915; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); 2001 2 BCLR 176 (SCA): paras 7-9 (per Schutz JA); *Logbro Properties CC v Bedderson NO & Others* 2003 2 SA 460 (SCA); 2003 1 All SA 424 (SCA): paras 5-11; *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others* 2008 4 SA 346 (T): paras 19, 22.

770 The PFMA. This Act regulates financial management by securing transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities on the national, provincial and local government levels. See PFMA: section 2.

771 The MFMA. This Act seeks to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. See MFMA: Preamble and section 2.

772 Local Government: Municipal Systems Act. This Act deals with municipal entities which opt to provide service delivery through competitive bidding processes. See sections 76, 80, 81, and 83. *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others*. See Bolton 2008:783; Bolton 2007:6.

773 See Bolton 2007a:39.

774 Prevention and Combating of Corrupt Activities Act 12/2004.

The above-mentioned legislation provides the broader legislative and regulatory framework within which affirmative government procurement operates. It is furthermore relevant to the discussion on black economic empowerment because organs of state are obligated to promote economic empowerment through the operation of section 10 of the B-BBEE Act, which provides that all organs of state and public entities must consider and, as far as is reasonably possible, apply the Codes of Good Practice issued in terms of the Act. It could therefore be stated that the procurement framework discussed above (and its application which is discussed in the following section) is the vehicle which would ultimately drive compliance with the B-BBEE Act.

4.2.9.2 Application

Section 217 of the Constitution applies "[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services[.]" It is argued that the phrase "organ of state in the national, provincial or local sphere of government" should be interpreted as meaning entities as described in section 239(a) of the Constitution,[775] as well as entities exercising a public power of performing a public function in terms of legislation and which are controlled by the state.[776] It is further stated that section 217 applies to those institutions identified in legislation as being institutions to which section 217 is applicable,[777] namely, institutions governed by the Public Finance Management Act.[778]

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775 The relevant part of section 239 of the Constitution reads as follows: "'Organ of state' means –

(a) any department of state or administration in the national, provincial or local sphere of government[.]"

776 Penfold & Reyburn 2003 *et seq*:25-6; Bolton 2007:65.

777 Penfold & Reyburn 2003 *et seq*:25-7.

778 The PFMA repeats the procurement principles set out in section 217 of the Constitution. See Penfold & Reyburn 2003 *et seq*:25-7.

(a) Definition or meaning of the term "procurement of goods or services"

Generally, the phrase "procurement of goods or services" refers to the act of purchasing goods or services from private sector entities.[779] In South Africa, procurement of goods and services also includes contracting with private entities for the provision of municipal services.[780]

Procurement includes the processes ranging from the initial planning stage, the actual process of procurement and the stage of contract management or administration which refers to the actual performance of the contract.[781]

Bolton[782] has argued for an extensive interpretation of the term "procurement" so as to include not only the acquisition of goods and services by the state, but also the selling and lending of assets by the state. This could be supported by the fact that the Preferential Procurement Regulations, 2001[783] prescribe a preferential point system for the sale and letting of assets. This is inconsistent with section 217 of the Constitution, which clearly only refers to the contracting for goods and services. Penfold and Reyburn[784] differ from Bolton in their contention that the term "procurement" is only limited to the process of acquisition of goods and services. This seems to be the correct view.

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779 Arrowsmith, Linarelli & Wallace 2000:1; UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994: Article 2, Definitions. Available at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf (accessed 11 February 2009).

780 Local Government: Municipal Systems Act: section 80 deals with the provision of services through service delivery agreements with private entities. Section 83 of the Act deals with the constitutional principles when third-party contractors are engaged. Bolton 2007:4; Penfold & Reyburn 2003 *et seq*:25-7. See also *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 3 SA 1013 (SCA); 2001 10 BCLR 1026 (SCA).

781 *Transnet Ltd v Goodman Brothers (Pty) Ltd*: para 22 (per Olivier JA): "[Section] 217 … can be relied upon by every person with whom the organ of State or other institution therein mentioned '*contracts for goods or services*'. It may well be that the words 'contracts for goods and services' must be given a wide meaning, similar to 'negotiates for' etc." Penfold & Reyburn 2003 *et seq*:25-7; Bolton 2007:9.

782 Bolton 2007:67-68; 2008:784. See also Letchmiah 1999:19.

783 Paras 5 and 6.

784 Penfold & Reyburn 2003 *et seq*:25-7 – 25-8.

The PPPFA (and its Regulations)[785] apply to an organ of state as defined in section 1 of said Act. An organ of state as defined in the PPPFA differs from the definition of the term in section 217 or 239 of the Constitution. The PPPFA defines "organ of state" as —

> (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
>
> (b) a municipality as contemplated in the Constitution;
>
> (c) a constitutional institution defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
>
> (d) Parliament;
>
> (e) A provincial legislature;
>
> (f) Any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies.[786]

It would seem that fewer entities are bound by the PPPFA than entities bound by the five constitutional principles set out in section 217, or entities included in the definition of organ of state in section 239 of the Constitution.[787]

The PPPFA makes provision for the exemption of state entities from the provisions of the PPPFA if (a) it is in the interests of national security, (b) international suppliers are the likely tenderers, or (c) it serves the public interests. This exemption will be granted by the Minister of Finance on request of such organ of state.[788]

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785 See PPPFA 5/2000: Draft Preferential Procurement Regulations, 2009: Regulation 2. Published in Government Gazette No 32489, 14 August 2009. The proposed regulations broaden the application of the regulations and provide that it will be applicable to "organs of state as contemplated in section 1 (iii) of the Act and all public entities listed in schedules 2, 3A, 3B, 3C and 3D to the Public Finance Management Act, 1999, Act No. 1 of 1999 ..."

786 No other institutions have as yet been recognised by the Minister of Finance by means of notice in the Government Gazette.

787 Bolton 2008:787; Penfold & Reyburn 2003 *et seq*:25-14.

788 PPPFA: section 3.

(b) Preference points system

The PPPFA establishes a preference points system for preferential procurement. Although by no means the only way to procure goods or services, the PPPFA and its Regulations operate on the basis that procurement is done through a tendering process.[789]

It would be sensible to point out that some disparities exist regarding the application of the preference points system. The Constitution clearly *permits* organs of state, as defined to implement preferential procurement policies but does not oblige all organs of state, as defined, to do so. Section 217(2) is very clear on this point, stating that "[s]ubsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy". The provision of section 2(1) of the PPPFA takes a different stance in that it provides that all organs of state[790] "must determine its preferential procurement policy and implement it within the … framework [established in section 2]".[791] The question raised by Penfold and Reyburn[792] is whether the framework established in the PPPFA has to be applied to all organs of state or whether it is applicable only once an organ of state chooses to implement a preferential procurement policy. The authors[793] deduced from the minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee of 18 January 2000, that

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789 Penfold & Reyburn (2003 *et seq*:25-16) give the following apt summary of the process: "[A]n organ of state incites tenders by the issuing of documents; the tenders received are evaluated according to the evaluation criteria stipulated in the tender documentation; and tenders are ranked by the allocation of points for each evaluation criterion. The total number of points that can be allocated is assumed to be one hundred." See also *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 1 SA 16 (SCA); 2004 1 All SA 504 (SCA): para 11.

790 As defined in section 1 of the PPPFA.

791 This provision is basically repeated in the Regulations to the PPPFA, regulation 2(1) and 2(2). See Department of Finance. 2001. Preferential Procurement Regulations, 2001 pertaining to the Preferential Procurement Policy Framework Act: No 5 of 2000. Government Notice No R725, Regulation Gazette No 7134, Government Gazette No 22549, 10 August 2001.

792 Penfold & Reyburn 2003 *et seq*:25-15. This question is also discussed by Bolton 2007:269; 2007a:48.

793 Penfold & Reyburn 2003 *et seq*:25-15.

the drafters' intention was to oblige every state organ to implement preferential procurement policy consistent with the framework of the PPPFA.[794]

The dual-scale preference points system is set out in section 2 of the PPPFA, and further detailed in the Regulations to the PPPFA. This system operates on an 80/20 or 90/10 preference points system depending on the size of the contract. The 80/20 points system will be applicable to tenders for contracts with a value of between R30 000-00 and R500 000-00[795] and the 90/10 points system will apply to contracts of more than R500 000-00.[796] Most of the points — 80 or 90 — are awarded for the price of the tender.[797] In terms of section 2(b) of the PPPFA, the remaining 10 or 20 points are awarded for the specific goals,[798] which include contracting with persons, or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability,[799] or implementing the programmes of the RDP.[800] The listed specific goals are not a *numerus clausus*, and other goals could also be included here,[801] although the primary focus at present is the empowerment of historically disadvantaged persons.[802]

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794 See argument in favour of obligatory nature of policy raised by Bolton 2006:206.

795 The proposed amendments to the Regulations increase the amount to which the 80/20 points system is applicable to contracts between R30 000 and R1 000 000. See PPPFA 5/2000: Draft Preferential Procurement Regulations, 2009: Regulation 4. Published in Government Gazette No 32489, 14 August 2009.

796 The proposed amendments to the Regulations increase the amount to which the 90/10 points system is applicable to contracts valued at more than R1 000 000. See PPPFA 5/2000: Draft Preferential Procurement Regulations, 2009: Regulation 5. Published in Government Gazette No 32489, 14 August 2009.

797 Other qualification criteria for consideration of tenders may be stipulated. Criteria such as technical ability would qualify a tender as an "acceptable tender" as defined in the PPPFA: section 1. Although it is permissible to list additional qualification criteria, these act as threshold criteria and are not part of the points-allocation process of tenders. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 2 SA 638 (SCA); 2005 4 All SA 487 (SCA): para 11; *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others*: para 56. Penfold & Reyburn 2003 *et seq*:25-18.

798 These specific goals are also included in detail in the Preferential Procurement Regulations, 2001: regulation 3, 4, and 17.

799 PPPFA: section 2(d)(i).

800 Ibid, section 2(d)(ii). These refer to programmes published in Government Gazette No 16085, 23 November 1994.

801 Bolton (2007:282) makes a case for the inclusion of environmental factors in the award of tenders.

802 This view is supported by the provision in section 217(2)(a) which allows for unspecified "categories of preference in the allocation of contracts", and by the Green Paper: para 4.27. See

Once the process of awarding points for each tender is completed, section 2(f) of the PPPFA provides that the contract must be awarded to the tenderer who scores the highest points,[803] unless objective criteria in addition to those contemplated in section 2(d) (implementation of RDP programmes or contracting with historically disadvantaged individuals) and section 2(e) (specific goals included in tender invitations) justify the award to another tenderer.[804]

At this point it would be fruitful to consider some of the reasons for caution. Due to the considerable size of procurement, the risk of corruption is exponentially larger. Even though some very commendable social and economic objectives may be achieved through the exercise of government purchasing power, corruption threatens to undo all the good work procurement could have accomplished. Corruption impacts on a variety of different groups and interests. The government spends tax payers' money and corruption therefore affects every tax payer personally. Corruption could also impact negatively on service delivery and threaten the effectiveness of procurement as a policy tool.[805] This is discussed later in Chapter 5. Effective regulation and control of public procurement is therefore of utmost importance. Good governance in procurement was also foremost in the minds of the drafters of the Constitution when the five constitutional principles — fairness, equity, transparency, competitiveness, and cost effectiveness — underlying preferential procurement, were formulated. Government procurement is also subject to the principles of good governance provided for in section 195 of the Constitution, which lays down the basic values and principles governing public administration. The Constitution provides, *inter alia*, for the following principles:

Penfold & Reyburn 2003 *et seq*:25-17; Bolton 2007:281. The proposed amendments to the Regulations provide that the 10 or 20 points be awarded on a sliding scale depending on the tenderer's BEE status. See PPPFA 5/2000: Draft Preferential Procurement Regulations, 2009: Regulation 4.2, 4.3, 5.2 and 5.3. Published in Government Gazette No 32489, 14 August 2009.

803 *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others*: paras 66-68; *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others*: para 55.

804 The Preferential Procurement Regulations, 2001: para 9 provides less restrictive guidelines as to when a tender may be awarded to a tenderer who does not score the highest points. The provision reads that "[d]espite regulations 3.(4), 4.(4), 5.(4), 6(4) and 8.(8), a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points."

805 Bolton 2007:4.

(a) The promotion and maintenance of a high standard of professional ethics.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.[806]

Section 2(g) of the PPPFA provides that a contract awarded on account of false information may be cancelled at the sole discretion of the state organ. Regulation 15 provides more detailed penalties, which are applicable in the case of fraudulent conduct by the tenderer.

4.2.10 Preamble and foundational principles of the Constitution

In the discussion on economic empowerment, various constitutional provisions explicitly or implicitly create the obligation to implement positive measures to create an economically just society. The Preamble to the Constitution and the founding constitutional provisions serve to shape and inform all substantive constitutional provisions. The Preamble and founding provisions therefore implicitly requires that positive measures be taken to eliminate the inequality that exists in South Africa due to past discriminatory practices. No comprehensive consideration of economic empowerment in its constitutional context is thus possible without referring to the Preamble and founding provisions of the Constitution.

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806 Constitution of the Republic of South Africa: section 195(1)(a) – (g).

The newly established, post 1994 dispensation is based on constitutional supremacy, as opposed to parliamentary supremacy. Thus, the fundamental normative elements of the Constitution provide the framework and boundaries for all government action, but also order the relations between the state and individuals and between individuals *inter se*.[807] These values and principles also provide overall guidance in the processes of judicial review and deliberation over constitutional issues. The section 1 values give substance to the value-based approach to constitutional interpretation[808] and should inform all aspects of our legal order.[809] Constitutional supremacy, as opposed to parliamentary supremacy, envisions the judiciary as the gatekeepers of the fundamental values and principles of the Constitution.[810]

Fundamental constitutional principles, or the "internal architecture"[811] of the Constitution, are values which function to order society and have particular relevance in describing the type of society envisaged in the process of constitutional transformation. They encompass not only the historical and political processes which culminated in the adoption of a Constitution, but also the political and legal road ahead.[812] Values and principles with constitutional status are generally a reflection of the type of society in which they are operating.[813] Fundamental constitutional principles are implicit in the

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807 Ibid, section 8.

808 See Constitution of the Republic of South Africa: section 165.

809 Chaskalson 2000:195.

810 Weinrib 1998:369; Hughes 1999:11.

811 The term "internal architecture" was used by the Supreme Court of Canada in *Quebec Secession Reference* [1998] 2 S.C.R. 217, 1998 CarswellNat 1299: para 50.

812 See *S v Makwanyane*: para 262: "In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic." See also *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC); 2000 8 BCLR 837 (CC): para 35.

813 Hughes 1999:16.

Preamble to the Constitution of South Africa. The breadth and depth of their importance is particularly clear when reading the Preamble:

> We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people.
>
> Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
>
> God seën Suid-Afrika. God bless South Africa.
>
> Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

The basic principles underlying the new constitutional order are constitutionalism, the rule of law,[814] democracy,[815] accountability,[816] responsiveness and openness,[817]

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814 Constitution of the Republic of South Africa: section 1(c); *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another* 2008 5 SA 31 (CC); 2008 8 BCLR 771 (CC): para 40; *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others*: para 39; *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC); 2000 3 BCLR 241 (CC): para 40.

separation of powers and checks and balances, co-operative government and devolution of power.[818] The founding provisions in Chapter 1[819] of the Constitution expressly lists the following fundamental values:[820] human dignity, the achievement of equality,[821] the advancement of human rights and freedoms,[822] non-racialism and non-sexism,[823] constitutional supremacy and the rule of law,[824] and democracy.[825] Any law or conduct

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815 *Democratic Alliance and Another v Masondo NO and Another* 2003 2 SA 413 (CC); 2003 2 BCLR 128 (CC): para 42. For a discussion on the meaning of democracy and the difference between constitutional and majoritarian democracy, see Malan 2006:142-160.

816 *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 2 SA 359 (CC); 2005 4 BCLR 301 (CC): paras 74-76; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40.

817 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC): para 111; *Matatiele Municipality and Others v President of the RSA and Others* 2006 5 SA 47 (CC); 2006 5 BCLR 622 (CC): para 41; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 2 SA 24 (CC); 2008 2 BCLR 158 (CC): para 138; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC); 2006 1 BCLR 1 (CC): para 111; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40.

818 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40. Currie & De Waal 2005:7.

819 In this respect reference is made mainly to the provisions of section 1 of the Final Constitution. Section 2 further states the principles of Constitutional supremacy; section 3 provides for equal rights and duties of citizenship; section 4 and 5 provide on issues of the national anthem and the flag; section 6 deals with the official languages. The reason for giving more weight to section 1 principles is also due to the different status afforded to it by the Constitution itself. Section 74(1) and section 74(3) provide different requirements for the amendment of section 1 and the other sections of Chapter 1, with a more stringent requirement set for the amendment of section 1. See also Henderson 1998:216; Roederer 2005 *et seq*:13–18; Ackermann 2004:647.

820 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2005 3 SA 280 (CC); 2004 5 BCLR 445 (CC).

821 Constitution of the Republic of South Africa: section 1(a); *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC); 2002 5 BCLR 454 (CC).

822 Constitution of the Republic of South Africa: section 1(a). Together with social justice, this value is also found in the Preamble of the Constitution of the Republic of South Africa, and given further realisation in the Bill of Rights.

823 Ibid, section 1(b).

824 Ibid, section 1(c).

825 Ibid, section 1 provides: 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.

contrary to or inconsistent with these principles will be invalid.[826] Throughout the Bill of Rights, contained in Chapter 2 of the Constitution, the inherent values of dignity, equality and freedom are emphasised and reinforced.[827]

4.2.10.1 The purpose of the foundational constitutional principles

Constitutional principles encapsulate the predominant features and values of a political and legal system, and set up broad parameters or boundaries for the operation of structures, institutions and practices.[828] These principles serve as guidelines for the interpretation of general legislative provisions as well as for substantive constitutional provisions and have a strong normative function.[829] The underlying constitutional norms in fact substantively define the Constitution.[830] They organise and inform the provisions of the Bill of Rights.[831] However, constitutional values and principles are not only interpretative guidelines for assessing legislative provisions and actions, but also serve as

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(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.

See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC); 1997 1 BCLR 1 (CC); *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40. On the link between dignity and the individual's right to vote, see *August and Another v Electoral Commission and Others* 1999 3 SA 1 (CC); 1999 4 BCLR 569 (CC).

826 Constitution of the Republic of South Africa: section 2. See also Ackermann 2000:539; Currie & De Waal 2005:7.

827 Ackermann 2004:647.

828 Hughes 1999:12; Henderson 1997:549.

829 *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 1 SA 495 (CC); 2002 11 BCLR 1179 (CC): para 19; *Quebec Secession Reference*: para 54; Ackermann 2000:544; Currie & De Waal 2005:272.

830 Ackermann 2000:539.

831 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: para 104. Roederer 2005 *et seq*:13–19; Currie & De Waal 2005:7.

yardsticks against which legislation and state action should also be tested and measured.[832]

Hughes argues that "as a whole, these principles have the potential to play a role more extensive than can any particular express constitutional provision, no matter how important".[833] Constitutional fundamental principles inform, but at the same time, reflect society's legal culture.[834]

Constitutional principles, as interpretative norms, should inform the interpretation of substantive constitutional provisions and should therefore always form the backdrop against which constitutional provisions are interpreted.[835] It has been argued that a right would carry greater weight if it furthers a foundational value, for example, the right to dignity and equality.[836] Section 7 of the Constitution clearly establishes the relationship between the founding values and human rights.[837] The foundational provisions have a particular significance that extends beyond the individual constitutional provisions. It has been argued[838] that fundamental constitutional principles should not necessarily be limited to those explicitly included in the text alone, and it would therefore be possible for new principles to evolve and be established from the matrix of constitutional values.

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832 *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another*: 597F – H (87); *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)*: para 19; Du Plessis 2000:193.

833 Hughes 1999:13.

834 Weinrib 1998:371; Hughes 1999:14.

835 *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)*: para 19; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: para 35; Henderson 1997:550; Hughes 1999:15. *Quebec Secession Reference*: para 49: "These defining principles function in symbiosis."

836 Roederer 2005 *et seq*:13–22.

837 Section 7(1) provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." See also Grant 2007:310.

838 Hughes 1999:17; Roederer 2005 *et seq*:13–19.

4.2.10.2 Constitutional principles

The Preamble to and founding provisions of the Constitution have both a direct and indirect relevance to the discussion on economic empowerment. Certain provisions, such as human dignity, the achievement of equality and advancement of human rights, social justice, non-racialism and non-sexism, transformation, accountability, responsiveness and openness, have particular importance to economic empowerment. The constitutional good governance principles, i.e., accountability, responsiveness and openness, transparency and efficiency, will be discussed below.[839] Other founding provisions, such as democracy, separation of powers, co-operative government, constitutional supremacy and the rule of law will not be discussed here. These principles, although central to the South African constitutional order, do not have definitive bearing on the discussion at hand.

The foundational values of human dignity and the achievement of equality (under which the advancement of human rights, social justice, non-racialism and non-sexism are included in this discussion) are significant when considering the objectives of remedial programmes in general, and black economic empowerment in particular. In case law, specific reference to the foundational principles of equality and dignity are found. In *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* the Court expressed itself as follows:

> "Not only is the achievement of equality one of the founding values of the Constitution, s 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past."[840]

On the issue of dignity, the Court stated the position as follows in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*:

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839 See para 4.3.5.4 below.

840 *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: para 50.

> "Dignity is a founding value of our Constitution. It informs most if not all of the rights in the Bill of Rights and for that reason is of central significance in the limitations analysis."[841]

In *Kaunda and Others v President of the Republic of South Africa and Others* O'Regan J refers to social justice and the advancement of human rights and freedoms as follows:

> "The leitmotif of our Constitution is thus the promotion and protection of fundamental human rights. Again and again, our Constitution restates the foundational importance of human rights to our constitutional vision. In the Preamble, it speaks of the need to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'; in s 1, the founding values clause quoted above, the Constitution commits us to the 'advancement of human rights and freedoms'; and in s 7(1), the Constitution asserts that the Bill of Rights is a 'cornerstone of democracy in South Africa'."[842]

Although a number of foundational principles and values are enumerated in the Preamble and Chapter 1 of the Constitution, some of these are of specific relevance to the subject of economic empowerment, and will therefore constitute the focus of the discussion.

4.2.10.3 Dignity

In the discussion on economic empowerment undertaken in this thesis, specific foundational values and principles are addressed separately, for example, the achievement of equality (which would include the advancement of human rights and freedoms, non-racialism and non-sexism), social justice, and transformative constitutionalism. Specific mention should however be made of the value of and right to dignity. Dignity is not separately addressed in this study, but due to its fundamental normative value, it is discussed here as part of the foundational principles and values.

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841 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*: para 62.

842 *Kaunda and Others v President of the Republic of South Africa and Others* 2005 4 SA 235 (CC); 2004 10 BCLR 1009 (CC): para 220.

Although the Constitution expressly provides for a right to dignity,[843] dignity is specifically included in section 1 of the Constitution together with respect for democracy, freedom and the achievement of equality. Dignity has also featured prominently in constitutional jurisprudence from the outset.[844] Dignity is an intrinsic value in every provision in the Bill of Rights.[845] It is crucial in balancing conflicting interests and values.[846] For example, dignity recognises the substantive content in equality.[847] Dignity has an underlying value for the substantive provision on freedom in section 12 of the Constitution.[848] To achieve substantive equality in an unequal South African society will also require the achievement of equality of dignity. It is in this respect that other provisions in the Bill of Rights have particular bearing. The positive obligation on the state to progressively realise the right to health care, housing, and social security, is essential for the achievement of dignity. Section 25 of the Constitution provides for an obligation to realise equitable access to land and natural resources.

In section 10 of the Constitution it is provided that "everyone has inherent dignity". This is proclaimed even before it provides the right of everyone "to have their dignity respected and protected". Consequently, dignity is not merely a right, but entails much more — it is definitional of what it means to be a human being.[849] Ackermann refers to the expression of dignity in the German "Rechtsstaat" and writes:

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843 Section 10.

844 *S v Makwanyane*: para 329; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*: para 62.

845 *S v Makwanyane*: paras 144, 328.

846 Chaskalson 2000:201. See also *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: para 35.

847 Chaskalson 2000:203; Currie & De Waal 2005:273. For example, see *Prinsloo v Van der Linde*: paras 31, 32; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 30; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: para 35.

848 *Ferreira v Levin NO; Vryenhoek v Powell NO*: paras 47, 49. Ackermann 2004:648.

849 Ackermann (2000:541-542; 2004:647) draws on the work of Kant in this regard. See also the treatment of dignity in Article 1 of the German Basic Law. It is not possible to amend Article 1 of the German Basic Law in any way which points to the seriousness with which dignity is treated.

> "[H]uman dignity is therefore the acknowledgement, respect, and protection due to all people, both from the side of the state and also from all other persons, because of the human's unique qualities of self-awareness, autonomy, and inestimable and incomparable worth."[850]

Defining the concept of dignity is notoriously difficult.[851] The South African Constitutional Court has identified certain elements relating to a definition of dignity. Firstly dignity means that every individual is not regarded as a means to an end, but rather as an end in itself,[852] of innate, priceless and indefeasible human worth.[853] Every individual is entitled to equal concern and respect,[854] as well as to self-development so as to realise each individual's full potential,[855] and self-governance[856].

Section 39 concerns the practical application of the constitutional values.[857] Section 39(1) stresses the importance of the values of human dignity, equality and freedom, by requiring courts, tribunals or forums when interpreting the provisions of the Bill of Rights to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

The limitation clause of the Constitution also stresses the importance of the fundamental qualities of human dignity, equality and freedom. Section 36(1) only permits a limitation of a right in the Bill of Rights "to the extent that the limitation is

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See article 79(3) of the German Basic Law. See also Kommers 1991:846; De Wet 1996:20; Henderson 1997:553.

850 Ackermann 2004:650.

851 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 28. Currie & De Waal 2005:273; Grant 2007:311.

852 *S v Dodo* 2001 3 SA 382 (CC); 2001 5 BCLR 423 (CC): para 38.

853 Woolman 2005 *et seq*:36-7; Ackermann 2000:541, 2004:652. *Prinsloo v Van der Linde*: para 31; *S v Dodo*: para 38.

854 *City Council of Pretoria v Walker*: paras 35, 81. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 28; *Du Toit and Another v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC): para 29. Woolman 2005 *et seq*:36-10; Grant 2007:311.

855 *Ferreira v Levin NO; Vryenhoek v Powell NO*: para 49. Woolman 2005 *et seq*:36-11.

856 *August and Another v Electoral Commission and Others*: para 17. Currie & De Waal 2005:274; Woolman 2005 *et seq*:36-12.

857 Grant 2007:310.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom[.]" Although this evidences the fact that no fundamental right is absolute,[858] it qualifies the permissible extent of limitation of these rights with reference to these values.[859]

Dignity, together with the achievement of equality and freedom and other foundational principles, as well as the values laid down in the Preamble to the Constitution, are indissolubly linked to any discussion of economic empowerment. These values and principles do not only inform and underlie all the empowering provisions in the Constitution, which directly or indirectly oblige economic empowerment, but in themselves also create a driving force for the creation of a society based on dignity, equality and freedom in which all people have the economic means to add to and fully participate in a culturally diverse and prosperous nation. As the Court noted in *Khosa v Minister of Social Development; Mahlaule and Others v Minister of Social Development and Others*, the Final Constitution commits to a concept of dignity in which "wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole."[860] With regard to social and economic rights and general social and economic justice, the Court noted the following in *Port Elizabeth Municipality v Various Occupiers*:

> "It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation."[861]

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858 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*: para 23.

859 See Constitution of the Republic of South Africa: section 36. Ackermann 2000:543; 2004:654; Currie & De Waal 2005:275; Malan 2006:143. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*: para 35.

860 *Khosa v Minister of Social Development; Mahlaule and Others v Minister of Social Development and Others*: para 74.

861 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC): para 18.

When formulating policy objectives for the process of black economic empowerment, and designing specific goals and measures for the implementation of the programme, government should constantly consider the foundational values and principles as guidelines to optimise the functionality of the programme, and to evaluate the way in which the programme ultimately emphasises and reinforces these values. The constitutional principles of accountability, responsiveness and openness are particularly relevant to the design and implementation of any type of government programme.

In conclusion it can be stated that black economic empowerment, as the government's initiative to eradicate economic injustice, is directly linked to the constitutional values of dignity and the achievement of equality. The B-BBEE programme as a whole aids the advancement of human rights and freedoms in a society based on the values of non-racialism and non-sexism. Successes achieved and progress made with the programme on these levels will indirectly lead to B-BBEE supporting and reinforcing other constitutional principles, such as constitutional supremacy, rule of law and democracy. The design and implementation of the B-BBEE programme should, however, be founded on the constitutional principles of openness and accountability. When the judiciary is faced with issues dealing with the BEE programme and its implementation, or the impact it has on various role players, the foundational constitutional principles and values should serve to infuse their interpretation of the rights at issue.

4.3 BEE in the context of constitutional limitations

4.3.1 Introduction

Broad-based black economic empowerment, preferential government procurement and all other affirmative measures are designed to promote social and economic justice and achieve a substantively more equal society. A number of provisions in the Constitution enable and some indeed mandate the achievement of this type of society.

These enabling provisions were discussed in the first part of this chapter. It should be noted that enabling provisions in themselves also contain a limiting dimension. For example, the right to equality[862] explicitly mandates the achievement of substantive equality by means of remedial affirmative action measures.[863] The function of this limiting dimension of the right to equality was addressed above — as part of the discussion of section 9 — as an enabling provision,[864] together with the way in which the Constitutional Court dealt with this provision in *Minister of Finance and Another v Van Heerden*, and is also referred to below.[865] The same holds true for the socio-economic rights provisions. Insofar as the facilitating role of B-BBEE is concerned — acting as a facilitator to promote access to socio-economic rights the programme has to comply with the standard of reasonableness for measures taken to promote access to socio-economic rights. The way in which the Constitutional Court interpreted the reasonableness requirement formed part of the discussion above,[866] which deals with socio-economic rights as enabling provisions for the adoption of remedial measures, and is briefly considered below.[867]

Other provisions or principles discussed above, such as transformative constitutionalism, social justice, economic justice, foundational constitutional values and principles, are fundamentally enabling provisions. However, by implication these provisions and values also pose standards against which to evaluate the B-BBEE programme (or any other affirmative action measure). Consequently it necessitates an evaluation of whether or not B-BBEE promotes or assists in the achievement of social and economic justice, aids the value of transformative constitutionalism and the foundational constitutional values, promotes the achievement of substantive equality, etc. These then place implicit limitations on the formulation and implementation of affirmative action measures and the B-BBEE programme specifically. An assessment of

862 Constitution of the Republic of South Africa: section 9.

863 Ibid, section 9(2) specifically.

864 See para 4.2.8.3 above.

865 Para 5.3.4.

866 See para 4.2.7.

867 See para 5.3.4.

the B-BBEE programme measured against the standards set by these enabling provisions follows in Chapter 6 below. Only specific limiting concepts will be dealt with in this chapter.

Without detracting from the importance of the enabling provisions discussed in this chapter, it is also necessary to consider constitutional provisions which provide boundaries or margins to the types of programmes that can be adopted to achieve this. One of the most obvious provisions in the Constitution for the provision of a framework for consideration with regard to limitations is section 36 (the general limitations clause). Other constitutional provisions and principles should also be considered when addressing the issue of limitations of constitutional rights. These are, for example, provisions which contain, for lack of a better term, internal limitations,[868] internal modifiers or other qualifications.[869] "Special limitation clauses" is the term used by Rautenbach to describe limiting elements in constitutional provisions other than the general limitation clause.[870] Limitations can also stem from foundational constitutional norms, for example the social state principle and proportionality and balancing as central, underlying constitutional principles.

4.3.2 Limitations in the context of section 36

The South African Constitution contains a freestanding limitation clause in section 36. It provides for the limitation of rights only in a manner which complies with certain criteria provided for in the limitation clause. The inclusion of such a general limitation clause is consistent with the belief that no right has absolute force. The limitation clause in the South African Constitution was influenced by four aspects: the German notion of negating the essential content of a right, the Canadian limitation clause, the levels of

868 For criticism on the use of this term, see Cheadle 2007 *et seq*:30-7.

869 Carpenter 1995:260.

870 Rautenbach 2001:621-622.

judicial scrutiny in the American fundamental rights and equal protection analysis, and the European Convention of Human Rights' limitation clauses.[871]

The inclusion of a separate limitation clause — as opposed to the approach in, for example, the United States and Germany[872] where no freestanding constitutional limitation clause exists — also furthers the "norms of the rule of law and of constitutionalism."[873] Factors and criteria for limitations are clearly set out, and should be considered by courts. These would seem to preclude the danger of an overly subjective approach to the interpretation of limitations. The inclusion moreover avoids a situation where the limitation of rights has to occur solely within the narrow interpretation of the scope of a right.[874] It does not, however, offer a panacea for all questions on the limitations of rights. According to Botha, it raises difficult questions about the "resolution of conflicts between individual rights and the public interest, the structure of fundamental-rights litigation, styles of constitutional adjudication (e.g. a more formal categorisation approach versus a flexible balancing approach), the separation of powers, and the degree of judicial activism or restraint that is proper in fundamental-rights cases."[875]

The South African Constitutional Court has adopted a two-stage approach to its review of limitations.[876] The first stage is the threshold or definition stage and involves a

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871 Woolman 1994:62.

872 The German Basic Law contains no freestanding limitation clause but the limitation of each fundamental right is regulated individually. See Blaauw-Wolf 1999:180.

873 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 82: "[A detailed limitation clause] would seem to further the norms of the rule of law and of constitutionalism better for Courts, in applying the [interim] Constitution, to seek for any limitation to s 11(1) rights in s 33(1), where the Constitution lays down criteria for limitation, than to seek limits in s 11(1) by means of an interpretative approach which must of necessity, having regard to the nature of the right to freedom, be more subjective, more uncertain and more constitutionally undefined."

874 *S v Makwanyane*: para 100; Iles 2007:71; Currie & De Waal 2005:165-166.

875 Botha 2003b:13-14.

876 *S v Zuma* 1995 2 SA 642 (CC); 1995 4 BCLR 401 (CC): para 21; *S v Makwanyane*: para 100; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: paras 44, 82; *Ex Parte Minister of Safety and Security and Others: In re S v Walter and Another* 2002 4 SA 613 (CC); 2002 7 BCLR 663 (CC): para 26; *S v Thebus and Another* 2003 6 SA 505 (CC); 2003 10 BCLR 1100 (CC): para 29.

contextual determination of the scope of the right.[877] Cheadle states that at the first stage of the analysis the courts should progress from the understanding that "there is no need to shape the contours of the right in order to accommodate pressing social interests."[878] This is an interpretative stage only and evidence and arguments are to be presented by the applicant in order for the Court to determine the scope of the rights involved and whether these rights have been limited or infringed upon by the law under review.[879] It is only once it has been found that the impugned law infringes the right or rights under consideration at the first stage, that the inquiry progresses to the second stage.

The first stage does not involve balancing, and a generous interpretation of the content of the right should be given with due consideration of the underlying values of the Constitution.[880] Limitations of rights and balancing of competing interests are left for the second stage of the inquiry.[881] Although this two-stage inquiry is well-established it would seem that the division of tasks to be contemplated or the division of issues to be addressed in each of the two stages are less settled.[882]

Cheadle argues that where rights with competing claims are concerned, for example, the overlap between the right to freedom of expression, the right to privacy and

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877 *Prinsloo v Van der Linde and Another*: para 35; Iles 2007:71; Currie & De Waal 2005:166; Cheadle 2007 *et seq*:30-3; Botha 2003b:13 fn 3; Woolman & Botha 2006 *et seq*:34-20.

878 Cheadle 2007 *et seq*:30-5. See also *S v Makwanyane*: paras 9, 10.

879 *Prinsloo v Van der Linde and Another*: para 35; *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 4 SA 631 (CC); 1995 10 BCLR 1382 (CC): para 9; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: paras 45, 82; Currie & De Waal 2005:166; Iles 2007:72.

880 In *S v Zuma* (para 15) Kentridge AJ quotes the following statement with approval from the Canadian Supreme Court case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 395-6: "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection." See also *S v Makwanyane*: para 9. Iles 2007:72.

881 *S v Zuma*: para 21.

882 Botha 2003b:13 fn 3.

the right to dignity in relation to defamatory speech, the balancing of these competing rights should not be done at the first stage of the inquiry. When the impugned law strikes a balance between these competing rights, it is appropriate for the balance to be reviewed under the proportionality analysis as part of the justification stage of the inquiry.[883] Iles[884] supports Cheadle in this contention, but this has not always been the approach taken by the courts.[885]

At the second stage of the inquiry, the justification stage, the state or party relying on the limiting legislation (the respondent) has to demonstrate that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom. This part of the inquiry will draw on the factors listed in section 36(1) of the Constitution.[886] These factors, as is the case in Canada, Germany and under the European Convention on Human Rights, concern two broad concepts, namely the purpose or the ends to be achieved and the proportional relationship between the means and the ends.[887] With reference to the right to freedom and security of the person[888] and the limitations clause[889] in the Interim Constitution, Ackermann J made the following statement in *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*:

> "The fact that the right to freedom must, in my view, be given a broad and generous interpretation at the first stage of the enquiry, must therefore not be thought to be premised on a concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter. I wish to emphasise quite explicitly that a broad and generous interpretation of freedom does *not* deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres. On the contrary, state intervention is essential to resolve the paradox of unlimited freedom (where freedom ultimately destroys itself) in all these spheres. But legitimate limitations on freedom must occur through and be justified under the principles

883 Cheadle 2007 *et seq*:30-6 – 30-7.

884 Iles 2007:72.

885 See *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC); 2002 8 BCLR 771 (CC).

886 *S v Makwanyane*: paras 102-104.

887 See also Gardbaum 2007:840.

888 Interim Constitution of the Republic of South Africa: section 11(1).

889 Ibid, section 33.

formulated in section 33(1), not by giving a restricted definition of the right to freedom in section 11(1).„[890]

Ackermann J further reiterated the point later in the same judgement and stated the following:

> "The fact that such a 'two-stage' approach is prescribed by the Constitution, and that section 33(1) prescribes fully the criteria that have to be met before an entrenched right can be limited, in my view lends constitutional and policy support to an interpretative approach which requires that the broadest interpretation be given to the entrenched right. If a limitation is sought to be made at the first stage of the enquiry, it requires, at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made. The temptation to, and danger of, judicial subjectivity is great. This Court would, in my view, be discharging its interpretative function best, most securely and most constitutionally, if, as far as is judicially possible, it seeks for any limitation of an entrenched right through section 33(1). It may well be that the Constitution itself, either because of the descriptive ambit of one or more of the many other rights entrenched in Chapter 3, or in some other way, expressly or by clear implication, indicates a limitation of an entrenched right at the first stage of the enquiry. Absent such an indication, the Court would be on safer constitutional ground if it were to find any limitation on the basis of the prescribed criteria in section 33(1). This approach will afford a better guarantee against the Court, however unwittingly, reading its own subjective views into the Constitution."[891]

It has been argued that irrespective of whether the rights in question have boundaries as a matter of their constitutional definition, have internal limitations, or are limited through constitutionally mandated legislation, the first stage of the inquiry should be interpretative only and no balancing or justification should occur at this stage.[892] However, as will be discussed below, the inclusion of a special limitation clause within a rights provision does tend to blur the boundaries between the first and second stages of the limitation enquiry somewhat.

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890 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 52.

891 Ibid, at para 82.

892 Iles 2007:72; Cheadle 2007 *et seq*:30-7. Cheadle calls these merely "textual guides to the scope of the right".

The limitation clause in section 36 of the Constitution addresses two issues concerning the standard of review of rights limitations, namely legality and proportionality. This is very similar to the approach taken by the Canadian Supreme Court in the consideration of section 1 of the Canadian Charter of Rights and Freedoms in the landmark case of *R v Oakes*.[893] Considering that section 36 of the South African Constitution is textually very close to its Canadian counterpart,[894] it is instructive to consider elements of the Canadian limitations jurisprudence when discussing the South African Constitutional Court's approach to the limitation of rights.[895]

Section 36 of the Constitution of the Republic of South Africa provides as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
>
> (a) The nature of the right;
>
> (b) The importance of the purpose of the limitation;
>
> (c) The nature and extent of the limitation;
>
> (d) The relation between the limitation and its purpose; and
>
> (e) Less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

4.3.2.1 "A law of general application"

It is clear that this formal, threshold requirement in section 36(1) of the Constitution serves the underlying constitutional principle of the rule of law and legality.

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893 *R v Oakes* [1986] 1 S.C.R. 103; 1986 CarswellOnt 95.

894 Which in turn followed international human rights instruments, especially the European Convention of Human Rights.

895 The same point was also made by Kentridge AJ in *S v Zuma*: para 35.

Another reason for the inclusion of this requirement is that only the legislature, as the democratically elected body endowed with legislative powers, may authorise the limitation of rights.[896] Section 36(1) clearly states that only a law of general application may limit a right in the Bill of Rights. It must firstly be clear that a limitation is authorised by law and then, secondly, that the law must be a law of general application.[897]

It is possible to identify four basic qualities that can be attributed to a law of general application to give effect to the rule of law.[898] Firstly the law must treat similarly situated persons similarly and ensure that no one is placed above the law, irrespective of position. This is also concomitant to the principle of constitutional supremacy. In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* the Court stated the following:

> "We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common-law constitutional principles and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power, including judicial review of all legislation and conduct inconsistent with the Constitution."[899]

Secondly, state power should always be exercised in a non-arbitrary fashion. Support for this can be found in numerous cases, and a few examples will be provided here.[900] In *Prinsloo v Van der Linde and Another* Ackermann, O'Regan and Sachs JJ, writing for the Court expressed it as follows:

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896 Blaauw-Wolf 1999:209.

897 Currie & De Waal 2005:168; Woolman & Botha 2006 *et seq*:34-51. Article 19(1) of the German Basic Law contains the "law of general application" requirement. See translation by Blaauw-Wolf 1999:180.

898 Woolman & Botha 2006 *et seq*:34-48–34-50. Underlying the requirement of the "law of general application" is the rule of law. See *President of the Republic of South Africa and Another v Hugo*: para 102 per Mokgoro J.

899 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*: para 40 (footnotes omitted).

900 See also *President of the Republic of South Africa and Another v Hugo*: para 102.

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State."[901]

In *S v Makwanyane* Ackermann J concurred with the Court's decision, but wrote a separate opinion in which specific emphasis was placed on the arbitrariness of the death penalty, which was at issue before the Court:

> "In reaction to our past, the concept and values of the constitutional State, of the 'regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble. The detailed enumeration and description in s 33(1) of the criteria which must be met before the Legislature can limit a right entrenched in chap 3 of the Constitution emphasise the importance, in our new constitutional State, of reason and justification when rights are sought to be curtailed. 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 such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow."[902]

As a last example of this point, the Court in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, made the following statement:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary

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901 *Prinsloo v Van der Linde and Another*: para 25 (footnotes omitted).

902 *S v Makwanyane*: para 156 (footnotes omitted).

> and inconsistent with this requirement. … The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."[903]

The third basic quality concerns the clarity and precision of the law, which would enable conformation of conduct with the law.[904] In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Divisions, and Others* the Constitutional Court confirmed that the requirement of a "law of general application" in section 36(1) of the Constitution "derives from an important principle of the rule of law, namely that 'rules must be stated in a clear and accessible manner'".[905] This quality is also relevant where legislation grants state officials discretionary powers and it prohibits the granting of unfettered use of discretionary powers.[906] The law must be clear and precise to the extent that it is possible for people to establish the extent of their rights and obligations.[907] This ties in with the requirement of prospective operation of legislation and leads to the fourth quality of a law of general application, namely the accessibility or public availability of

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903 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*: paras 85-86.

904 See also *President of the Republic of South Africa and Another v Hugo*: para 102.

905 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Divisions, and Others*: para 57.

906 *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs*: para 47. The Court stated the position as follows: "It is an important principle of the rule of law that rules be stated in a clear and accessible manner … It is because of this principle that s 36 [of the Constitution] requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."

907 *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 4 SA 294 (CC); 2002 5 BCLR 433 (CC): para 44. The Court stated that "[t]he prohibition is so widely phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition." This was found in relation to a prohibition against broadcasting material which is likely to prejudice relations between sections of the population in clause 2(a) of the Code of Conduct for Broadcasting Services (Schedule 1 to the Independent Broadcasting Authority Act 153 of 1993).

laws.[908] In *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* the Court stated that it "is an important principle of the rule of law that rules be stated in a clear and accessible manner".[909]

The above four-legged test for a law of general application will be satisfied by most legislation,[910] regulations,[911] subordinate legislation other than regulations,[912] municipal by-laws, common law rules,[913] customary law rules,[914] court rules[915] and international conventions.[916] Woolman and Botha[917] reiterate that the issue of whether mere norms and standards, directives or guidelines issued by government agencies or statutory bodies qualify as laws of general application remains unclear. However, when considering that the requirement merely states that the limitation had to have been made *in terms of* a law of general limitation and standards, directives or guidelines are more often than not issued in terms of existing legislation, it seems moot to further consider this issue.

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908 See also *President of the Republic of South Africa and Another v Hugo*: para 102.

909 *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs*: para 47.

910 *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC); 2005 2 BCLR 150 (CC): para 83 fn 8. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); 2002 7 BCLR 702 (CC): para 61.

911 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 1 SA 745 (CC); 1997 12 BCLR 1655 (CC): para 27. See also Kriegler J in *Du Plessis and Others v De Klerk and Another*: para 136.

912 See reasoning of Mokgoro J in *President of the Republic of South Africa and Another v Hugo*: para 96.

913 *Du Plessis and Others v De Klerk and Another*: paras 44, 136.

914 *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: para 95. See also Kriegler J in *Du Plessis and Others v De Klerk and Another*: para 136.

915 Woolman & Botha 2006 *et seq*:34-53.

916 Cheadle 2007 *et seq*:30-9; Woolman & Botha 2006 *et seq*:34-51 – 34-53; Currie & De Waal 2005: 169.

917 2006 *et seq*:34-53.

4.3.2.2 "Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"

Once it is clear that the infringing act qualifies as a "law of general application", it needs to satisfy the second requirement for a valid limitation of a right in the Bill of Rights, being that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[918] Simply stated, this requirement limits the possible limitations of rights in the Bill of Rights by laying down parameters within which limitations are to be reviewed. This requires a balance between the limitation and the purpose of the limitation.[919] After considering all relevant factors (including the five specifically listed in section 36) any limiting law must be reasonable and justifiable in the specific context of a democratic and open society based on human dignity, equality and freedom. The general (and preferred) approach taken to this inquiry is proportionality. Proportionality has been the Constitutional Court's preferred approach to the limitation analysis from its earliest judgments. In *S v Makwanyane* the position was stated as follows:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) [of the interim Constitution]. The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the

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[918] In *R v Oakes* (at para 67) the Canadian Supreme Court made the following statement on the meaning of the term "justified in a free and democratic society": "A second contextual element of interpretation of s. 1 is provided by the words 'free and democratic society'. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

[919] Rautenbach & Malherbe 2004:319.

> application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."[920]

Despite the fact that *S v Makwanyane* was decided in terms of section 33 of the Interim Constitution, the case had a fundamental impact on the formulation of the limitation clause in section 36 of the Final Constitution,[921] and proportionality remains the basis for the Constitutional Court's limitation jurisprudence.[922] The limitation clause in section 36 of the Constitution is based on the limitation clause section 1 of the Canadian Charter. Although the Constitutional Court initially was a little apprehensive about following the Canadian approach to proportionality,[923] it now firmly recognises its importance.[924] It is therefore instructive to consider the way in which proportionality is

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920 *S v Makwanyane*: para 104 (footnotes omitted).

921 Woolman & Botha 2006 *et seq*:34-69; Currie & De Waal 2005:177; Blaauw-Wolf 1999:200.

922 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: paras 33, 34; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 3 SA 1 (CC); 2000 5 BCLR 491 (CC): paras 32, 33; *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC); 1995 12 BCLR 1579 (CC): para 18 (decided in terms of IC section 33); *Magajane v Chairperson, North West Gambling Board and Others* 2006 5 SA 250 (CC); 2006 10 BCLR 1133 (CC): para 61; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC); 1998 7 BCLR 779 (CC): paras 86-88.

923 See *S v Zuma*: para 35: "The Canadian Courts have evolved certain criteria, in applying this section, such as the existence of substantial and pressing public needs which are met by the impugned statute. There, if the statutory violation is to be justified, it must also pass a 'proportionality' test, which the Courts dissect into several components. See, for example, *R v Chaulk* (1991) 1 CRR (2d) 1. These criteria may well be of assistance to our Courts in cases where a delicate balancing of individual rights against social interests is required. But s 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."

924 *S v Makwanyane*: para 104 fn 130: "A proportionality test is applied to the limitation of fundamental rights by the Canadian courts, the German Federal Constitutional Court and the European Court of Human Rights. Although the approach of these Courts to proportionality is not identical, all recognise that proportionality is an essential requirement of any legitimate limitation of an

applied by the Canadian Courts when discussing the South African limitation jurisprudence.

4.3.2.2.1 The five listed factors

(i) Section 36(1)(a) — the nature of the right

The nature of the right does not refer to the importance of the right. It seems that Currie and De Waal confuse these two concepts.[925] Although it is clear from the Constitutional Court's judgement in *S v Makwanyane* that it indeed considered the importance of the right as one of the factors in its proportionality considerations, this had not translated in a factor included in the text of section 36. In *S v Makwanyane* Chaskalson P stated the following:

> "In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[926]

The commencement of the final Constitution in 1996, and the non-inclusion of the importance of the right in section 36, has not resulted in its being excluded from the list of factors considered by the Court.[927] The Constitutional Court explained the continued

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entrenched right. Proportionality is also inherent in the different levels of scrutiny applied by United States courts to governmental action."

925 See Currie & De Waal 2005:178-179.

926 *S v Makwanyane*: para 104.

927 *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs*: para 40: "Section 36(1) of the Constitution provides that a limitation of a constitutional right may be justified. It will be justified only if the Court concludes that the limitation of the right, *considering the nature and importance of the right* and extent of its limitation on the one hand, is justified in relation to the purpose, importance and effect of the provision

consideration of the importance of the right in the following passage from *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*:

> "In *Makwanyane* the relevant considerations in the balancing process were stated to include '… the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.' The relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paras *(a)-(e)* thereof. In my view, this does not in any material respect alter the approach expounded in *Makwanyane*, save that para *(e)* requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose (of the limitation)'. Although s 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation."[928]

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causing the limitation, taking into account the availability of less restrictive means to achieve the purpose of the provision, on the other." (own emphasis); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); 2000 10 BCLR 1051 (CC): para 31: "[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the *nature and importance of the right* and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on undertaking the limitations analysis in respect of religious practices, the standard to be applied is the nuanced and contextual one required by s 36 and not the rigid one of strict scrutiny." (own emphasis); *Ex Parte Minister of Safety and Security and Others: In re S v Walter and Another*: paras 26-27, see especially para 27: "In essence this requires a weighing-up of the *nature and importance* of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment." (own emphasis) This was quoted with approval by Moseneke J in *S v Thebus and Another*: para 29; *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC); 2004 7 BCLR 775 (CC): para 35: "This Court has held that s 36 requires a proportionality analysis. The *nature and importance* of the right must be measured against the purpose and extent of the limitation taking into account whether a less severe limitation might have been sufficient adequately to serve the government's purpose." (own emphasis); *S v Manamela and Another (Director-General of Justice Intervening)*: para 65: "The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the *nature and importance* of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose." (own emphasis). See also *Magajane v Chairperson, North West Gambling Board and Others*: para 62: "The first factor, the nature of the right, raises at the outset the *importance of the right* the state seeks to limit." (own emphasis); *De Lange v Smuts NO and Others*: para 88.

928 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 34.

When consideration is given to the importance of a right, this implies the existence of a hierarchy of rights within the Bill of Rights and that, therefore, some rights are more important than others in an open and democratic society based on human dignity, equality and freedom.[929] The more important the right, the more difficult it would be to justify a limitation of that right. This means that different levels of scrutiny are applied in the limitation analysis. Although the existence of such a hierarchy has been expressly rejected by the Constitutional Court,[930] the debate has seemingly not abated and academics are still very critical of whether or not the importance of a right should be considered.

Cheadle calls for greater weight to be attributed to Canadian limitation jurisprudence, especially since the limitation clause in section 36 is indeed based on its Canadian counterpart. Essentially, the Canadian proportionality analysis assesses the means used to limit the right and does not involve an assessment of the "balance between the importance of the right and the purpose of the limitation."[931]

Woolman and Botha argue that although there is no hierarchy of rights as such, the Court created a flexible approach to the overall proportionality inquiry by considering in each instance the importance of the right in an open and democratic society based on human dignity, equality and freedom. The more important the right is deemed to be in

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929 This would be tantamount to implementing the theory of "balancing of interests" or *Güterabwägung* from the German limitation jurisprudence whereby rights and values are abstractly and concretely ranked. This theory has not found support in the German limitation jurisprudence, not by the Federal Constitutional Court or eminent academics. See Blaauw-Wolf 1999:197-199.

930 *Christian Education South Africa v Minister of Education*: paras 29-31; *Prince v President, Cape Law Society, and Others* 2002 2 SA 794 (CC); 2002 3 BCLR 231 (CC): para 128. *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 6 SA 329 (SCA); 2004 11 BCLR 1182 (SCA): paras 40-41, quoting from *Khumalo and Others v Holomisa*: paras 24-28; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another*: para 84; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SA 523 (CC); 2007 2 BCLR 167 (CC): paras 55, 91, 125, 128; *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC); 2007 7 BCLR 751 (CC): para 49; *S v Mamabolo (E TV and Others Intervening)* 2001 3 SA 409 (CC); 2001 5 BCLR 449 (CC): para 41; *Van Zyl and Another v Jonathan Ball Publishers (Pty) Ltd and Others* 1999 4 SA 571 (W): 591-592; *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T): 469. See also Woolman & Botha 2006 *et seq*:34-71.

931 Cheadle 2007 *et seq*:30-11 with reference to *R v Oakes*.

such a society, the more compelling the justification of the limitation needs to be.[932] This would seem to coincide with what has been happening in practice, where life and human dignity (and closely related rights, for example, protection against punishments that are cruel, inhuman or degrading) have been accorded a central role in the society envisioned by the Constitution.[933] It would take an undeniably important justification to justify any infringement of these rights.

In an instance where two rights are competing, a hierarchy of rights will give rise to a situation where one right will always have to yield to a right with a higher hierarchical position. This is tantamount to adopting a review based on different levels of scrutiny as found in the United States. It lacks the essential characteristic of proportionality analysis where, in considering the context and relevant factors, the ultimate objective is to achieve a balance between the competing rights on a case-by-case basis,[934] having due regard for the interconnected and interdependent nature of rights.[935]

While Cheadle makes a compelling argument against the consideration of the importance of the right, it cannot be disputed that the list of factors in section 36(1) are by no means a closed list. Besides the textual proof against such a finding,[936] the Constitutional Court has also stressed the fact that the five listed factors are by no means

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932 Woolman & Botha 2006 *et seq*:34-71; Woolman 1997:110.

933 *S v Makwanyane*: para 144; *S v Williams and Others* 1995 3 SA 632 (CC); 1995 7 BCLR 861 (CC): para 76; *Ex parte Minister of Safety and Security and Others: In re: S v Walters & Another*: para 28; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*: para 58; *Makinana and Others v Minister of Home Affairs and Another; Keelty and Another v Minister of Home Affairs and Another* 2001 6 BCLR 581 (C): 606; *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: para 71.

934 *S v Manamela and Another (Director-General of Justice Intervening)*: paras 32, 33; *Magajane v Chairperson, North West Gambling Board and Others*: para 62.

935 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 3 SA 617 (CC); 1996 5 BCLR 609 (CC): para 27; *Government of the Republic of South Africa and Others v Grootboom and Others*: para 23. Emphasis was also placed on the interconnectedness of rights in *Nakin v MEC, Department of Education, Eastern Cape, and Another*: para 36; *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs*: para 42. Iles 2007:79.

936 Section 36(1) expressly provides that the limitation analysis should "[take] into account *all relevant factors*, including …" (own emphasis).

a *numerus clausus*.[937] Other rights found to be of central importance in an open and democratic society are the right to equality,[938] freedom of religion,[939] freedom of expression,[940] the right to vote,[941] the right to adequate housing,[942] the right of access to court,[943] and the right to be presumed innocent.[944] The Court approaches the limitation analysis by considering the value of the right in a democratic and open society when dealing with the nature of a right (the first listed factor) as one of the factors involved in determining the proportionality of a limitation.

Although the first stage of the limitation analysis enjoins the Court to study the nature and content of the right and to determine whether or not there had in fact been a

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937 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Divisions, and Others*: para 56; *Prince v President, Cape Law Society, and Others*: para 45; *S v Manamela and Another (Director-General of Justice Intervening)*: paras 32, 33; *Magajane v Chairperson, North West Gambling Board and Others*: para 62.

938 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*: para 58; *Moseneke and Others v The Master and Another*: paras 22-23; *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 6 SA 642 (CC); 2002 11 BCLR 1117 (CC): para 97; *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*: para 71.

939 *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs*: para 89; *Christian Education South Africa v Minister of Education*: para 36.

940 *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC); 1999 6 BCLR 615 (CC): para 7; *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: paras 26-27; *S v Mamabolo (E TV and Others Intervening)*: para 37; *Islamic Unity Convention v Independent Broadcasting Authority and Others*: paras 26-28; *Khumalo and Others v Holomisa*: para 21; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 3 SA 345 (CC); 2003 4 BCLR 357 (CC): para 23; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*: para 59; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC); 2005 8 BCLR 743 (CC): paras 45-46.

941 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*: para 47.

942 *Government of the Republic of South Africa and Others v Grootboom and Others*: para 83; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC); 2005 1 BCLR 78 (CC): para 39.

943 *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC); 1999 12 BCLR 1420 (CC): para 22.

944 *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC); 1996 3 BCLR 293 (CC): para 19; *S v Mello and Another* 1998 3 SA 712 (CC); 1998 7 BCLR 908 (CC): para 10; *S v Manamela and Another (Director-General of Justice Intervening)*: para 40.

limitation of that right, the nature of the right is again listed as a factor to be considered as part of the proportionality analysis. According to Cheadle and Iles, this should be seen as an attempt to determine the limitability of the right.[945] The question could be asked as to whether there is a possible distinction between a difference in limitability and different levels of scrutiny. Once again it should be stressed that no right is absolute, but it would seem that some rights are less limitable than others, such as the right not to be subjected to slavery, servitude or forced labour[946] or the right not to be tortured or treated or punished in a cruel, inhuman or degrading way.[947]

This factor also calls on the Court to consider whether the positive or negative aspect of the right under consideration is being limited.[948] According to Cheadle, this is important because "it illustrates the manner in which different contexts illuminate a different mix of values within a right."[949] Woolman and Botha regard the nature of the right as a factor that belongs solely to the first stage of the limitation inquiry.[950]

(ii) Section 36(1)(b) — the importance of the purpose of the limitation

This factor concerns two aspects, namely the purpose of the limitation and the importance thereof, and both of these have to be considered within the context of the constitutional values, that is, the value system underlying an open and democratic society based on human dignity, equality and freedom.

Identifying the objective of the legislation requires the Court to consider, among other things, the overall purpose of the legislation, the historical developments of the

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945 Cheadle 2007 *et seq*:30-13; Iles 2007:80.

946 Constitution of the Republic of South Africa: section 13.

947 Ibid, section 12(1)(d) and (e).

948 Cheadle 2007 *et seq*:30-14 referring to *Edmonton Journal v Alberta Attorney-General* [1989] 2 S.C.R. 1326. Iles 2007:80.

949 Cheadle 2007 *et seq*:30-14.

950 Woolman & Botha 2006 *et seq*:34-70. See also Woolman 1997:108.

rules and the particular situation it sets out to address, as well as the level of generality with which the purpose of the legislation was worded.[951]

The Constitution does not in section 36[952] specify any purposes for which rights may be limited or how important a purpose for limiting a right must be. When appraising the purpose of the infringing legislation within the context of constitutional values, it stands to be established that at a minimum the legislative objective agrees with the values and principles of an open and democratic society based on human dignity, equality and freedom.[953] An objective that the Constitutional Court has found to be in conflict with these values is, for example, retribution (but prevention is an agreeable object).[954] At this stage of the inquiry it can be stated that this factor is a threshold requirement for the limitation analysis, due to the fact that if the objective is found to not justify the infringement it caused, the limitation inquiry ceases and the limitation fails the justifiability test.[955]

While some objectives are clearly in disagreement with the constitutional values,[956] some objectives are designed to expressly reaffirm or reinforce constitutional values. These constitutional values include openness, democracy, human dignity, equality,

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951 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 115; Woolman & Botha 2006 *et seq*:34-74.

952 Although a specific purpose could be specified in special limitations included in particular rights provisions.

953 Cheadle 2007 *et seq*:30-14; Woolman & Botha 2006 *et seq*:34-74.

954 *S v Makwanyane*: paras 128-131. Another rejected objective is found in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 37: "Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose has been suggested. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose."

955 Woolman 1997:109, 110.

956 A third type of legislative objective which will not be elaborated on in detail in this study involves legislative objectives which are not directly founded in constitutional values but which are also not in conflict with such values. The Constitutional Court has found legislative objectives of sufficient importance to justify limitations which are however not specifically based in these values as being, for example, crime prevention (*S v Manamela and Another (Director-General of Justice Intervening)*: paras 41-42, 88; *Ex Parte Minister of Safety and Security and Others: In re S v Walter and Another*: para 44); recovering an insolvent company's assets (*Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 126); *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC); 2006 6 BCLR 682 (CC): para 63: "[T]he pursuit of a legitimate government purpose is central to a limitation analysis.")

freedom and social justice.[957] The Constitutional Court has dealt with a number of these objectives.[958] With regard to the objectives of the enabling legislation concerning broad-based black economic empowerment, general affirmative action programmes and preferential procurement legislation, it can be concluded that the creation of a more equal society based on dignity and freedom and serving to create a more socially and economically just community, can be deemed to be a legislative purpose which is expressly designed to reinforce constitutional values.

If a legislative objective is not squarely grounded in a constitutional right, and it is clear that the objective is not in conflict with constitutional values, the objective should serve a substantial state interest.[959] This is clear from the decision of the Constitutional Court in *Magajane v Chairperson, North West Gambling Board and Others* where it was stated as follows:

> "The second factor, the importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a *substantial state interest* requiring the limitation. It is not surprising that this factor is crucial in the United States, as the first necessary condition in the three-pronged test, and in Canada, as a key aspect of the balancing inquiry. Regulatory statutes aim at protecting the public health, safety and general welfare. The court must carefully review the public interest served by the statutory provision and determine the weight that this purpose should carry in the proportionality review."[960]

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957 Constitution of the Republic of South Africa: Preamble, section 1. Woolman & Botha 2006 *et seq*:34-74.

958 *Islamic Unity Convention v Independent Broadcasting Authority and Others*: para 45; *Christian Education South Africa v Minister of Education*: paras 39-50; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Divisions, and Others*: paras 61-67.

959 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 126: " … a pressing or compelling State interest …"

960 *Magajane v Chairperson, North West Gambling Board and Others*: para 65.

(iii) Section 36(1)(c) — the nature and extent of the limitation

This factor is central to the proportionality analysis.[961] Proportionality will require that the more invasive the limitation of the right, the greater the level of justification required in rationalising the limitation.

The Constitutional Court has regarded different factors in their evaluation of the nature and extent of a limitation.[962] The first factor is identified as whether or not the limitation affects the underlying core values of the right or rights concerned.[963] Furthermore the Court considers the severity of the impact of the infringement on those adversely affected by it[964] and, in certain instances, the social position of those affected.[965] When assessing the severity of the impact of the infringement, the Court also regards the permanency of the limitation and whether or not the limitation results in a complete or partial denial of the rights concerned.[966] Although largely overlapping with the factor listed in section 36(1)(e) — the availability of less restrictive measures — the Court has also on occasion enquired whether or not the limiting provision is narrowly tailored to achieve its objective.[967]

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961 *S v Manamela and Another (Director-General of Justice Intervening)*: para 69. Cheadle (2007 *et seq*:30-15) and Iles (2007:83) argue that this factor should only deal with the nature and extent of the limitation of the right or rights and not with the impact on the rights holder.

962 See also the discussion in Woolman & Botha 2006 *et seq*:34-79 – 34-84.

963 *De Lange v Smuts NO and Others*: para 89; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Divisions, and Others*: para 59.

964 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: paras 23, 36; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*: para 39; *S v Bhulwana; S v Gwadiso*: para 21; *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC); 1996 3 BCLR 293 (CC): para 20; *S v Manamela and Another (Director-General of Justice Intervening)*: para 40 (for the majority); *Chief Lesapo v North West Agricultural Bank and Another*: para 25.

965 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: para 25.

966 *S v Makwanyane*: paras 135, 143; *Ex Parte Minister of Safety and Security and Others: In re S v Walter and Another*: paras 30-31; *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 1 SA 1109 (CC); 2001 1 BCLR 1 (CC): paras 38, 58; *Chief Lesapo v North West Agricultural Bank and Another*: para 25; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*: para 146; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: paras 115, 119.

967 Woolman & Botha 2006 *et seq*:34-82. *Magajane v Chairperson, North West Gambling Board and Others*: paras 66, 71; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-*

(iv) Section 36(1)(d) — the relationship between the limitation and its purpose

Regarding the relationship between the limitation and its purpose, it should be established that there is a rational connection between the purpose of the limitation and the means employed to achieve that relationship, or in other words, the means must be reasonably capable of achieving the objective of the legislation in question.[968] Irrespective of the nature (or importance) of the right or the importance of the objective of the limitation, the absence of a rational connection between the objective and the means employed indicates that the limitation cannot be justified in an open and democratic society.[969]

When considering this factor, the issue of proportionality need not be overemphasised. The formulation of the factor is indeed wide enough to encompass an element of proportionality, but it should then also be clear that there will be a fair amount of overlapping between this factor and the less restrictive means factor.

(v) Section 36(1)(e) — less restrictive means

This is the factor which would result in most limitations either failing or succeeding and is probably most strictly applied by the Court.[970] In German constitutional theory,

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integration of Offenders (NICRO) and Others: para 67; *S v Mamabolo (E TV and Others Intervening)*: para 48; *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another*: para 54; *Islamic Unity Convention v Independent Broadcasting Authority and Others*: para 44; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: paras 115, 116.

968 Woolman & Botha 2006 *et seq*:34-84; Iles 2007:83; Cheadle 2007 *et seq*:30-15; Woolman 1997: 110.

969 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*: para 126: " … it is clearly reasonable (in the sense of there being a rational connection between mischief and remedy) …"; *S v Bhulwana; S v Gwadiso*: paras 20, 22; *S v Mbatha; S v Prinsloo*: paras 21-22; *South African National Defence Union v Minister of Defence and Another*: para 36; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*: para 56.

970 Currrie & De Waal 2005:184; Gardbaum 2007:842.

this element is referred to as proportionality in the narrow sense.[971] It is clear that there should not be a disproportionate relationship between the benefits achieved and the infringement caused by the achievement of said objectives. Therefore, where obviously less intrusive methods of achieving the same objective exist, it would be hard to reach a finding whereby the limitation is deemed as reasonable and justifiable in an open and democratic society. The Court has to make a selection between different policy choices.[972] Although this factor raises questions of the separation of powers between the judiciary and the legislature and judicial activism, it is clear that the Court's approach to this is to allow some level of deference to the legislature's choice of method. On the other hand, the Court has not been overly deferential to the legislature, and the accepted approach to the issue was formulated by O'Regan J and Cameron AJ[973] as follows:

> "It is clear that the question whether there are less restrictive means to achieve the government's purpose is an important part of the limitation analysis. However, it is as important to realise that this is only one of the considerations relevant to that analysis. It cannot be the only consideration. It will often be possible for a Court to conceive of less restrictive means, as Blackmun J has tellingly observed: 'And, for me, "least drastic means" is a slippery slope. ... A Judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.' (quoting from *Illinois State Board of Elections v Socialist Workers Party et al* 440 US 173 (1979) at 188 – 9). The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly

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971 Blaauw-Wolf 1999:194-195.

972 Iles 2007:84.

973 Although theirs was the dissenting opinion, the majority approved of this approach. See *S v Manamela and Another (Director-General of Justice Intervening)*: para 34: "These themes are eloquently dealt with in the judgment of O'Regan J and Cameron AJ (the minority judgment). We agree with their approach and also agree that there is a pressing social need for legislation to address the evil they identify. Section 36, however, does not permit a sledgehammer to be used to crack a nut. Nor does it allow for means that are legitimate for one purpose to be used for another purpose where their employment would not be legitimate. The duty of a Court is to decide whether or not the Legislature has overreached itself in responding, as it must, to matters of great social concern. As the minority judgment points out, when giving appropriate effect to the factor of 'less restrictive means', the Court must not limit the range of legitimate legislative choice in a specific area. The minority judgment also states that such legislative choice is influenced by considerations of cost, implementation, priorities of social demands, and the need to reconcile conflicting interests. These are manifestly sensible considerations that do not provoke disagreement. Our difference with the minority judgment is not over how the principles should be articulated, but rather as to how they should be applied in the circumstances of this case."

> narrowing the range of policy choices available to the Legislature in a specific area. The Legislature, when it chooses a particular provision, does so not only with regard to constitutional rights, but also in the light of concerns relating to cost, practical implementation, the prioritisation of certain social demands and needs and the need to reconcile conflicting interests. The Constitution entrusts the task of legislation to the Legislature because it is the appropriate institution to make these difficult policy choices. When a Court seeks to attribute weight to the factor of 'less restrictive means' it should take care to avoid a result that annihilates the range of choice available to the Legislature. In particular, it should take care not to dictate to the Legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution."[974]

The Constitutional Court's answer to this pressing issue of judicial deference can best be conveyed by the following dictum of Kriegler J in *S v Mamabolo (E TV and Others Intervening)*:

> "Where s 36(1)*(e)* speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And, in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."[975]

It would be a contradiction in terms to insist on a strict and definitive separation of powers between the legislature and the judiciary while at the same time insisting on applying a value-based, context-sensitive analysis of the reasonableness (or not) of legislative limitations of fundamental rights, based on balancing and proportionality.[976] It would then seem that the Court has attempted to solve this problem by placing the less restrictive means test within the broader balancing application of the five factors of section 36.[977] Woolman[978] argues for a flexible approach in response to the difficulties

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974 *S v Manamela and Another (Director-General of Justice Intervening)*: paras 94-95.

975 *S v Mamabolo (E TV and Others Intervening)*: para 49.

976 Botha 2003b:14 fn 5 quoting from *Prince v President, Cape Law Society, and Others*: para 155: "[L]imitations analysis under s 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights."

977 Woolman & Botha 2006 *et seq*:34-91.

978 Woolman 1994:86.

experienced by the Canadian courts when they adhered strictly to the minimal impartment requirement of the limitation clause in *R v Oakes*. This more flexible approach should "allow the government sufficient freedom to achieve its substantial and pressing goals", while at the same time engaging government to take necessary "cognisance of the manner in which fundamental freedoms may be deleteriously affected by its programmes or actions."[979]

Although the Court does not always separate the different elements of the proportionality analysis, the less restrictive means consideration plays an important part in the proportionality inquiry. In *De Lange v Smuts NO and Others* Ackermann J, for the Court, held as follows:

> "In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."[980]

As part of the proportionality inquiry, the Court has on a number of occasions found a limiting provision unjustifiable, based on the availability of less restrictive means.[981] One of the earliest examples is *S v Makwanyane* where it was found that the objective of deterring crime could be served in a less invasive manner by long prison sentences rather than by imposing the death penalty.[982] Other examples where the Court found that the less restrictive means could have been employed to achieve the objective were *S v Williams and Others* (juvenile whipping); *S v Mbatha; S v Prinsloo* (presumption of guilt when found in possession of arms); *Mistry v Interim Medical and*

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979 Ibid.

980 *De Lange v Smuts NO and Others*: para 88.

981 *Brink v Kitshoff NO*: para 49; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others*: paras 27-28; *Magajane v Chairperson, North West Gambling Board and Others*: paras 90-95; *Makinana and Others v Minister of Home Affairs and Another; Keelty and Another v Minister of Home Affairs and Another*: 607; *Islamic Unity Convention v Independent Broadcasting Authority and Others*: paras 50, 51; *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*: paras 13, 14, 32 (Langa J concurring with the majority on this point); *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: paras 48-63, 91, 93, 97, 108-112; *S v Manamela and Another (Director-General of Justice Intervening)*: para 43; *De Lange v Smuts NO and Others*: para 99.

982 *S v Makwanyane*: paras 123, 128.

Dental Council of South Africa and Others[983] (largely unlimited statutory power of search of inspectors of medicines).

Another way to approach the less restrictive means factor is to consider whether the provision is narrowly tailored in its achievement of the legislative purpose, or whether it is carefully focused and not overly broad.[984] When measures are overly broad and not narrowly tailored, or impose a cost which far outweighs the benefit of the limitation, they cannot be held to be reasonable.[985]

Although the South African approach to limitation analysis has involved an extensive study of the Canadian approach, it does not follow the same sequential steps when adjudicating limitations.[986] The South African Constitutional Court approaches the limitation inquiry as a holistic analysis. Woolman[987] seems to favour a more step-by-step enquiry where almost every factor is considered to be a threshold enquiry (as discussed above), meaning sudden death to the question of the justifiability of the limitation. This is however an attempt to minimise the balancing exercise or the weighing up of the benefits flowing from the limitations and the costs imposed by it.[988] Although valid points of criticism can be levelled against balancing as a tool of judicial analysis,[989] it would be impossible to have a section 36 limitation inquiry, rooted in proportionality and devoid of any type of balancing. This would reduce limitation analysis to nothing more than an inquiry which is mechanistic and rigid in nature.

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983 *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 4 SA 1127 (CC); 1998 7 BCLR 880 (CC).

984 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*: para 62; *S v Mamabolo (E TV and Others Intervening)*: para 49; *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*: paras 13, 14, 32; *S v Manamela and Another (Director-General of Justice Intervening)*: para 43.

985 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*: para 14, per Kriegler J for the majority; *S v Manamela and Another (Director-General of Justice Intervening)*: para 43.

986 Stone Sweet & Mathews 2008:129.

987 Woolman 1997:109; Woolman 1994:89 fn 80.

988 Botha 2003b:23.

989 Ibid, at 21-23.

In conclusion it could be stated that it is probably the level of deference to the legislature which sets apart the Canadian and South African proportionality analyses. Where the Canadian Supreme Court shows great deference to the legislature's judgement on policy choices, the South African Constitutional Court is more comfortable with finding that legislative measures are not constitutionally valid limitations of rights.

In the German limitation jurisprudence this element of the proportionality analysis is referred to as proportionality in the narrow sense (*Verhältnismäßigkeit*), and means that the restriction should be proportional to the importance and meaning of the fundamental right.[990] It has been the object of much the same criticism as is the case in South Africa. According to Schlink[991] the choice between different policy measures is solely the prerogative of the executive authority. Choosing the most appropriate means to achieve the legislative objective as a function of balancing the individual's rights with the broader public interest is dependent on political considerations. It is essentially incapable of being objectively clarified in a methodological and theoretical sense. For this reason Schlink prefers to categorise the choice of the least restrictive means as part of the enquiry into the necessity of the limitation of the fundamental rights.

4.3.3 Internal limitations in specific constitutional provisions

Section 7(3) of the Constitution provides that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." Section 36, or the general limitation clause, is discussed above. This leaves limitations elsewhere in the Bill of Rights.

Different types of limitations can be distinguished here. Firstly, limitations which can be termed definitional limitations, internal modifiers, immanent limits or internal qualifications are identifiable. These definitional limitations serve to immediately delineate the type of activity protected by the right concerned. Thus, in the two-stage

990 Blaauw-Wolf 1999:194-5.

991 Schlink "Freiheit durch Eingriffsabwehr — Rekonstruktion der klassischen Grundrechtsfunktion" 1984 *EuGRZ* 457 at 462, referred to by Blaauw-Wolf 1999:196.

limitation analysis described above, these limitations will be relevant in the first part of the analysis: where the scope of the right in question is determined. In a methodological sense, this is a formal requirement for the limitation of a right which must be met before any consideration of the proportionality of the limiting provision.[992] Rautenbach[993] argues that this type of limitation "equates the 'limitation of a right' with 'the meaning of a right'." These limitations are designed to demarcate the boundaries of a right with reference to the protected conduct or interest,[994] the conduct or interest *not* protected,[995] the institutions or persons bound by the right,[996] their respective duties,[997] the categories of persons protected[998] or the geographical area[999] within which the rights stand to be exercised.[1000] The inclusion of an internal limitation provision carries implications for the proof of the limitation. The burden of proving that the alleged conduct or limiting legislation impinged on the protected scope of the right lies with the applicant (alleging the infringement).[1001] On the other hand, as shall be seen below, when identifying a phrase or term contained in a rights provision as a special limitation clause, the burden of

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992 Blaauw-Wolf 1999:212.

993 Rautenbach 2001:618.

994 See the Constitution of the Republic of South Africa: section 10 (dignity); section 11 (life); section 12 (freedom and security of person); section 14 (privacy); section 15 (conscience, religion and belief); section 16 (expression); section 17 (to assemble, to demonstrate, to picket and to present petitions); section 18 (association); section 19(1) and 19(2) (political choice and to vote).

995 Ibid, section 16(2) (the right to freedom of expression does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm).

996 Ibid, section 8(1) and (2).

997 Ibid, section 13 (not to be subjected to slavery, servitude, forced labour); section 20 (not to be deprived of citizenship); section 24 (to have the environment protected); section 25(1) (not to be deprived of property); sections 26(2) and 27(1) (to reasonable legislative and other measure to realise the right to access to housing, health care, food, water, and social security); section 33(1) (administrative action which is lawful, reasonable and procedurally fair).

998 Ibid, sections 19, 20, 21, 22: citizens; section 28: children; section 31: workers and employers; section 35: arrested, detained and accused persons.

999 Ibid, section 21(3): "in the Republic".

1000 Rautenbach 2001:617-618.

1001 Woolman & Botha 2006 *et seq*:34-31.

justification shifts to the respondent who seeks to uphold the legislative provision under review.[1002]

4.3.4 Special limitation clauses and the right to equality in section 9

In certain provisions in the Bill of Rights there are words or terms included which deal with details regarding the institution which may impose limitations,[1003] the procedure applicable to limitations,[1004] the purpose for which limitations may be imposed, the relation between the limitation and its purpose,[1005] or a description of the circumstances under which limitations are permissible.[1006] These can be termed special limitation clauses.[1007] These special limitation clauses are, as was the case with the general limitation clause in section 36, merely frameworks for analysis when determining the constitutionality of limitations. Special limitation provisions are not dealt with when determining the protected scope of the right — as part of the first phase of the limitation inquiry.[1008] Special limitation clauses are contained in the specific provisions in respect of which they operate and serve as qualifiers. It may appear that the inclusion of a special limitation provision operates to shift the burden of proof in the first stage of the limitation analysis to the state or other responding party, to provide proof of reasonableness or fairness. This is, however, not supported by case law.[1009]

1002 This is however not always as clear when considering the case law in this respect. For example, consider sections 15(3)(b), 30 and 31: it is not clear whether the burden to prove inconsistency in these sections shifts to the state. The same can be said of the burden to prove that the state has taken reasonable steps to progressively realise the rights contained in sections 26, 27 and 29. See also Woolman & Botha 2006 *et seq*:34-33.

1003 See the Constitution of the Republic of South Africa: section 23(5) and 23(6); section 32(2); section 33(3).

1004 Ibid, section 23(5).

1005 For example, “reasonableness”, “justifiability”, “non-arbitrariness”, “rationality”.

1006 See the Constitution of the Republic of South Africa: section 37(1)(a).

1007 Rautenbach 2001:619; Rautenbach & Malherbe 2004:325-326.

1008 Although it has been argued that special limitations actually introduces an intermediate stage of analysis. De Vos 1997:93; Pieterse 2003:43.

1009 Woolman & Botha 2006 *et seq*:34-33.

With regard to the operation of special limitation clauses, it should be pointed out that the reasoning of Rautenbach is favoured in this discussion and will form the basis thereof. At the outset it is accepted that in principle the general limitation clause in section 36 applies to all provisions in the Bill of Rights.[1010] Although special limitation provisions deal with matters similar to the general limitation clause, these are not exactly the same, and set the stage for an intricate relationship between the operation of the special and general limitation clauses. The main question that needs to be answered is the extent to which special limitation clauses obviate the need to refer to the general limitation clause.

Specific limitation clauses are often used to qualify or describe more fully certain elements of the limitation clauses.[1011] Generally, the purpose for which this is done determines the relationship between the general and special limitation clauses.[1012] The purpose for including a special limitation clause in a particular rights provision is to qualify certain elements of the general limitation clause in relation to the specific right where the special limitation was included. When the special limitation clause addresses only some of the justification elements of the general limitation clause, then any unaddressed aspects of the general limitation clause will still be relevant to the inquiry. The special limitation clause could have been included for a variety of purposes. It could be that the special limitation clause sets more rigid requirements than those set out in the general limitation clause.[1013] On the other hand, the special limitation clause could set less rigid requirements for the limitation of rights than the general limitation clause, the clearest example of which would be the provisions in the Bill of Rights dealing with the limitation of rights during states of emergency.[1014] However, no special limitation clause can exempt a limitation provision from judicial scrutiny. Special limitation clauses may also act so as to clear up possible uncertainty regarding some of the aspects of the general

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1010 Rautenbach 2001:622; Rautenbach & Malherbe 2004:326.

1011 Rautenbach & Malherbe 2004:326.

1012 Ibid.

1013 Rautenbach 2001:622; Rautenbach & Malherbe 2004:326. See the Constitution of the Republic of South Africa: section 35(1) and 35(2).

1014 Rautenbach 2001:623; Rautenbach & Malherbe 2004:326. See the Constitution of the Republic of South Africa: section 37.

limitation clause pertaining to the specific rights provision.[1015] In this respect section 9(2) of the Constitution acts to identify the elimination of existing inequalities as a specific purpose for which a certain degree of departure from the equality principle is justified.[1016]

A discussion of some of the special limitation clauses in sections of the Constitution follows.

Section 9 of the Constitution can be labelled as containing a specific limitation clause, and it would seem, even more than one. Section 9(1) provides the guarantee that everyone is equal before the law and that everyone has the right to equal protection and benefit of the law. Rautenbach[1017] uses this subsection to illustrate a special limitation clause not contained in the text of the provision, but inserted in the interpretation given to the text by the courts. A threshold test was introduced in *Prinsloo v Van der Linde and Another* where the Constitutional Court held that it is "necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'."[1018] The test that the Court devised was grounded on the existence of a rational relationship between the differentiation under review and the "governmental purpose which is proffered to validate it."[1019] If the rational relationship is absent, the differentiation fails section 9(1) and no further enquiry into the possibility of it also constituting unfair discrimination or entertaining any analysis under section 36 is necessary. Rautenbach argues that although the rational relationship test contains certain elements of the general limitation enquiry, it in itself fails to take account of instances where the nature and extent of the limitation would be of a more serious nature. Another problematic issue concerning this rational relationship test is that it shifts the burden of

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1015 Rautenbach 2001:623. See for example, Constitution of the Republic of South Africa: sections 32(2), 33(3)(c), 25(2), 25(4)(a), 23(5), 23(6).

1016 Rautenbach & Malherbe 2004:327.

1017 Rautenbach 2001:624-626.

1018 *Prinsloo v Van der Linde and Another*: para 17.

1019 Ibid, para 26.

proof to the complainant regarding issues that would usually form part of the aspects to be established by the party seeking to justify the said limitation.

Woolman and Botha also argue that special limitation clauses import limitation clause considerations into the first stage of the limitation enquiry, in other words, justification considerations now form part of the determination of the scope or content of the right.[1020] One of the most recognisable special limitation clauses is the test for unfair discrimination as originally formulated in *Harksen v Lane NO and Others*. The unfairness analysis in terms of section 9(3) requires that the Court take into account the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, the extent to which the rights and interests of the complainants were affected, and the nature of the provision or power and the purpose sought to be achieved by it.[1021] Ordinarily, when establishing whether or not the dignity of the complainants has been impaired, or whether they have suffered comparably serious consequences, the position of complainants in society and the specific way in which they were affected are essential. This is representative of the considerations relevant in section 36(1)(c), namely the nature and extent of the limitation, but is also of concern when determining the scope of the right in the first stage of the limitation analysis. The purpose sought to be achieved by the unequal treatment and the nature of the power that has been exercised (as this could point to the availability of less restrictive measures) are purely issues for the limitation analysis. They do not seem to fit into the objective determination of the effect or potential impact of the discriminatory treatment, and add no substance to the enquiry into the impairment of the dignity of the complainants,[1022] this being the central question when determining the unfairness of unequal treatment.[1023]

1020 Woolman & Botha 2006 *et seq*:34-31.

1021 *Harksen v Lane NO and Others*: para 52.

1022 Rautenbach 2001:627.

1023 *President of the Republic of South Africa and Another v Hugo*: para 43; *Harksen v Lane NO and Others*: para 51: "The nature of the unfairness contemplated by the provisions of s 8 [Interim Constitution] was considered in paras [41] and [43] of the majority judgment in the *Hugo* case. … In para [41] dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner. … It is made clear in para [43] of *Hugo* that this stage of the enquiry focuses primarily on

It has been argued that due to the fact that the unfairness analysis under section 9(3) is "virtually identical to the considerations raised to demonstrate reasonableness and justifiability under FC s 36" there will not be a need to progress any further than the findings under the section 9 enquiry.[1024] Frankly, although the Court pays due regard to the factors listed in section 36,[1025] the Constitutional Court has yet to make a finding to the effect that unfair discrimination can be justified in terms of section 36, and it is virtually possible to state that the Court's analysis of unfairness brings the enquiry to an end.[1026] Moreover, it would seem self-contradictory to come to a conclusion that discrimination which is unfair due to the fact that it infringes the dignity of a person by, for example, differentiating on grounds such as race, could then possibly be deemed justifiable in a society based on dignity, equality and freedom.[1027]

However, regard should be given to the following as further support for the opinion held by Rautenbach that internal limitations usurp only the functions of the general limitation clause which are addressed internally and that any outstanding matters are still dealt with in terms of the general limitation clause. A matter expressly addressed in the general limitation clause is that any right in the Bill of Rights may only be limited in terms of a law of general application. When considering "unfairness" as a special limitation provision in the *locus classicus — Harksen v Lane NO and Others —* no mention is made of one of the two essential elements of the general limitation inquiry, namely the law of general application element (the other element of course being that the limitation must be reasonable and justifiable in an open and democratic society based on

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the experience of the 'victim' of discrimination. In the final analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination."; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*: para 41.

1024 Woolman & Botha 2006 *et seq*:34-34.

1025 *Brink v Kitshoff NO*; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. Kriegler J did draw a distinction between factors to be considered as part of the justification analysis and factors which solely concerns unfairness in his dissenting opinion in *President of the Republic of South Africa and Another v Hugo*: para 77.

1026 The only exception to this statement is the finding by the Cape High Court in *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 2 SA 817 (C); 1999 4 BCLR 440 (C).

1027 See also Currie & De Waal 2005:238; Woolman & Botha 2006 *et seq*:34-35.

human dignity, equality and freedom). In light of which, consideration should be given to the Constitutional Court's treatment of the factors in section 36(1) and the non-applicability thereof when dealing with section 9(3) in *Hoffmann v South African Airways*. In *Hoffmann* the Court found that the Airline's refusal to appoint Hoffman, due to his HIV status, and the company's policy in terms of which this decision was made, did not qualify as a law of general application and therefore could not be considered as a justifiable limitation of the complainant's rights.[1028]

Section 9(2) constitutes further evidence of the difficult relationship that exists between special limitation clauses and the general limitation clause. It also has a complicated and sometimes uneasy relationship with the other subsections of section 9 as a whole. When considering the position of section 9(2) in its relation to section 9 in its totality, it is clear that the relationship between section 9(2) and the rest of the equality guarantee is similar in its complicated character to the relationship between section 15(1) and 15(2) of the Canadian Charter.

The test proposed by the Constitutional Court in *Minister of Finance and Another v Van Heerden* amounts to little more than mere rationality for the establishment of valid affirmative action measures. When applying such a merely formal test to matters of substance, the analysis seems doomed to failure. Mere rationality, to the exclusion of a contextually framed normative enquiry simply fails to convince of its appropriateness in dealing with multilayered and complex issues. Confirmation of this line of thinking is contained in, for example, the dissenting opinion of McLachlin J (as she was then) in *Miron v Trudel*,[1029] where she referred to the "aridity of relying on the formal test of logical relevance as proof of non-discrimination under s. 15(1)".[1030]

Mere rationality cannot possibly contend that in itself it usurps all the considerations included in the definitively contextual, all-encompassing list of factors

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1028 Rautenbach 2001:627.

1029 *Miron v Trudel* [1995] 2 S.C.R. 418; 1995 CarswellOnt 93:489.

1030 See Pretorius (2009:416 fn 105): "This was in response to the so-called 'relevancy test', first articulated by Gonthier J in *Miron* and applied by La Forest J in *Egan v Canada* [1995] 2 SCR 513, which is essentially a test for arbitrariness in so far as it enquires whether a distinction is functionally relevant in terms of the objectives underlying the impugned legislation."

included in an analysis under the general limitation clause in section 36. Outstanding issues, which do not put into question the justifiability of affirmative action measures, must surely be addressed. On the contrary, it serves to reinforce the fact that a well-designed and well-implemented affirmative action programme is one of the strongest possible confirmations of the constitutional transformation of a society based on dignity, equality and freedom.

When considering section 9(2) of the Constitution as a special limitation clause, its purpose could be stated as identifying a specific objective or purpose for which the right to equality may be limited.[1031] As stated above, special limitation provisions can deal with similar matters as those dealt with by the general limitation clause, and are often used to describe matters which are only generally dealt with in section 36 more clearly. In the case of section 9(2) it could possibly be that it seeks to emphasise and give weight to the objective of remedial equality. However, remedial or restitutive equality is but one facet of the concept of substantive equality as subscribed to in the Constitution. As to the clearing up of uncertainty with regard to certain parts of the general limitation clause pertaining to section 9, section 9(2) specifically identifies the elimination of existing inequalities as a purpose for which deviation from the equality principle is allowed. However, the special limitation provision included in section 9(2) only pertains to one element of the general limitation clause, namely, the importance of the purpose of affirmative action measures. Other elements of the general limitation clause should still be relevant to any specific enquiry into the limitation of rights. This is, however, not the approach taken by the Constitutional Court in *Minister of Finance and Another v Van Heerden*.

In *Minister of Finance and Another v Van Heerden*, the Constitutional Court's basic point of departure was that any measure taken in terms of section 9(2) of the Constitution — which complies with the internal requirements for valid affirmative action measures in section 9(2) — does not attract the presumption of unfairness and is therefore exempt from any analysis in terms of section 9(3). Over and above this the Court made no further reference to the applicability of the general limitation clause. The

[1031] Rautenbach 2001:620.

only requirements set out for valid affirmative action measures are whether or not the measures target persons or categories of persons which have previously been disadvantaged by unfair discrimination, whether the measures are designed to protect or advance such persons or categories of persons, and whether or not the measures promote the achievement of equality.

The following statement of Woolman and Botha evidences the complexities of the relationship of section 9(2) with section 36:

> "FC 9(2), the provision for restitutionary measures, is an affirmative defence that carves out of FC 9 space for inegalitarian measures that pursue egalitarian ends. FC 9(2) does not expressly modify FC 9(1) or FC 9(3) or FC 9(4), but it does so just the same. However, FC 9 as a whole, like FC ss 26 and 27, does not fit easily into the two-stage model of fundamental rights analysis."[1032]

Special limitations contained in section 26(2) and 27(2) of the Constitution turn on the reasonableness of state action or measures implemented in order to ensure the progressive realisation of the rights to access to adequate housing, health, food, water and social security. If the Court finds that the state failed in its duty to take reasonable steps to realise these rights, the enquiry stops there and there is no further analysis of the possibility that the state could still have acted reasonably and justifiably in an open and democratic society based on human dignity, equality and freedom.[1033] However, a distinction should be drawn between the state's positive (section 26(2) and 27(2)) and negative obligations (section 26(1) and 27(1)), flowing from the provisions of section 26 and 27. It can be said that the special limitation provision included in section 26 and 27 operates only with respect to the positive duties it instils upon the state. With respect to refraining from infringing upon the rights contained in these provisions, in other words the negative obligations which they pose for the state, there is nothing preventing the Court from immediately proceeding to the section 36 analysis.[1034] This was indeed also the conclusion reached by the Court in *Jaftha v Schoeman and Others; Van Rooyen v*

1032 Woolman & Botha 2006 *et seq*:34-31 and 34-31 fn 2.

1033 See *Government of the Republic of South Africa and Others v Grootboom and Others*; *Minister of Health and Others v Treatment Action Campaign and Others (No 2).*

1034 De Vos 1997:93-94; Pieterse 2003:44.

Stoltz and Others.[1035] With respect to the "reasonableness" special limitation included in sections 26(2) and 27(2), it would seem that despite academic debate over the issue, the consideration of reasonableness with regard to sections 26(2) and 27(2) is the same as the consideration of reasonableness under section 36. Section 36 adds nothing to this analysis and therefore a finding of unreasonableness under section 26(2) or 27(2) means the end of the road for the inquiry. This was mainly the finding of the Constitutional Court in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*.

4.3.5 Other limiting constitutional provisions

Certain constitutional provisions could play a part in defining the limiting constitutional framework for the B-BBEE programme and should therefore be discussed here. Under this section specific reference will be made to the right to freedom of trade, occupation and profession, the right to fair labour practices, and the right to property, and the interaction that exists between these rights and the implementation of the B-BBEE programme. The question that needs to be answered is whether or not some elements of these provisions would be concerned by the implementation of B-BBEE.

4.3.5.1 Freedom of trade, occupation and profession

Section 22 of the Constitution provides that "[e]very citizen[1036] has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or

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1035 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*: paras 31-34.

1036 Currie & De Waal (2005:489-490) argue that although the application of the right is restricted to citizens (interpreted in terms of the South African Citizenship Act 88/1995 it means that the right applies to natural persons only) the nature of occupational freedom would allow juristic persons to depend on the protection afforded by section 22. If not so, a juristic person would be able to rely on the protection afforded by section 22 if such juristic person is able to show that it has a sufficient interest in doing so (in terms of the standing provision (section 38) of the Constitution of the Republic of South Africa). Davis (2003 *et seq*:54-2) states with reference to *City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 2 SA 733 (C); 2000 2 BCLR 130 (C): 747A-C (142) that the use of the phrase "every citizen" excluded juristic bodies from the benefits of this provision. He

profession may be regulated by law". According to Currie and De Waal,[1037] section 22 is a right informed by a number of fundamental values. The first relates to a public interest in full employment and an interest in benefiting from individual skill. The freedom to pursue a livelihood is fundamental to individual autonomy, which in turn informs the exercise of other freedoms and rights. The authors state that "[i]t is therefore more than a right to provide materially for oneself, but is aimed at enabling individuals to live profitable, dignified and fulfilling lives."[1038]

Section 22 is a more limited provision of occupational freedom than its predecessor in the Interim Constitution.[1039] In *JR1013 Investments CC and Others v Minister of Safety and Security and Others*[1040] this was interpreted as being a clear indication that this section was remedial in nature. The formulation was linked to remedial strategies to correct historical disadvantage. The court stated this as follows:

> "We have a history of repression in the choice of a trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions

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does however later in a footnote (54-8 fn 4) concede that the doctrine of objective unconstitutionality would leave the door open for corporate entities to challenge the constitutionality of regulation under section 22. Lagrange (2009 *et seq*:17-6) argues that juristic persons would not be able to invoke the section 22 protection.

1037 Currie & De Waal 2005:491.

1038 Ibid. The authors quote from Currie's translation of the German Pharmacy case (BVerfG 7, 377 (1958) Apotheken–decision) where the Court stated the interrelationship between occupation and other values as follows: "To be sure, the basic right aims at the protection of economically meaningful work, but it views work as a 'vocation'. Work in this sense is seen in terms of its relationship to the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence through which that person simultaneously contributes to the total social product."

1039 Interim Constitution of the Republic of South Africa: section 26 provided as follows:

(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

1040 *JR1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 7 BCLR 925 (E).

> upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs."[1041]

Textual similarities exist between this provision and article 12(1) of the German Constitution[1042] and therefore the interpretation afforded to article 12(1) in German jurisprudence holds substantial comparative value when considering the interpretation of section 22. In its leading decision[1043] of article 12, the German Constitutional Court held that the legislature is allowed to place limitations on or regulate both the choice and the practice of profession or occupation. The Court held that different levels of constitutional scrutiny are applicable when evaluating either regulations limiting choice of profession or limiting the practice of profession. When choice is limited, more stringent scrutiny is applied than when the practice of profession is limited.[1044] Due to textual similarities, the Germans' graduated approach to section 12 will in all likelihood be followed in South Africa.[1045] Therefore, section 22 will require that regulation governing choice of trade be distinguished from regulation impacting on the practice of trade. With regard to freedom to choose an occupation or trade, regulation thereof will be scrutinised in terms of the limitation clause, whereas regulation which pertains to the practice of trade or occupation will need to be rational in order to pass constitutional muster.[1046]

1041 Ibid, at 930. See also Davis 2003 *et seq*:54-3.

1042 Article 12(1) of the German Constitution provides as follows: "All Germans have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law."

1043 BVerfG 7, 377 (1958). Apotheken–decision (Pharmacy case). Translation available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=657 (accessed on 24 March 2010).

1044 Translation para 5. See also Currie & De Waal 2005:488; Davis 2003 *et seq*:54-4.

1045 Davis 2003 *et seq*:54-3; Currie & De Waal 2005:488.

1046 Davis 2003 *et seq*:54-3; Currie & De Waal 2005:489.

It could sometimes be problematic to draw clear distinctions between regulations that affect the choice or practice of a profession or trade.[1047] The German Constitutional Court's approach to this issue is to take note of the invasiveness and stringency of the regulation of occupation — the more invasive and stringent the regulation, the stricter the scrutiny with which the regulation will be adjudged.[1048]

With regard to section 22 of the South African Constitution, the crucial enquiry turns on whether it can realistically be said that a restriction of commercial activity impacts on occupational freedom.[1049]

The second part of section 22 which provides that "practice of a trade, occupation or profession may be regulated by law" is an internal qualifier of the right to freedom of occupation.[1050] The freedom to choose a trade, occupation or profession is subject only to the criteria laid down in section 36 of the Constitution, and the internal qualifier in section 22 arguably only relates to the regulation of the right to practice an occupation.[1051] Limitations on the practice of a trade, occupation or profession can only be done by means of regulation in terms of law.[1052] Regulating the practice of an occupation by law requires rationality between the regulation and the legitimate objective thereof.[1053] No specific objectives are listed in section 22 (as was included in its predecessor, section 26(2) of the Interim Constitution)[1054] but generally the courts would

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1047 Lagrange 2009 *et seq*:17-2.

1048 Currie & De Waal 2005:489.

1049 Ibid.

1050 Ibid, at 493.

1051 *Van Rensburg v South African Post Office Ltd* 1998 10 BCLR 1307 (E): 1322. The Court stated that the "content of the right in section 22 of the Constitution is *the right to choose* a trade, occupation or profession, within the framework of any lawful regulation which controls its practice." Currie & De Waal 2005:494.

1052 Davis 2003 *et seq*:54-9; Currie & De Waal 2005:494. *Janse van Rensburg NO en 'n Ander v Minister van Handel en Nywerheid en 'n Ander* 1999 2 BCLR 204 (T): 221 it was held that *ad hoc* administrative action would not constitute regulation as provided for in section 22.

1053 Currie & De Waal 2005:494.

1054 Davis (2003 *et seq*:54-1) states that the formulation of section 22 "turns the core protection of [Interim Constitution] s 26 into a substantially more limited right." See also Lagrange 2009 *et seq*:17-1.

show deference to the legislature relating to matters concerning economic policy decisions.[1055]

Davis[1056] also points to similarities between section 22 and provisions in Japan's 1947 Constitution which guarantee freedom of economic activity.

On the face of it, it could be stated that section 22 will have no meaningful impact on the overall constitutionality of the B-BBEE programme. Insofar as B-BBEE could be classified as regulating the practice of trade, the regulation is rationally connected with the legitimate (and important) objective of achieving substantive equality through remedial measures. Furthermore, the Court would generally defer to the legislature's policy decisions in this regard. This statement is however qualified in instances where B-BBEE poses *de facto* limitations on the choice of trade and occupation, or where B-BBEE amounts to arbitrary regulation of freedom of trade, occupation or profession. This will be discussed further in Chapter 6 below.

4.3.5.2 The right to fair labour practices

Section 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices". The Constitution does not provide a definition of what is meant by the term "fair labour practice". Cheadle states that labour practices are the practices "that arise from the relationship between workers, employers and their respective associations"[1057] and that the right regulates conduct as opposed to laws.[1058] In *National Education Health and Allied Workers Union v University of Cape Town and Others* the Constitutional Court stated that the "focus of s 23(1) is, broadly speaking, the relationship

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1055 *S v Lawrence; S Negal; S v Solberg* 1997 4 SA 1176 (CC); 1997 10 BCLR 1348 (CC): para 44. Although this case was decided under section 26 of the Interim Constitution, the same would probably apply to decisions under section 22 of the Final Constitution.

1056 Davis 2003 *et seq*:54-3. Article 22 of the Japanese Constitution provides that "every person shall have the freedom to choose his or her occupation to the extent that it does not interfere with the common good". Quoted from Davis 2003 *et seq*:54-5.

1057 Cheadle 2009 *et seq*:18-3. See also Cooper 2006 *et seq*:53-11; Cooper 2005:206.

1058 Cheadle 2009 *et seq*:18-13.

between the worker and the employer and the continuation of that relationship on terms that are fair to both."[1059]

The Labour Relations Act has, in accordance with earlier jurisprudence concerning labour practices,[1060] identified several forms of conduct as constituting unfair labour practices. These include unfair dismissal and unfair conduct involving promotion, demotion, probation, training, benefits, suspension, discipline, reinstatement and protected disclosures.[1061] The Constitutional Court has found that the right not to be unfairly dismissed is "essential to the constitutional right to fair labour practices".[1062]

The issue of what would constitute fairness or unfairness in relation to labour practices "depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept."[1063] This value judgement will involve balancing the interests of employers in the economic advancement and success of their enterprise through productivity, and the interests of employees in social justice and democracy in the workplace.[1064] This is also reflected in

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1059 *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 3 SA 1 (CC); 2003 2 BCLR 154 (CC): para 40.

1060 Mostly the jurisprudence of the Industrial Court with its basis in the 1956 Labour Relations Act (the unfair labour practice provision was introduced in 1979 following the recommendations of the Wiehann Commission).

1061 Labour Relations Act: section 186(2). Section 186(2) provides as follows:

"Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving —

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

1062 *National Education Health and Allied Workers Union v University of Cape Town and Others*: para 42.

1063 Ibid, para 33.

1064 Cooper 2006 *et seq*:53-16.

the statement of the purpose of the Labour Relations Act which is to advance economic development, social justice, labour peace and the democratisation of the workplace.[1065]

The concept of fair labour practices would then include issues pertaining to affirmative action in employment, which has direct relevance to the employment equity element of the B-BBEE scorecard. This is because issues of affirmative action deal with possible unfair treatment regarding work opportunities (in the form of promotion) and work security. It is therefore submitted that insofar as the employment equity element on the scorecard deals with these issues, it should take cognisance of the fairness and contextual approach adopted by the Labour Court to matters of affirmative action. It could be concluded that the scorecard does not adequately accommodate the contextual fairness and proportionality enquiry that is the accepted approach under the affirmative action provisions of the Employment Equity Act, and the jurisprudence developed by the courts dealing with this issue. These questions will be elaborated further in Chapter 6.

4.3.5.3 Property

The Constitution provides for the protection of property rights.[1066] When attempting to establish a link between B-BBEE and constitutional property guarantees, it

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1065 Labour Relations Act: section 1.

1066 Constitution of the Republic of South Africa: section 25 provides:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application —

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital

is necessary to consider whether the concept of constitutional property includes the type of property typically in question within the framework of the B-BBEE programme, i.e., shares in enterprises which are addressed under the ownership element of the scorecard.

It should firstly be stated that the notion of property in the Constitution is not limited to land.[1067] It can be said that shares in an enterprise amount to specific types of contract-based personal rights. Shares are therefore generally accepted to constitute constitutional property.[1068] In German law it is assumed that an established and operating business concern is recognised as constitutional property.[1069] Regulatory attempts to exercise control over the management of private enterprise could be construed as interfering with the operation of business as going concerns.[1070] The general approach of the Courts to the classification is expected to be one where the notion of property is interpreted fairly widely, rather than narrowly, favouring the inclusion of a right or interest within the notion of property, rather than its exclusion, which leaves room for a

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improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section —

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

1067 Ibid, section 25(4)(b).

1068 Van der Walt 2005:98.

1069 Ibid.

1070 Ibid, at 99-100.

substantive enquiry into whether the alleged infringement of the right was legitimate and justifiable.[1071]

What should be clear is that shareholding in a company would pass the threshold enquiry into whether the affected property qualifies as being a protected property under the constitutional property clause.[1072] The next issue that needs to be addressed is whether the targets set out for ownership composition in the B-BBEE scorecard, which implies that the shareholders in the measured entity should part with a portion of their shareholding in order to facilitate the new entrant, could be construed as either a deprivation or expropriation of property within the meaning of section 25 of the Constitution.

The inclusion of interests under the classification of "property" for purposes of the property clause does not guarantee protection against all types of interference. Van der Walt states that a "substantive weighing up of private property interests and the public interest could indicate that a particular deprivation or expropriation of property is justified".[1073] The fact that property is afforded constitutional protection does not mean that such protection continues at all cost and does not guarantee compensation in the event of all or any limitation or change.[1074] Van der Walt[1075] formulates this as follows:

> "If anything, it means that existing property and new property interests are recognized and protected when and in so far as it is necessary to establish and uphold an equitable balance between individual property interests and the public interest, with due regard for the historical context within which property holdings were established and the constitutional context within which they are now protected."

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (the *FNB* decision) the Constitutional Court stated the purpose of section 25 as follows:

1071 Roux 2003 *et seq*:46-16; Van der Walt 2005:114.

1072 Roux 2003 *et seq*:46-15, 46-16; Van der Walt 2005:115, 118; Currie & De Waal 2005:539.

1073 Van der Walt 2005:106.

1074 Ibid, at 120.

1075 Ibid.

> "The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[1076]

The result of the Court's approach to section 25 in the *FNB* decision is to focus the enquiry on whether the deprivation is arbitrary or not. The role that section 36 (the general limitation clause) will play regarding property enquiries will be limited because the standard of review has now been replaced by a determination of whether or not the law at issue is justified in terms of the test of arbitrariness.[1077] With regard to whether or not the courts will entertain the notion of extending the concept of constitutional property to instances where only some of the incidents of ownership are affected, it is submitted that the courts would be willing to do this in order to suspend the interest-balancing enquiry to a later and more flexible stage of the enquiry.[1078] In the *FNB* decision the term "deprivation" is given a wide meaning to include almost any interference with the "use, enjoyment or exploitation of private property".[1079] In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* (*Mkontwana* case) the Court further elaborated on the meaning of the term "deprivation" by stating the following:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[1080]

1076 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (the *FNB* case): para 50.

1077 Roux 2003 *et seq*:46-3; Roux & Davis 2009 *et seq*:20-6; Currie & De Waal 2005:562.

1078 Roux 2003 *et seq*:46-14.

1079 *FNB* case: para 57.

1080 *Mkontwana* case: para 32.

In *Mkontwana* the Court elaborated on its finding in the *FNB* case. Yacoob J related the test formulated in *FNB* as follows:

> "[T]here must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the s 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be."[1081]

In other words, in light of the Constitutional Court's finding in the *FNB* decision (and its subsequent finding in the *Mkontwana* case), it could be concluded that shares in a company, which forms the subject of the ownership component of the BEE scorecard, would likely qualify as constitutional property within the cadre of protection of section 25 of the Constitution. In light of the above, a Court would also probably find that BEE poses some interference with certain aspects of ownership.

The fact that constitutional property does not enjoy unqualified protection under section 25 poses the question whether or not the ownership targets in the B-BBEE scorecard can be interpreted as being an interference with constitutional property rights. The targets set for ownership imply that existing shareholders would have to relinquish some part of the shareholding so as to facilitate a new ownership composition. The constitutionality of this interference with existing property rights has to be determined.

A contextual analysis, taking fairness and proportionality into account, will render a nuanced approach to the determination of whether arbitrary deprivation occurred, without unduly favouring either state or private interests in determining the balance between conflicting interests. The requirement that the deprivation of property must not be arbitrary means that there must be "an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is

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[1081] Ibid, para 35.

intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination."[1082]

However, this remains a highly complex question which turns on whether or not state action, which set out to regulate the sale of assets between private persons, could be construed as interfering with property rights. The sales of shares under the ownership element are often concluded at a discounted or subsidised rate, for which the measured entity is usually left out of pocket. It is submitted that state regulation, through the B-BBEE Act and its Codes of Good Practice, created the cascade effect which made adherence to the regulations, which include the ownership element, a business imperative. It could therefore be concluded that in light of the Court's approach in *FNB*, this indirect interference with property rights would constitute a deprivation of property in terms of section 25(1) of the Constitution. Whether such interference could constitute arbitrary deprivation will be considered later in Chapter 6.

The issue of property in the context of B-BBEE also raises questions about the application of section 25 between private actors. Roux, after critical analysis of the Constitutional Court's decision in *Khumalo and Others v Holomisa*, the Court's *dictum* in *Phoebus Apollo Aviation CC v Minister of Safety and Security*,[1083] and the commentary of Van der Walt, De Waal, Currie and Erasmus, concludes that it is unlikely that section 25 will have direct or indirect horizontal application.[1084]

4.3.5.4 Constitutional good governance principles

In a system of constitutional supremacy, the fundamental normative elements of the Constitution provide important guidelines as to the framework and margins within which government action must function. Foundational values and principles act as interpretative guidelines for the evaluation of legislative provisions and state actions, but

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1082 The *FNB* case: para 98.

1083 *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (CC); 2003 1 BCLR 14 (CC).

1084 Roux 2003 *et seq*:46-6 – 46-8; Roux & Davis 2009 *et seq*:20-10.

simultaneously also lay down a framework against which state action and legislation should be tested. By implication, foundational values and principles then also act as limiting provisions. Specific foundational values act as limiting factors when considering affirmative action programmes in general, and, more specifically, the B-BBEE programme. These are the good governance principles underlying the Constitution, which are also the essential components of democracy and democratic systems of governance.

Good governance is recognised in the foundational values and further reiterated in the constitutional principles governing the public administration,[1085] and the provisions regarding the constitutional right to access to information[1086] and the right to just administrative action.[1087] Transparency concerns the way in which the government relates information about policies and legislation, as well as proposed future state action, and this both enhances public participation and lessens the risk of corruption. The government should promote efficiency in the way it functions with regard to the way in which policy decisions and legislation are formulated, and implemented. Moreover, the government should have a proper regard for the timeous delivery of services and the dissemination of information regarding policy decisions. Accountability enhances and promotes the culture of justification. The government is responsible to the people for both its legislative and policy decisions. This should be enhanced by a system of checks and balances which promotes the credibility of the government.[1088] The government is limited in its formulation of policies by these foundational provisions because they provide the guidelines and requirements for constitutionally valid programmes.

The founding values of accountability,[1089] responsiveness and openness,[1090] which include transparency and efficiency, speak to the specific economic empowerment

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1085 See also *South African Broadcasting Corporation Ltd v Mpofu and Another* 2009 4 All SA 169 (GSJ): para 55.

1086 Constitution of the Republic of South Africa: section 32.

1087 Ibid, section 33.

1088 Bray 2005:212; Currie & De Waal 2005:17.

1089 *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*: paras 74-76; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40.

programmes, as remedial programmes, rather than to the objectives which these programmes strive to achieve. In other words, when the government sets out to achieve empowerment, the programme, as a vehicle through which this is done, should be designed, formulated, implemented, and its progress subsequently monitored, in a way which is efficient, rational, open and justifiable. This would guard against any arbitrariness in the way empowerment programmes are executed.[1091] Therefore, empowerment should not only be evaluated as ways in which the foundational values of human dignity, the achievement of equality and advancement of human rights, social justice, non-racialism and non-sexism are furthered, but should also be assessed in terms of the constitutional values of accountability, responsiveness and openness, which should exist as the guidelines to the ways in which these objectives are achieved.

1090 *Doctors for Life International v Speaker of the National Assembly and Others*: para 111; *Matatiele Municipality and Others v President of the RSA and Others*: para 41; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*: para 138; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*: para 111; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA and Another*: para 40.

1091 See generally, for example, *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 4 SA 222 (CC); 2009 7 BCLR 637 (CC): para 157; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*: paras 625-628.

Chapter 5

B-BBEE in practice

5.1 Introduction

This practical assessment of the government's broad-based black economic empowerment programme follows the constitutional framework within which this programme is set to function, comprising both the authorising and limiting framework. This chapter will focus on the following aspects: problematic issues within the programme and its formulation; analysis of the progress made with the programme; measuring the progress of the programme against the set objectives thereof. In addition, problem areas within the elements of the balanced scorecard will be discussed, followed by an identification of the general concerns of the overall programme, with the object of evaluating its overall constitutionality. The following analysis is done based on the figures provided, which information was accepted as accurate.

The political transition of South Africa from the apartheid regime to a democratic inclusive government after the 1994 elections may be viewed as a formidable process. On the economic front, inflation was brought down from double-digit levels to a third of the levels of inflation in 1990.[1] Following almost 15 years of decline in economic growth (from 1980), growth accelerated once again. However, during the first 10 years of democracy an average annual GDP growth of a mere 3.1 percent was achieved.[2] In 2007 unemployment levels had reached 25 percent, compared to 15 percent in 1995, and income inequality remained high.[3] Economic growth, especially under the Mbeki presidency, fell short of the developing country average. Foreign direct investment

1 Hausman 2008:1.

2 Statistics South Africa 2003:3; 2007:9; 2009:10.

3 Coomey 2007:31; Hausman 2008:2.

remained low and the investment rate remained around 16 to 17 percent.[4] On the up side, the government managed to reduce national debt from 64 percent of GDP in 1994 to about 35 percent in 2005, with foreign debt at 19.1 percent.[5] South Africa thus required no assistance from the World Bank or the International Monetary Fund (IMF). The budget deficit even improved to a small surplus after 2004,[6] and inflation stabilised. However, in order to substantially reduce unemployment statistics an annual growth rate of 6 percent was required, and the prospect of this happening looks bleak.[7]

National economies at times appear to exist independently of the societies in which they operate. However, a country's economy forms the basis on which people and groups of people interact on different levels, which include the political, ideological and cultural level. Although certain conservative economists regard the economy of a country with a sense of absoluteness, as something which should be left untouched, free from political or social meddling, this is an approach that does not accord with the basic premise that the economy forms the bedrock of society.[8]

The concept of "empowerment" does not lend itself to a precise definition. It is a general and more practical notion which relates to increasing the control which people, whether individually or collectively, have over their own lives and affairs, in the relevant political, economic, education, employment, etc., contexts.[9] Empowerment also relates to the realisation of human rights. The issue under discussion concerns a more specific type of empowerment, namely economic empowerment and the role it plays in the transformation of South Africa. Black economic empowerment has promoted political stability in South Africa, but has also undermined it in a certain respect. The importance of this endeavour as a means to political stability was made clear from the declaration of then President Mbeki in his State of the Nation address to Parliament in February 2003:

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4 Johnson 2009:412.

5 Ibid.

6 The budget deficit was 5.1 percent of GDP in 1994 and fell to 2.3 percent in 2004. See Johnson 2009:412.

7 Johnson 2009:412.

8 Innes 2007:49.

9 Somerville 1998:233; Lyons, Smuts & Stephens 2001:1234.

> "As we approach the end of the first decade of our new democracy the need for an economic transformation that brings about effective and significant black economic empowerment becomes more pressing. We believe that it is in the interests of all citizens that we succeed in this endeavour. Through a far-sighted partnership between all sectors of our society we can ensure a stable and growing economy that erases the inequities of the past and draws us all — irrespective of our race, sex or creed — into a more prosperous and equitable future."[10]

Empowerment has become a real feature in South African business and it is forecast that within the next decade it would have spread throughout the economy.[11] Even at this relatively early stage in the empowerment process it is already clear that there are changes in the socio-political and economic landscape of South Africa.[12] BEE has been labelled an initial trade-off between the then new ANC government and white business in which government committed to maintaining stability on a macro-economic level and embracing globalisation, whilst on the other hand expecting a transfer of economic power to blacks.[13] Although mostly focused on the ownership and equity element of empowerment, BEE has largely been successful in the sense that it is no longer possible to refer to corporate South Africa as exclusively white-owned. This has translated into a degree of political stability in South Africa. However, although B-BBEE has from the outset been labelled a growth strategy, economic empowerment has not had equally successful results for the broad masses of the poor and unemployed. This has caused a deepened division between classes in the black population as well as increasing income inequality,[14] which in turn has a limiting impact on political stability in South Africa. The South African government has been cautious in its approach to BEE. At times it has ardently emphasised redistribution of equity while also appreciating that business-friendly policies are necessary when looking to advance economic growth.[15] B-

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10 Mbeki "State of the Nation Address" delivered 14 February 2003. Available at http://www.info.gov.za/speeches/2003/03021412521001.htm (accessed on 27 October 2009).

11 Shubane & Reddy 2005:10.

12 Ibid, at 6.

13 Beall, Gelb & Hassim 2005:693; Butler 2006:81; Southall 2007c:8.

14 Beall, Gelb & Hassim 2005:693; Coomey 2007:31.

15 Tangri & Southall 2008:700.

BBEE, as a partnership between government and private business, is seen as a tool to promote fast economic growth and political stability, so as to prevent a system of populist redistribution along racial lines as was the case with Zimbabwean land reform.[16]

Black economic empowerment has been controversial since its advent in post-apartheid South Africa. Cargill[17] describes it as follows:

> "Fundamentally, BEE has become an explicit political intervention to ensure that black South Africans can participate equitably in the economic activities of the country, from the perspectives of both income sharing and decision-making. The intention, therefore, is appropriate; the means to achieving it, however, remains controversial[.]"

Early progress with the process of black economic empowerment was spread over a variety of industries. For example, in the broadcasting sector, state-owned radio stations were privatised and new licenses were issued which created investment opportunities of approximately R1 billion.[18] Licenses issued by the Independent Broadcasting Authority for television and radio broadcasting were taken up by black consortia. In the gambling industry, black shareholding in casinos and the lottery operators increased after 1996, although concern remains about the actual black economic interest and control.[19] In the fishing industry, major companies concluded BEE transactions before the government introduced BEE requirements for the allocation of fishing licenses.[20]

Initial narrow-based empowerment was criticised as creating a small elite of super rich black business people to the exclusion of the masses. The government's response to this has been the broad-based black economic empowerment programme as it currently operates in South Africa. Central to this new broad-based approach is the balanced scorecard which measures compliance over a range of criteria designed to achieve empowerment, based on a system of voluntary compliance. The hope was that BEE would be a sustained programme focused on human development measures instead of

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16 Moyo 2003:64; Reed 2003:17; Coomey 2007:31; Hirsch 2005:193.

17 Cargill 2005:21.

18 Gqubule 2006d:116.

19 Ibid.

20 Ibid, at 117.

just the equity held by a few individuals.[21] This new effort has not warded off all criticism successfully. Even individuals who strongly support the fundamental objectives of black economic empowerment have been vocal in their disapproval of the programme. Moeletsi Mbeki, businessman and social commentator (as well as brother of former President Thabo Mbeki), has been quoted as describing black economic empowerment as a project of white business in which business people are "trying to deracialise their club by buying black members into their oligarchies".[22] Wakeford has described the empowerment process as characterised by "crony capitalism, fronting, enrichment and debt-burdened deals".[23] The debate on whether the substructure established by the Act will effectively ensure the achievement of *broad-based* empowerment continues.[24] The following comment of the secretary-general of the SACP is evidence of the growing resentment within the ANC's alliance partners:

> "With few arguable exceptions, we believe that most of the celebrated BEE deals have had a neutral and probably negative impact on addressing the real transformational challenges of our economy. The dominant approach is to implement a narrow BEE, focusing on the advancement of a black minority through equity acquisitions and individual promotion into the senior management ranks. … BEE must principally be about addressing the needs of the overwhelming majority of our people — black workers and the poor — the basic economic empowerment of millions of our people through access to jobs and through the provisions of affordable and reliable electricity, housing, transport, telecommunications and so on[.]"[25]

Although the transfer of shares in corporations to black hands has gathered speed since 2003, it is still characterised by the same small group of black business leaders benefiting from the process across various economic sectors.[26]

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21 Radebe 2006:14; Balshaw & Goldberg 2008:18.

22 Reed 2003:17.

23 Wakeford 2004.

24 Cheadle, Thompson & Haysom 2005 *et seq*:1-7; Tangri & Southall 2008:701.

25 Tabane (2004:4) quoted this from an article in the SACP publication, Umsebenzi. See Cheadle, Thompson & Haysom 2005 *et seq*:1-7 where reference to this is also made.

26 Beall, Gelb & Hassim 2005:694.

Kehler in 2001 observes the following with specific reference to women, but is just as appropriate with reference to the general state of affairs in South Africa, and captures the essence of the true test of validity of the B-BBEE programme:

> "[O]nly the effectiveness of the translation from the theory of equality and non-discrimination into the practice of empowerment and socio-economic upliftment of women and the poor will be one of the main criteria determining success or failure of South Africa's transformation process."[27]

Certain issues relating to the specific elements of the generic scorecard will now be discussed.

5.2 Scorecard elements

5.2.1 Ownership

During the first wave of empowerment, ownership and transfer of ownership into the hands of previously disadvantaged individuals received the most attention. This narrow-based form of empowerment (narrow-based empowerment in terms of both race and gender) created an elite few rich individuals who to this day remain the majority and repeat beneficiaries of empowerment deals across various economic sectors. This situation prompted a wave of criticism[28] that has failed to abate even after the government's direction change to a broad-based empowerment strategy.

However, ownership transfer is probably the most visible element of the empowerment programme and tends to receive the most wide-ranging attention. Black shareholding is not only important for creating a society based on economic justice,[29] but

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27 Kehler 2001:10.

28 Beall, Gelb & Hassim 2005:694; Jack 2007a:109; Andrews 2008:96; Moeletsi Mbeki in Reed 2003:17; Makgetla 2005:9; Ntshalintshali 2007:7; Stones 2007:10; Johnson 2009:391; Commey 2009:27; Seepe 2007:15; Hoffman 2008:93; Madisha 2005:8-10; Tangri & Southall 2008:700, 701; Jack 2007:60-61; Parr 2005:1; Shubane & Reddy 2005:7; 2007b:8.

29 Mbeki in a 1999 speech to the Black Management Forum made the following statement: "I would like to urge, very strongly, that we abandon our embarrassment about the possibility of the emergence of successful and therefore prosperous black owners of productive property and think

it also shows corporate South Africa's participation in the drive towards political transformation of South Africa. Nevertheless, this has translated into an over-emphasis of equity as the sole measure of the success for empowerment, which is essentially only a narrow-based form of empowerment.[30] Then Minister of Trade and Industry, Mandisi Mpahlwa, stated emphatically that the focus of BEE should not be on equity transfer only.[31] This sentiment is echoed by voices within the business community.[32] This begs the question about whether the general attitude towards BEE in South Africa has changed, and whether equity is not still the preoccupation of the broader public.

In reaction to criticism that BEE enriched certain black individuals to the exclusion of the larger majority which have been left in a state of poverty, Wendy Luhabe,[33] one of the founding members of Wiphold, writes:

> "We must reject the widely held notion that it is acceptable for white people to be wealthy but that wealth creation for black people is obscene. The real obscenity is that which underpins such double standards. Why is self-enrichment an acceptable practice for whites and a crime for blacks? Why should black business bear a disproportionate responsibility for alleviating poverty when black people are not even responsible for the levels of poverty in our country?"

Cyril Ramaphosa rejects outright the notion that BEE has benefited only a few individuals and states that "[a]s in every country, you are only able to count a few who raise their heads above the parapet. When the white corporate class amassed power and influence — as they still are today — fingers were never pointed at them." Saki

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and act in a manner consistent with a realistic response to the real world. As part of our continuing struggle to wipe out the legacy of racism, we must work to ensure that there emerges a black bourgeoisie, whose presence within our economy and society will be part of the process of the deracialisation of the economy and society. Accordingly, indeed, the government must come to the aid of those among the black people who might require such aid in order to become entrepreneurs." Available at http://www.anc.org.za/ancdocs/history/mbeki/1999/tm1120.html (accessed on 27 October 2009).

30 Kalula & M'Paradzi 2007:14; Cargill 2005:21; Bardien 2005:22; Hausman 2008:5.

31 Radebe 2006:14.

32 Raymond Ndlovu of Noah Financial Innovation stated that it is "clear that BEE can no longer be only about equity transactions, but needs to focus on broad-based empowerment." (as quoted by Radebe 2006:14)

33 2007:20.

Macozoma is especially vociferous in his rejection of this criticism. He states that it is "racist propaganda that a black person cannot be wealthy. There's this idea that a black person can embrace capitalism, but must behave like a socialist."[34] They argue that BEE was never intended to be a poverty-relief programme. Although this is true, what is also true is that "meaningful economic participation in the economy by black people in order to achieve sustainable development and general prosperity"[35] does imply relief from poverty, job creation, social upliftment, etc., which narrow-based, equity obsessed deal-making has not achieved by any stretch of the imagination.

There are also those who argue that BEE actually places too little emphasis on the ownership element.[36] The argument is that the more ownership black people have, the more control they will have over the board of directors of companies, which ultimately determines the direction of the company. According to Ndlovu, it is this level of control that will ultimately determine the success of South Africa as a whole.[37] However, this argument ignores the fact that the ownership element is not the sole interest of B-BBEE, and that the companies concerned are not solely those traded on the JSE.

The general opinion still considers the acquisition of equity as the core of empowerment.[38] Shubane and Reddy[39] are critical towards what they call the fixation of South Africans with equity-based transactions instead of realising the great advances made through other elements of empowerment. The authors contend that the other elements of empowerment do not receive enough exposure.[40] The continued overemphasis on the ownership and control elements of the balanced scorecard are evidenced even in communications by (then presidential candidate) president Jacob Zuma in an address to the Confederation of Black Business Organisations in March 2009. He

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34 Cited in Reed 2003:17.

35 B-BBEE Act: section 2(e).

36 The Black Management Forum has called for an increase in the ownership target to 30 percent by 2017. See Khanyile 2009:4.

37 Ndlovu 2007:103-104.

38 Tangri & Southall 2008:701.

39 2005:5.

40 Shubane & Reddy 2005:8.

seems to equate truly broad-based empowerment with the promotion of "ownership and control of productive assets by black people, women and youth".[41]

Therefore, due to its high visibility as empowerment indicator and general political preoccupation with equity transfer, the focus remains on narrow-based empowerment. This could also be ascribed to the fact that narrow-based initiatives are easier to facilitate than broader-based programmes. This visibility and easier facilitation contribute to the general neglect of the actual broad-based elements of empowerment with its lesser visibility.[42]

Ownership remains a highly complex element, the measurement of which is difficult and complicated. The very prominence of the ownership element highlights one of the most fundamental problems with the ownership measurement of the balanced scorecard: access to capital for black individuals or companies looking to acquire equity in existing companies, and, more pointedly, the sustainability of the funding mechanisms used in these deals. It could be said that lack of black capital is the very reason for the existence of the programme of broad-based black economic empowerment, whilst at the same time one of the programme's biggest flaws. Access to capital is essential to the creation of capital.[43] Since the initial phases of black economic empowerment of the 1990's, the most immanent problem concerned financing — or the sustainability of the overall funding mechanisms. Since black people lacked adequate capital or collateral to finance BEE deals, innovation led to the birth of the special purpose vehicle or SPV as financing mechanism.[44] The SPV basically served to allow black people time to pay off loans used to acquire shares (which were used as collateral for the loans) in existing companies. In exchange for providing funds for the purchase of shares, the financier (usually a banking institution) would receive a combination of equity and debt instruments. The SPV would thus enjoy the benefits of the performance of the underlying shares while the BEE investor (black person) enjoyed the voting rights

41 SAPA 2009a.

42 Kalula & M'Paradzi 2007:19.

43 Lucas-Bull 2007:132.

44 Jack 2007a:106; Hirsch 2005:219.

associated with the shares. The SPV's entitlement to the performance of the shares as repayment of debt was usually capped as a percentage of the prime lending rate with the overflow of return going to the BEE investor.

The basic belief was that achieving empowerment status would serve to increase the company's earning potential and share price. This is usually the case in times of a bullish market, low interest rates and rising share prices, because when the terms of agreement of the SPV requires the repayment of the capital borrowed to buy shares, the BEE partners can sell a portion of their shares or use dividends received to repay debt. However, when the shares' performance is unable to service the debt linked to it, the SPV takes control of the shares, unless the BEE company has sufficient cash reserves to service it. This typically happens when prime lending rates increase or when a bull market changes direction.

This was indeed what occurred during the aftermath of the Asian market crisis in 1998 which led to a bear market in South Africa and skyrocketing interest rates. Between May and September 1998, the JSE lost 40 percent of its value.[45] When repayment of their debt became due, BEE shareholders were unable to raise the cash to repay it and therefore forfeited the underlying assets to the financing company, whilst also causing losses for financing companies because the share value had fallen to below what would have sufficed to cover the debt obligations.[46] This is due to the fact that the collateral for the loans — being the shares — has suffered a loss in value.[47] Black ownership on the JSE plummeted and the fundamental flaws of BEE deal structuring were laid bare. Before the 1998 crash, 7 percent of the total market capitalisation on the JSE was black owned. It is estimated that it fell to approximately 2.2 percent after the crash.[48]

A point of criticism, also highlighted by the market crisis of 1998, is the fact that by using a SPV as funding mechanism for acquiring shares in a company, the black

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45 Mbanga 2009:29.

46 Cargill 2005:23; Jack 2007:129; Hirsch 2005:219.

47 Cargill 2005:22; Jack 2007a:106.

48 Beall, Gelb & Hassim 2005:693 fn 53; Tangri & Southall 2008:703. Johnnic's 1994 BEE deal, funded through a SPV, entirely financed by third parties, proved the flawed structure of SPV's as funding mechanisms. See Radebe 2007:53.

company takes on very little financial risk while acquiring full control. The financier bears the financial risk without having any control over the underlying asset. This does not accord with generally fundamental business principles.

After the flaws of the SPV's financing of BEE deals became apparent, it was clear that new and innovative financing structures had to be designed. Increased BEE market activity, brought about by the Mining Charter and Financial Sector Charter, has seen banks become more willing to make BEE loans, but without assuming the same levels of risk for which they previously had suffered losses. Looking at the progress made on empowerment during what can be labelled the second wave of BEE after 2002, various industries produced transformation sector charters and the DTI's release of the BEE Strategy Document in 2003 gave rise to a new initiative of BEE capital reform.[49] New funding models were being developed which shifted away from structures based on holding companies and passive investment instruments in order to achieve black interest in actual operations. These models required black companies to actually make contributions and quantifiably add value to the companies involved with black companies. Financial arrangements to lower the cost of capital and link repayments of capital to operational performance were some of the further measures developed by the financial sector which provided the basis for new BEE transactions.[50] During the period between 2003 and 2004, BEE transactions to the value of R100 billion were concluded, predominantly in the mining and financial sectors.

To give black entrepreneurs opportunities to buy into companies, and to garner important empowerment credit, vendor companies (established companies looking to sell its shares to black investors) are increasingly funding the sale of shares themselves. This is done through loan guarantees, price discounts, or internal financing at below market finance rates. This, in fact, is a system whereby vendor companies subsidise the sale of shares in itself to black investors.[51] This type of scheme can be criticised as actually encroaching on the property rights of companies. Although a voluntary compliance

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49 Gqubule 2006d:122.

50 Ibid, at 124.

51 Cargill 2005:23.

system, companies face overwhelming pressure to sell assets at discounted values, which also negatively impacts the share prices for other shareholders, which often includes black pension funds if the vendor company is a listed company (although both share values of public and private companies are discounted in this way).[52] In the case of medium and small companies, the voluntary B-BBEE programme has particularly distressing effects. Selling its shares at a discount, as well as providing financing for the transaction, could have a devastating impact on the operation of such an enterprise. Should the enterprise not be able to fulfil its B-BBEE obligation, it faces detriment through reduced business opportunities. This new self-financing system was largely brought about by banks being willing to provide finance for BEE transactions, but *without* assuming the risk for the debt. Most of the risk now accrues to the vendor company itself.

The high level of indebtedness of black investors has, nevertheless, remained unchanged from the earlier stages of BEE financing.[53] Even though vendor companies provide financing, black investors still have very little other than the associated shares to provide as collateral for financing. Financing share acquisition through what is called leveraged buy-outs, whereby dividends are used to repay deal-financing debt, prove just as fault-ridden as the SPV's used during the first wave of BEE.[54] Repayment of debt is directly linked to the company's increasingly positive performance and declaring ever-increasing dividends.[55] This is untenable in most instances but for the very few companies able to show exceedingly high growth rates. Even under the best of economic situations the severe dilution of black ownership at the end of the finance period is inevitable and problematic. Once again the economic downturn of 2008-2009 proves that it is unsustainable and downright irresponsible to bank on share value growth to service debt repayment.[56] Some has even likened the current BEE funding model to the US sub-

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52 Johnson 2009:428.

53 Cargill 2005:23; Hirsch 2005:224.

54 Jack 2007a:108.

55 This change was brought about by changes to section 38 of the Companies Act. Theobald 2007: 104.

56 Empowerdex estimate that R41 billion worth of empowerment deals were wiped out due to the unfavourable trading conditions of 2008-2009. Mabanga 2009a:24.

prime mortgage model which spurred the current global financial crisis.[57] The pressures of the international financial meltdown have indeed contributed to the unbundling of a deal between construction company, Group Five, and its BEE partner, iLima consortium.[58] The financial crisis has caused many companies to severely downsize or downright suspend the payment of dividends. For shareholders dependent on the flow of dividends to service underlying debt, this move could end in catastrophe.[59]

The impossibility of this situation is further underlined by the fact that this type of empowerment facilitation has limited impact in reality. There is a basic irreconcilability between a system which requires the retention of black ownership *and* the sale of shares to service debt.[60] When ownership is based on underlying debt, and the debtor has to sell a part of the asset to service the debt, it leaves the company with a decreased black ownership share unless the debtor once again sells the share to another black person. On the other hand, it defeats the object to buy an asset of which a portion has to be sold to service the debt. Once the debt has been serviced, the black person exits the transaction with no real ownership or, at most, diluted ownership in the company. This in turn leaves the black person with very little control in the company and does not succeed in bringing about meaningful transfer of equity to black people. Conversely, it leaves the company with very little empowerment accomplished. For example, transport and logistics company Super Group entered into a BEE deal with Peu Group in 2004 in terms of which a 25.6 percent stake of equity would be bought by the empowerment group. Peu Group entered into a finance agreement with Deutsche Bank AG, London. When the time came to settle its loan obligation, the empowerment group had to sell off a portion of its shares which left it with only 16.1 percent unencumbered share of equity in Super Group, and left Super Group with markedly reduced empowerment credentials.[61]

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57 Donnelly 2009:1.

58 Lapper 2009b:2; Rabkin 2010:2.

59 Mabanga 2009b:33; Stokes 2009:42.

60 Jack 2005:30.

61 Radebe 2007:53.

The government's answer to this dilemma came in the form of the "flow-through principle" and the "modified flow-through principle",[62] as discussed in Chapter 3 above.[63] These principles are not without problems. Jack[64] raises some points of criticism. Firstly, limiting its application to the sub-elements of voting rights and economic interest, and excluding it from the calculations to determine realisation points, means that an entity that uses the principle will lose points on the net value indicator. Using this principle would make it unlikely for an entity to attain the maximum number of points under the ownership scorecard. In practice this would result in a negative attitude on the side of measured entities towards non-black investment in empowerment partners. Needless to say, this will lead to fewer investors and a decrease in funds available for empowerment transactions.

Therefore, the continued lack of black investment capital still remains problematic in the overall framework although certain of the toughest funding tests have been met, especially in the mining and banking sectors, which posed huge funding challenges. Up until 2007, empowerment deals with a value of more than R50 billion had been concluded in the mining and financial sector.[65] The sustainability of these cannot be attested to. Market volatility makes measuring the share of black ownership of the total market a highly problematic exercise.

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62 Codes of Good Practice: Code Series 100, Statement 100, para 3.2 and para 3.3.

63 Chapter 3, para 3.7.1, sub-para (d1). The flow-through principle provides that when shares are held by black people through another legal entity or an intermediary entity, for example, trusts etc., the flow-through principle will be applied to measure the actual benefit accruing to or actual voting rights held by black persons, as well as the level of black participation in that economic interest. The need for such a principle becomes clear when considering that voting rights and economic interest are diluted when held in a multi-tiered entity. The flow-through principle is a mathematical formula to determine the real benefit accruing to black people. See Cliffe Dekker 2007:17; Jack 2007:134. The modified flow-through principle entitles a measured entity to bulk up the participation of one black *majority* owned company to 100 percent black-owned in an ownership structure for every chain of ownership involved in the measured entity. This can only be done on one tier in a chain of ownership. This principle has limited application.

64 Jack 2007:136-137.

65 Lucas-Bull 2007:133. It is estimated that in the first decade of the new democracy at least 1 364 empowerment deals worth R285 billion were concluded. Tangri & Southall (2008:700) obtained these figures from a survey conducted by Ernst & Young. Shubane & Reddy (2005:10) however puts the value of transactions for this period only R150 billion.

Considered from another perspective, there is a perception that vendor companies, in structuring debt instruments to facilitate the sale of equity in the company to black investors, have structured deals with terms which almost guarantee that the shares would revert back to the company at the end of the finance period. Thus, whereas companies comply with BEE scorecard criteria, the terms of the financing make it unlikely that the yield on the share value would suffice to service the indebtedness. When operating under the "once empowered, always empowered" principle, this would mean that vendor companies would continue to benefit from their empowerment status even after the shares have reverted back to it due to failure to repay debt.[66] This has led to the government's overall reluctance to accept the "once empowered, always empowered" principle. This type of behaviour from companies should be strongly condemned, not only because these deals are clearly concluded in bad faith, but also because of the greater detriment it serves the important objectives of economic justice and eradicating inequality. On the other hand, this type of criticism in certain instances disregards the cost and time wasted (and in addition, the company also loses its BEE profile) by a company in structuring and formulating complex transactions in order to obtain empowerment credentials when in the end it is forced to repurchase shares which empowerment partners cannot afford to keep.[67]

The government's response to this problem came in the shape of net value or realisation points. This scheme emphasises the government's attitude that the objective is *ownership*, and not merely "sale of equity" targets.[68] Realisation points comprise 40 percent of the total points awarded under the ownership element of the general scorecard. This is a significant portion of the available points, and stresses the government's endeavour to create unencumbered shareholding. It means that if the black shareholder does not experience any real net benefit from the shares due to the debt attached to the purchase of the shares, the vendor company or measured enterprise will forfeit points on the scorecard. Thus, the government is interested in ensuring the successful outcome of

66 Jack 2007:130; Rumney 2007:3.

67 This is exactly what happened to Altech when the company was forced to buy back the shares it had sold to black economic empowerment partners, the Matomo group. See Stones 2007:10.

68 Lucas-Bull 2007:133.

BEE investment. The achievement of unencumbered shareholding is staggered over a suggested timeframe of a 10 year period for achievement. Throughout this period certain targets are to be achieved *re* the net value accruing to the BEE investor. Encumbered shareholding is permitted as long as the net value is positive.[69]

Although this arrangement is important for realising real empowerment and unencumbered ownership is the ultimate objective of BEE, it does pose some problems. Basically, the vendor company has to all but underwrite the increasingly positive performance of the company over the ten-year period so as to provide the dividends to service the debt and increase the net value of the shareholding, or the company faces an effective penalty of its ownership points.[70] External market conditions which could cause a slump in share price (as was the case during the Asian market crisis in 1998 and the world-wide economic crisis in 2008-2009) are not accommodated in the net value or realisation point scheme. These are conditions that companies have no control over, but which could severely affect their BEE ratings. On the other hand, it effectively places the vendor company at the mercy of the black investor's personal financial management. How the investor chooses to spend any additional funds — by either servicing debt or not — is not within the control of the company.[71] Companies are therefore faced with either taking the full risk of the investment success and the interest rate, or basically giving shares to black investors at extremely low prices or heavily subsidising these shares to the point of almost being free. This does not accord with good business principles, because the new investor carries no risk and subsequently has no real interest in advancing the success of the company. It does not encourage the black investor to make careful

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69 Jack 2007:132; Cargill 2005:24. Ownership fulfilment and net value are difficult items to independently verify and monitor. This could pose problems for any independent review or monitoring programme which aims to report on these factors. See DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:3. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

70 Cargill 2005:24; Shubane & Reddy 2005:13. Lucas-Bull (2007:133) points out that unless a company can achieve a rate of return of approximately 30 percent for a sustained period of at least 7 years, it faces a dilution of its empowerment shareholding due to the fact that total value of the stake empowerment partners are acquiring is subject to finance.

71 Black investors have also been criticised for taking too much out of the business too soon, without leaving enough funds in companies in order for these companies to remain sustainable. Johnson 2009:386.

investment choices and does not add to development of the critical entrepreneurial skills of the black investor.[72]

The government's rejection of the "once empowered, always empowered" principle also ties the black investor to a company and restricts his/her choice over when to move on. When the black investor wants to consolidate investment and realise profit, he/she should be free to do so. Nonetheless, the Codes are pertinent to only the partial recognition for these deals, if certain criteria are met, i.e., the black participant had held the shares for a minimum period of three years, and depending on the net value created in the hands of the black investor and the level of transformation achieved in the measured entity.[73] This has caused companies to turn to lock-in agreements with their black investors in order to retain the black economic empowerment rating. At issue is the fact that when black investors — and this could also be said for black managers under the control element — leave, measured entities are left stranded. In order to continue benefiting from the targeted black stockholding, companies enter into lock-in agreements with black investors — tying these investors to the company for a specified period, usually 10 years. This is beneficial to neither the company nor the black investor. These agreements are contrary to the spirit of empowerment and hinder unencumbered black participation in the economy.[74] The government introduced the continuing consequences principle into the Codes — which allows a measured entity to retain just under 10 points on its scorecard for a black partner who has left the firm — as the solution to the early exit problem.[75] The continued retention of points after black investors have exited the company is again subject to the black investor having held the shares for minimum of three years, and, the attainment of a high level of transformation within the business it leaves behind.[76] However, this does not completely solve the irreconcilable situation that in a free market economy an investor should be free to enter and exit agreements when it best suits him/her, without having to carry the burden of ensuring that transformation is

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72 Cargill 2005:25.

73 Codes of Good Practice: Code Series 100, Statement 100, para 3.5.

74 This argument was raised by Cyril Ramaphosa, as reported in Jacks 2009a:17.

75 See for example, Hunt 2007:116.

76 Codes of Good Practice: Code Series 100, Statement 100, para 3.5.1.

achieved within the company which he/she is leaving behind. Although this does propose to encourage active service rendered by shareholders in the company, this would hardly be possible in large listed companies, and frankly does not accord with what has generally been happening in practice. The first priority for investors is usually gaining maximum financial benefits from companies.

Underwriting shares in the manner discussed above in order to facilitate black equity purchases will also have major cost implications for companies which will eventually be costed by these companies.[77] This costing flows back to *all* shareholders of the company — white shareholders, but also black pension fund members and provident fund members with shareholdings in the company.[78] The increased cost of facilitation of BEE transactions could also act to discourage international investment in South Africa, a vital element of increasing economic growth in order to benefit real broad-based economic empowerment.

Although equity sale and ownership transformation is essential for the achievement of economic equality and justice, there are certain constraints which cannot be ignored. In times of slower economic growth, return on investment will not be sufficient to sustain ownership reform as envisaged by the B-BBEE programme. What is required is sustained high economic growth, low interest rates and low inflation rates in order to ensure that companies show enough return on investment so as to ensure that ownership targets are met and continuously achieved. These are factors which do not necessarily fall within the control of individual companies (especially not medium and smaller sized companies). Though the transformation of ownership in South Africa is a commendable objective, it is contended that the B-BBEE programme alone will not achieve this in a truly sustainable manner. Wendy Lucas-Bull[79] states the problem as follows:

> "[A]t some point, insisting on specific levels of black ownership in companies, particularly in listed companies, will have to be discarded, since equity markets are by nature very liquid and dynamic and it is unreasonable and a further investment hurdle to

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77 Cargill 2005:24.

78 Ibid, at 25.

79 Lucas-Bull 2007:134.

expect companies to ensure that a particular class of shareholder always has a precise shareholding at any given time."

This system of reservation or warehousing of black empowerment stakes is contrary to the free market system on which the South African economy is based. Ultimately, especially when dealing with buying and selling of equity stakes in the larger corporations, this is a practice that could more aptly be described as pure financial engineering[80] as opposed to an activity which drives empowerment, increases economic growth, levels of productivity and employment.

Other commentators are critical of the actual targets set in the scorecard, labelling these as unrealistic.[81] It is especially unrealistic to expect 25 percent direct ownership to be in black hands within 10 years. This would mean that black people have to own 25 percent equity in every company, not excluding companies which are economically unviable. In 2007, BEE transactions accounted for 13.8 percent, or a total of R89.9 billion, of corporate activity in South Africa which, it has been said, is grossly inadequate if the government is to meet the targets it set for 2017.[82] If the 25 percent target is to be met, it would mean that an additional R72 billion worth of transactions had to have been concluded. Jack emphasises that these targets are unrealistic and that the ownership element will not succeed especially because of the high levels of debt leverage used to finance BEE deals.[83] Specific criticism against the ownership element involves arguments that accommodating new shareholders in a widely held organisation, for example, a listed company, may prove less challenging than integrating them in a closely held entity, for example, a private company or partnership.[84] Larger companies will usually have more capacity to provide finance for equity transactions and will therefore find it easier to incorporate empowerment shareholders, as opposed to the situation in smaller enterprises. This is particularly challenging in small family-owned businesses.[85]

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80 Makgetla 2005:9.

81 Kalula & M'Paradzi 2007:14.

82 Jacks 2008:17.

83 Jack 2007a:109.

84 Shubane & Reddy 2005:6.

85 Ibid.

This, however, provides further support for the suggestion made regarding the increased recognition of worker empowerment schemes.[86]

It is also believed that the heavy emphasis placed on ownership and management control will lead to an increase in fronting.[87] At the 2009 Mining Indaba, Buyelwa Sonjica, then Minister of Mines, reiterated that fronting remained a problem in the mining sector, particularly in Limpopo and the Eastern Cape.[88] Fronting means "falsely claiming to be a majority black owned company, having black ownership in a company or having black staff occupying top management positions."[89] Another definition of fronting describes it as the "co-option of token but relatively powerless blacks to decorate a company's image."[90] For example, in 2009, Vulisango, BEE partner to junior miner Simmer & Jack, claimed that it was merely used as a front in order to obtain mining rights.[91] The government has vowed to clamp down on the practice of fronting due to the negative impact it has on empowerment in mining[92] in both specific and general regard.

On 30 September 2003, black people owned, directly and indirectly, approximately 15.7 percent of the JSE (total market capitalisation of all companies) worth R234 billion.[93] It is estimated that in the first decade of the new democracy at least 1 364 empowerment deals worth R285 billion were concluded.[94] In 2006 the Financial Mail placed the stake of black control of the JSE's total market capitalisation at between 4

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86 See also Chapter 6, para 6.2.2.2 below.

87 Butler 2006:82; Hoffman 2008:97.

88 Mpofu 2009b:1; Sergeant 2009. Available at http://www.mineweb.com/mineweb/view/mineweb/en/page72068?oid=78224&sn=Detail (accessed on 5 November 2009).

89 Definition taken from the website of the SABC programme "Africa Inc".

90 Johnson 2009:395.

91 Mpofu 2009a:1.

92 Although the discussion at hand pertains to ownership, the Minister also criticised what she labels fronting in management in the mining sector. Mpofu 2009b:1; Seccombe 2009. Available at http://www.miningmx.com/news/markets/SA-mines-minister-lashes-companies.htm (accessed on 4 November 2009).

93 Wu 2004:10.

94 Tangri & Southall, (2008:700) taking these figures from a survey conducted by Ernst & Young. Shubane & Reddy (2005:10) however puts the value of transactions for this period at only R150 billion.

percent and 8 percent of the approximately R2.5 trillion.[95] Only five companies listed on the JSE had more than 51 percent black ownership.[96] There was black ownership of between 25 percent and 50 percent of only 22 companies and only 27 companies were 25 percent black-owned. It is reported though that black ownership of the JSE in 2009 (directly and indirectly) stands at 23 percent.[97] Accountancy group Ernst & Young reported in an annual survey that between 1990 and 2009 black owners acquired almost R500 billion in assets, with the bulk of acquisitions — R150 billion — traded during 2007 and 2008. As a result of the worldwide financial crisis and recession, equity transactions were severely depressed in 2009.[98]

Employee share options programmes

By implication the repetitive enrichment of a few well-connected individuals through empowerment deals ignores the plight of worker empowerment. In small and medium-sized privately owned firms specifically, it is submitted that worker empowerment should in essence be preferable over the empowerment of an outsider. This is due to the fact that it is usually the workers who have contributed to the establishment of a successful or relatively successful enterprise and should therefore be the first in line to receive the benefits which flow from obtaining an equity share in the company. Workers also possess knowledge of the workings of a particular industry and firm. Costs, especially financing costs, of doing BEE deals fundamentally take the form

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95 Radebe 2006:28.

96 These were Kagiso Media, Brimstone, Arch Equity, Hosken Consolidated Investments, and Mvelaphanda. Radebe 2006:28.

97 Fisher-French 2009. Available at http://www.moneyweb.co.za/mw/view/mw/en/page306448?oid=325364&sn=2009%20Detail&pid=292677 (accessed on 11 December 2009). Trade union Solidarity published its SA Transformation Monitor in March 2010, which found that black ownership, directly and indirectly, of the JSE stood at 23.8 percent in 2008 (Solidarity Press Release 2010. Available at http://www.solidaritysa.co.za/Home/wmview.php?ArtID=2324 (accessed on 19 March 2010)). These findings were criticised by the DTI because of the conflation of direct and indirect ownership, as well as the disregard the research showed for unencumbered parts of the shareholding. See Prinsloo 2010. Available at http://www.polity.org.za/print-version/solidarity-bee-survey-does-not-address-direct-ownership-dti-2010-03-19-1 (accessed on 22 March 2010).

98 Lapper 2009b:2; Stokes 2009:42.

of a subsidy by the vendor company of the BEE investor. It therefore follows that employees should be the most deserving beneficiaries of such subsidies and schemes.[99]

The need for employee empowerment has received some attention in the Codes of Good Practice. Empowerment of workers through equity transfer is usually operated through Broad-Based Ownership Schemes, Employee Share Ownership Schemes or Trusts. These all operate in similar fashion and each is regulated by a governing constitution or trust deed which clearly sets out the applicable rules regarding governance and distribution of benefits.[100] These schemes, as a rule, operate on a relinquishment basis, where employees who leave the service of the company before the end of a specified period forfeit their entitlement to any benefits flowing from the scheme. This works to encourage long term equity ownership and commitment to the vendor company or measured entity.[101]

What emerges as problematic for these broad-based ownership schemes is the fact that shareholding and benefits accruing to the individual may be limited and could possibly not enable the individual employee to independently enter the mainstream economy. This is due to the fact that the benefits accruing to the individual as a result of ownership is shared with a (sometimes large) number of other beneficiaries, and could thus take a very long time to generate real economic benefit.[102] Another criticism that could be levelled against broad-based ownership schemes are the high costs involved in setting up these schemes. This, coupled with the limited benefit that will realise in the end, could prompt one to ask whether it is worth the effort.[103]

Some ill-conceived broad-based ownership schemes have spread the benefits of equity across so many beneficiaries that these benefits have virtually vanished, and, in addition, these schemes have very little say in the control of the company due to the

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99 Cargill 2005:25.

100 Codes of Good Practice: Code Series 100, Statement 100, Annexe 100(B).

101 Kalula & M'Paradzi 2007:9.

102 Jack 2005:29; 2007:156.

103 Jack 2005:29; 2007:157-158.

dilution of the voting rights associated with the shares.[104] In some instances broad-based ownership schemes are set up with vague or even unspecified beneficiaries. Some critics have argued that when BEE benefits are spread to the benefit of a bigger group, it often lacks the transformation imperative, and usually reflects nothing more than transactions designed to retain the control in the same hands as before conclusion of the transactions.[105] In response to this, it could be argued that transformation of control, albeit ownership control or management control, is specifically addressed in the Codes of Good Practice and the scorecard, and that this particular criticism does not, necessarily, hold any water.[106]

Broad-based ownership schemes,[107] held for the benefit of employees *or* communities of black people (public benefit schemes), could therefore be successful only if they form part of the overall broad-based black economic empowerment process. The Codes of Good Practice seek to address this point by providing that a measured entity can claim a maximum of 40 percent[108] of the total points on the ownership scorecard if it meets the qualification criteria[109] set out in the Codes. The measured entity will only be able to claim 100 percent of the ownership scorecard if it meets certain additional requirements[110] set out in the Codes. These criteria basically entail that the ownership

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104 Jack 2007:158.

105 Shubane & Reddy 2007b:8.

106 Codes of Good Practice: Code Series 100, 200 and 300. See also the scorecard elements dealing with ownership control, management control and employment equity. See further Shubane & Reddy 2007b:9.

107 These take the form of broad-based ownership and employee ownership schemes, private equity funds, section 21 companies and companies limited by guarantee, and trusts. See Codes of Good Practice: Code Series 100, Statement 100, paras 4, 5, 6, and 7.

108 See Codes of Good Practice: Code Series 100, Statement 100, paras 4, 5, 6, and 7.

109 The additional rules on certain types of enterprises are set out in Codes of Good Practice: Code Series 100, Statement 100, Annexe 100(B): paras 1-4.

110 As set out in Codes of Good Practice: Code Series 100, Statement 100, Annexe 100(B): para 5. The relevant paragraphs provide as follows:

5.1. For a Measured Entity to obtain the maximum points on its ownership scorecard, the following additional requirements must be met by a Broad-Based Scheme or Employee Share Ownership Scheme:

5.1.1 a track-record of operating as a Broad-Based Ownership Scheme or Employee Share Ownership Scheme, or in the absence of such a track-record demonstrable evidence of full

schemes have operational capacity, i.e., the scheme and its operatives have a mandate to pursue other business opportunities.[111] This is evidenced through a track record of operating as such or demonstrating its full operational capacity (through the involvement of suitably qualified, experienced staff in adequate numbers, operating premises, experienced advisers in professional capacity, other operational requirements). This however adds massive costs to the operation of such schemes, even further diluting and delaying financial reward for beneficiaries.[112]

The rationale for generally affording these schemes limited recognition appears to be the fact that negotiations between the company and its workers — the intended beneficiaries — are not generally considered to be done at arm's length, which could lead, and have lead in past instances, to abuse. The vast number of recipients of benefits from these schemes seems to be a troubling aspect of the scheme which added to the eventual partial recognition of ownership.[113]

The increase in BEE deals for the benefit of employees has elicited criticism (some from the super-rich elite created by the first wave of BEE). It has been said that broad-based BEE could overwhelm the basic fundamentals of the original empowerment agenda. Mzi Khumalo, a black entrepreneur, has been quoted as saying that BEE "faces the danger of becoming a simple charity and social responsibility programme devoid of any commercial sense".[114] These sentiments are shared by Saki Macozoma, another beneficiary of the first wave of BEE, who warned that "broad-based BEE should not replace capital accumulation by black entrepreneurs."[115] Although these arguments hold

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operational capacity to operate as a Broad-Based Ownership Scheme or Employee Share Ownership Scheme;

5.1.2 operational capacity must be evidenced by suitably qualified and experienced staff in sufficient number, experienced professional advisors, operating premises and all other necessary requirements for operating a business.

111 B-BBEE Act The Codes of Good Practice Interpretive Guide 2007:41.

112 Patel 2007:1.

113 Anonymous 2007b:21.

114 Quoted in Radebe 2006:14 from an interview Khumalo did with the Financial Mail.

115 Radebe 2006:14.

a certain amount of merit, it is contended here that well-designed employee share-option plans could provide benefits that far outweigh the disadvantages.

Equity transfer schemes which have employees as beneficiaries provide opportunities for new entrants into the realm of empowerment instead of empowering the same well-connected, already enriched individuals. It increases the number of people being integrated into the mainstream economy, and brings to the fore people with a hands-on involvement in the business itself. These programmes, designed in good faith and based on sound economic principles, would probably effect more broad-based empowerment than equity transfer to consortia or individuals with no real interest in the enterprise. However, the DTI argues that it is discouraging any transaction "in which the accrual of benefits is conditional or in which no real power of ownership accrue to employees, the use of broad-based schemes as employee retention strategies and the use of employee schemes to the exclusion of new entrants or entrepreneurs".[116] This argument does not hold water. In the first place, no accrual of benefits, irrespective of the structure of the deal or the participants in the deal, occurs unconditionally. It would not correspond with fundamental business practice or the basic rationale of black economic empowerment. The idea was never to simply give equity away *gratis* to the beneficiaries of the deal, but has always held that some sort of counter-performance should be tendered in return for the equity. The basic structure of all deals is therefore by implication conditional — the transfer of unencumbered shares in exchange for fully rendering the agreed-on performance, which would usually be a financial consideration. It follows that in order to receive the full benefit from the equity transfer, the condition should be fulfilled. To therefore say that all conditional benefits should be discouraged does not make sense.

Secondly, it is agreed that a properly designed employee share scheme should have a written constitution or trust document with the defined or definable beneficiaries. This issue has also been addressed in the Codes of Good Practice with its set requirement that

[116] Anonymous 2007b:21.

beneficiaries should be identified in the employee share plan documentation.[117] The government's motivation for only permitting partial recognition of ownership points for this reason does, therefore, not make sense. In the third place, the use of equity deals as part of employment retention schemes is not a phenomenon associated only with BEE. It has been standard practice to attempt to retain and award loyal employees by offering equity deals. In fact these deals have in the past been structured less favourably in order to retain employees' service, by, for example, tying them to service periods of five or ten years. Structuring a BEE deal with an employee in order to retain his/her services does not force the employee to enter into the deal — he/she is still free to decline the offer — but it does offer the company a way of retaining someone in whom it had invested money, for example for training costs, etc., but also rewarding employees for good service. This should thus not be a concern to the government resulting in partial recognition of such deals.

Fourthly, usually employees have generally not been major beneficiaries of black economic empowerment deals at the stage of concluding broad-based ownership schemes, and *are* therefore new entrants in the market. Holding out on empowerment of workers for the sake of benefiting new entrants is therefore illogical. Lastly, ensuring the success of entrepreneurship is better suited by the elements of preferential procurement and enterprise development. The government's reluctance to embrace worker empowerment through employee share schemes therefore seems not to be motivated by concern for real broad-based empowerment, but rather seems to be rooted in the promotion of cronyism and a continued focus on narrow-based empowerment. It also does not comply with the specific objectives of the B-BBEE Act which provide for "increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training."[118]

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117 See the provisions of Codes of Good Practice: Code Series 100, Statement 100, Annexe 100(B): paras 2.1.1 and 3.1.1 where the requirement is clearly set that beneficiaries of these schemes must be defined.

118 B-BBEE Act: section 2(c).

A number of broad-based ownership-transfer schemes have been reported on and a few examples are provided here. SABMiller has announced plans to sell 10 percent of its South African subsidiary to employees, to store owners selling its products, and to a charitable foundation. Of the total deal, worth R6 billion, 4 percent will be offered to its 9 000 employees, 80 percent of whom are black.[119] In 2005, Murray & Roberts concluded a R494 million transaction which saw a 10 percent share in its equity being transferred to its employees and community-based organisations.[120]

Sasol, considered a latecomer to the BEE deal front, concluded an equity transfer deal in 2007 (the biggest up to that time) which saw 4 percent of the total deal worth R19 billion being allocated to an employee share-ownership plan. The entire deal represented 10 percent of Sasol's equity and the residual 6 percent was apportioned to a mass-based retail scheme (3 percent), selected broad-based BEE groups (1.5 percent) with the remaining 1.5 percent going to the Sasol Foundation.[121] This deal caused some controversy (with criticism coming from the DTI) due to the inclusion of a number of white employees as beneficiaries of the employee share-ownership plan. The DTI did however later issue a statement in support for the deal. All white employees set to benefit from the scheme were below managerial level which places the deal in line with accepted practice and DTI policy.[122] When SABMiller recently expanded their employee share-option scheme to include lower-paid white workers (which amounted to 20 percent of the 9 400 lowest paid employees) it again caused some upset, but the company held firm that all employees contributed to the success of the company.[123] Anglogold's

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119 Planting 2009:35; Lapper 2009a:14. Available at http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T7971606949&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T7971606952&cisb=22_T7971606951&treeMax=true&treeWidth=0&csi=293847&docNo=10 (accessed on 24 November 2009).

120 Radebe 2006:14.

121 Radebe 2007:53.

122 Ibid.

123 Mathe 2009:11.

employee trust, which holds 6 percent of the company's South African assets, was set up for the benefit of approximately 30 000 of its employees, also regardless of their race.[124]

Some public companies, for example MultiChoice Media24, have opted for a special share offer which is only available to people meeting the requirements of the generic scorecard, with empowerment groups only allowed to subscribe if they had control of their companies.[125] While these deals are truly broad-based, they are based on the assumption that the necessary cash or credit will be available to fund individual subscriptions. The huge success enjoyed by these companies which offered shares could also have had something to do with the fact that they were very prompt in making these types of offerings. Latecomers to these types of deals could find themselves with a limited market, due to the same constraints that have been the problem ever since the start of the programme, namely lack of capital. These share offerings also do not prevent shareholders from selling their stake at anytime, leaving these companies carrying the risk of empowerment dilution.

It would subsequently become necessary to monitor what black business people have done with the benefits that they derived from their acquisition of equity. Having had the opportunity to obtain large equity stakes in major companies, the issue that should be addressed is the level of transformation which these empowered individuals have orchestrated in the organisation within which they are operating. Skills transfer from these individuals who have benefited from spending time at high levels of executive management, should be facilitated in the direction of young and upcoming black people who did not necessarily have the benefit of partaking in equity transfer deals.[126] It should be a case of ploughing something back in exchange for the benefits received directly as a result of the B-BBEE programme.[127]

It has been said that BEE is to blame for a massive exit of listed companies abroad (international diversification), which leaves big companies less exposed to South African

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124 Bearing in mind that 90 percent of the company's workforce is black. See Anonymous 2007a:21.

125 Anonymous 2007c:21.

126 Jack 2005:28.

127 Ibid.

conditions. Freeing up cash to invest in international holdings is actually generated through BEE deals, which are a smoke screen to limit South African holdings and expand overseas interests. Companies have sold off billions in South African assets, for example, Anglo-American, BHP Biliton, Old Mutual.[128] Moving headquarters and listings in London limits a company's exposure to BEE and affirmative action, but also to South African political risks and threats of nationalisation.[129] This trend of disinvestment is probably one of the most detrimental indirect results of the B-BBEE programme.

The assessment of the ownership element of the generic scorecard here highlighted the difficulty black people experience in gaining access to capital to finance equity acquisition or to start up new enterprises. This is one of the problematic aspects which accompanies the achievement of black economic empowerment. Government, through the co-ordination of the DTI, has established a variety of mechanisms or empowerment finance vehicles to facilitate the empowerment of previously disadvantaged sectors of the population. These are the Industrial Development Corporation, the National Empowerment Fund, Khula Enterprise Finance Limited, the Development Bank of Southern Africa, and the Public Investment Corporation.

The Industrial Development Corporation (IDC)[130] is a self-financing, state-owned development finance institution with the objective of contributing to the creation of balanced, sustainable economic growth in Africa and to the economic empowerment of the South African population, thereby promoting the economic prosperity of all citizens. The IDC seeks to accelerate BEE, especially focussing on the development of SMMEs.

The IDC's financial assistance to SMMEs includes the following:

- Providing wholesale financing to intermediaries for making loans to entrepreneurs in similar business enterprises. This is particularly the case for franchises.

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128 Johnson 2009:436.

129 Ibid, at 437.

130 See http://www.idc.co.za/.

- Providing bridging finance for SMMEs who have secured contracts with public or private sector companies or enterprises.

- Providing performance or other similar guarantees.[131]

The IDC, for example, provided the finance for Nail's purchase of Metropolitan Life.[132] The IDC has been criticised for its objective of accelerating BEE. It is said that the objective to accelerate BEE is nothing more than creating a narrowly focused black elite.[133]

Khula Enterprise Finance Ltd (Khula), established in 1996, is an independent agency of the DTI which focuses predominantly on the development of small business enterprises. It seeks to provide sustainable finance (loans, guarantees, seed funds) to retail financial intermediaries in order to facilitate loans or equity capital to SMMEs.[134]

The National Empowerment Fund (NEF)[135] seeks to promote economic equality and transformation by promoting saving and investment among previously disadvantaged people and providing finance for BEE and black business. The NEF's objectives are to redress existing economic inequality by providing finance for the acquisition of shares or interests in restructured or privatised state-owned enterprises and private enterprises.[136] This institution was initially entangled in so much controversy that it failed to provide effective services. It was established in 1998, and, by 2003, the first CEO of the trust, Khanya Motshabi, had not succeeded in getting the operation off the ground and had not even fulfilled his statutory duty to submit an annual report to the Minister of Trade and Industry. He was relieved of his duties, and replaced by Sydney Maree, who by mid-2004, together with other senior staff members of the trust, was suspended due to making irregular payments and was later jailed. These incidents left the trust paralysed.[137]

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131 Industrial Development Act 22/1940: section 3 and 4; Fubu 2003:40.

132 Jack 2007:381.

133 Johnson 2009:399.

134 See http://www.thedti.gov.za/thedti/khula.htm. Fubu 2003:43.

135 Established by the National Empowerment Fund Act.

136 See http://www.thedti.gov.za/thedti/nef.htm.

137 Johnson 2009:401; Hirsch 2005:226-227.

However, the NEF seems to have sorted out its initial problems and is ready to further its objectives.[138] It is specifically tasked with providing quicker access to finance than what is usually the case with government institutions. It also runs a R50 million per year rural development and community development fund, which manages a dairy farm in the Eastern Cape and a berry farm in KwaZulu Natal. In urban townships it facilitates transactions for black entrepreneurs looking to buy franchise operations and develop shopping centres.[139]

The Development Bank of Southern Africa (DBSA)[140] facilitates and finances the development of infrastructure in order to promote sustainable socio-economic development for the benefit of all, but especially at grassroots level.[141]

The Public Investment Corporation Ltd (PIC)[142] is a government-owned investment management entity that manages government pension, provident, social security, development and guardian funds.[143] Through the Isibaya Fund, the PIC participates in programmes which seek to promote job creation, alleviation of poverty and economic transformation. Its core focus is assisting already established entrepreneurs from previously disadvantaged backgrounds with proven track records. The fund provides between R50 million and R1 billion for investment in infrastructure development, direct investment in private equity, and investments into third-party managed private equity funds that promote SMME development, especially in agri-business, technology, tourism and mining. As at the end of March 2009, the PIC manages assets valued at R739 billion, with the Isibaya Fund managing assets worth R30.9 billion.

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138 Jack 2007:381.

139 Mbanga 2009:28.

140 Established in terms of the Development Bank of Southern Africa Act 13/1997. See http://www.dbsa.org/pages/default.aspx.

141 Fubu 2003:43. The DBSA has announced plans to spend between R100 billion and R140 billion between 2010 and 2015 on projects concerning health, water and sanitation, energy and education. It also plans to focus the implementation of these projects so as to create employment, particularly youth employment. See Kamhunga 2010:10.

142 Established by the Public Investment Corporation Act 23/2004.

143 See http://www.pic.gov.za/Inveloper.asp?iP=7&iVdate=04/11/2009&iS={A39E4874-B63E-4111-9BCE-64154C46821A}.

Besides government financing, the private sector does have a role to play in providing finance. This is broadly outlined in the Financial Services Charter. The Financial Services Charter committed 10 percent of all assets under its management for empowerment financing — an estimated R122 billion. Institutions within the sector have not being able to decide which would provide what amount and this has led to some disappointment with the overall success of the empowerment objective of the charter.[144] The Financial Services Charter has been mired with problems and was believed to be on the brink of collapse. The Minister of Finance, Pravin Gordhan, has however stated that the National Treasury is aiming to have the charter finalised well before the end of 2010.[145]

The issue of financing empowerment thus still remains a serious concern. In an unpublished report submitted to the Presidency in 2005, Empowerdex (an empowerment consultancy firm) stated that in order to achieve 25 percent black ownership of the JSE, R389 billion in financing would be required.[146] Even though financing necessary for ownership transformation in the rest of the economy is not as easily quantifiable, it should be clear that it would be virtually impossible to reach the set 25 percent target within a ten-to-fifteen year timeframe. The entire allocation of financing in the Financial Services Charter and the funding available through state and semi-state BEE facilitation schemes would not even account for a third of the total financing required.

5.2.2 Management control

As is also highlighted below under the employment equity and skills development elements, South Africa is faced with a severe shortage of highly skilled people. Enforcing the management control element of the scorecard leaves companies without enough suitably qualified candidates to comply with this element which would lead to

144 Jack 2007:381.

145 Pickworth 2010. Available at http://www.fm.co.za/10/0226/moneyinvest/amoney.htm (accessed on 1 March 2010).

146 Hirsch 2005:227.

employing people with less than adequate skills, which would in turn lead to severe skill constraints at senior management levels.[147] Due to the small pool of available and suitable management and board candidates, the same individuals are co-opted to serve on a number of boards, which limits the value these individuals could add to individual companies.

In 2005 a survey found that of the 3 029 directors of listed companies, 307 (10 percent) were black and only 60 were executive directors.[148] In 2008, 24 percent of directors on the boards of JSE-listed companies were black, with 487 individuals holding 714 black directorship positions. Of the total of 1 023 executive directors only 118 were black and only 16 were black women.[149] Although progress has been made, compared to the targets set out in the Codes of Good Practice, these numbers fall far short. The Codes require 50 percent target for executive black directors with 25 percent black female directors.

A study specifically pertaining to conditions in the metal industry, conducted during 2005 on behalf of the National Union of Metal Workers of SA (Numsa), found that black executives were appointed mostly in a non-executive capacity, with the focus on concerns regarding corporate governance and BEE compliance, whereas white executives would be focussing on technical and marketing issues (therefore both technical and managerial portfolios).[150] Specific to the metals industry is the high level of technical and engineering skills required, which could point to the lack of skills in the particular area contributing to the lack of black executives entrusted in these areas. Complying with the management control element should consequently be a challenge for the longer term instead of attempting quick fixes in this area.

Shortcomings in the education system also result in a dearth in the production of suitably qualified candidates, who could be further groomed by companies for positions in senior management. This delays substantive compliance with this element.

147 Hausman 2008:11; Hoffman 2008:96.

148 Johnson 2009:434.

149 Jack 2008:3.

150 Bardien 2005:22.

The management control element of the scorecard for Qualifying Small Enterprises poses a specific problem. The objective of the management control scorecard for Qualifying Small Enterprises is to promote black participation in top management.[151] As the definition[152] of a top manager allows for this employee also having ownership rights in the measured entity before he or she may be counted under the management control element, combined with the unreasonable target set for recognition, Jack[153] is consequently very critical of the practicality and outlook of success for this element.

5.2.3 Employment equity

Certain operational elements of the employment equity element of the scorecard could be questioned. A point of criticism that can be levelled against the employment equity element is the fact that it uses different occupational levels than those provided in the EEA. Although there could be advantages,[154] it may, however, complicate administration for companies when having to use two different types of categorisation. In many small and medium companies no distinctions are made between senior management, middle management and junior management, which complicate the process of measuring these entities' level of compliance. It also poses particular challenges for any independent research and monitoring programme.[155] Calculating an enterprise's score on the employment equity element does not allow for the same contextual analysis as provided for in terms of the EEA. Jack[156] is critical of the scorecard measuring employment equity because the corporate environment and organisational culture are not reflected on the scorecard, because they are deemed an "unquantifiable soft element". The absence of this is seen as detrimental to the furtherance of diversity and the

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151 Codes of Good Practice: Code Series 800, Statement 802, para 3.2.

152 Codes of Good Practice: Schedule 1, Interpretation and Definitions, Part 2, Definitions.

153 Jack 2007:247.

154 Ibid, at 259.

155 See DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:3. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

156 Jack 2007:260.

accommodation of the multiple cultures present in South African society. Maziya[157] doubts the general probability of correcting employment inequality by means of the B-BBEE programme. On the other hand some analysts credit employment equity as being one of the major contributors to the growing black middle class.[158]

In certain industries employment equity presents particular challenges. The survey done for Numsa specifically in the metals industry, highlighted the almost total unavailability of black professionals in the fields of industrial engineering, design engineering, manufacturing and technical specialists.[159] This underscores the difficulty in the achievement of targets in certain sectors. It does not seem that the Codes of Good Practice make specific allowance for this. Despite this evidentiary proof, Jimmy Manyi, in his capacity as head of the Employment Equity Commission, told Parliament in 2007 that the argument that there are not enough skilled black people is an urban legend, used by companies as excuses to ignore skilled black people and reinforce their discriminatory practices.[160]

The employment equity report for the period 2008/2009 has shown that progress to achieve employment equity in the private sector has been slow. Overall (in both public and private sectors), 61 percent of top positions are still held by white men, while this figure increases to 74 percent when the analysis extends to the private sector. This has solicited calls from Manyi that the government should change its persuasive approach to a more forceful one. Cosatu stated that this information once again points out the importance of a programme such as BEE.[161]

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157 Maziya 2006:161.

158 Shubane & Reddy 2005:10.

159 Bardien 2005:23.

160 Anonymous 2007d:12. Particular difficulty is also experienced to find empowerment candidates for appointment as financial professionals. This was reported by the Association of Certified Chartered of South Africa. See Temkin 2010a:14.

161 SAPA 2009b. Regarding the successes achieved with the mining charter, the Minister of Mining reported in 2009 that the employment equity targets had not been met. This has vehemently been denied by companies such as Anglo American who stated that several of the targets set out in the mining charter had not only been met, but exceeded, which included the employment equity targets. The company reported that more than 50 percent of management positions were held by black people, with 18.6 percent of senior positions being held by women. After completion of the review

Whilst progress has been slow and it is agreed that BEE has an important role to play, the biggest threat to affirmative action and employment equity is the lack of good education in South Africa, which necessarily leads to critical skills shortages and a lack of adequately qualified candidates for appointment.[162] This is borne out by a study conducted by the South African Institute of Race Relations. Only 50 percent of the grade 10 class of 2004 sat for matric exams in 2006. Of the 528 525 pupils sitting for the matric exams in 2006, 351 726 (67 percent) passed, with merely 84 741 (16 percent[163]) passing on higher grade. Of the total number of pupils in the exams only 25 217 passed mathematics on higher grade.[164] The distinction between higher and standard grade mathematics was subsequently abandoned and 2008 saw the first candidates to write the matriculation examination under the outcomes-based education curriculum. Of the 533 561 pupils taking the exam, 298 821 wrote mathematics, the more difficult of the mathematics papers. Only 39.5 percent of the pupils managed to achieve more than 40 percent.[165] Of all matriculants who passed the exam, 20.1 percent passed well enough to qualify for studying toward a university bachelor's degree.[166] It is said that in 2007, out of the total South African population under the age of 20, less than 28 percent has successfully completed secondary education.

What is even more telling about the quality of students delivered by the education system, is the fact that generally, first-year students are ill-prepared for university studies. The national benchmarks tests project, carried out by Higher Education South Africa,

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of the mining charter, Susan Shabangu, the Minister of Mining, however stood firm on the non-compliance of the mining industry. The charter's targets for employment equity of 10 percent women and 40 percent black people in management by April 2009 were not met, and fronting has been rife. Mpofu 2009b:1

162 In the 2007 BEE compliance study conducted on behalf of the Presidential Black Business Working Group, 50.2 percent of respondents stated that they experienced difficulty in finding suitably qualified candidates. See DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:18. http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010). See also Temkin 2010a:14.

163 Sixteen percent of the total candidates taking the exam.

164 Cronje 2007:9.

165 SAIRR 2009b:62.

166 Ibid, at 55.

tested 13 000 students on academic literacy, quantitative literacy and mathematics in February 2009. The results were as follows: 47 percent of students assessed were proficient in academic literature, 25 percent were proficient in quantitative literature and only 7 percent were proficient in mathematics.[167]

In 2007 South African universities awarded a total of 77 981 degrees. Of these 40 percent of recipients were white and 44 percent of recipients were black. Indian and coloured students represented 8.7 percent and 6.3 percent of graduates respectively.[168] These statistics pose fundamental problems for the achievement of overall employment equity requirements and the targets set out in the B-BBEE scorecard. It would seem that there are simply not enough graduates to satisfy the demand if set targets are to be met. Arbitrary enforcement of employment equity targets left South Africa with a critical skill shortage as was experienced firsthand when Eskom's lack of skilled personnel and planning errors dumped the country in virtual darkness in 2008 with catastrophic consequences for ordinary South Africans, but also for the economy. Eskom's staffing policies were partly blamed for the crisis, caused by lack of maintenance staff, engineers and generally poor management.

Other examples of the detrimental effects of inflexible application of employment equity plans can be found in the health care sector. For example, despite the desperate need of millions of South Africans for adequate health care services and the country-wide shortage of doctors, the provincial government in the Western Cape's refusal in 2007 to appoint any white or Indian doctors in the public sector led to loss of these skills and deteriorating service to the public. The government's furious denial of this state of affairs was merely refuted in the media with facts contradicting the state's summation of events.[169] Although not specifically relevant to the discussion on BEE, this type of conduct by the government highlights the underlying problems which could be created by an unrelenting focus on employment equity without taking cognisance of the broader context within which policies operate.

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167 Ibid, at 2.

168 Ibid, at 96.

169 Keeton 2007a:1; 2007b:6.

In the public sector, the government is adamant that expanded investment and infrastructure development will not be done at the expense of affirmative action policies. This raises questions about a certain level of irreconcilability between the two objectives. For example, in order for Eskom to fully implement its infrastructure programme, it has been said that the utility company will have to appoint 2 new staff members every day, and their employment equity programme prescribes that at least one should be a black woman.[170] This seems unattainable and the utility company is faced with either retracting on its infrastructure development or relaxing rigid employment equity plans. The same could be said for the state and its expanded public works programme. If looking to successfully implement these programmes, which serve economic growth and job creation, especially for lesser-skilled categories of workers, it will have to make tough decisions on the implementation of employment equity targets.

Employment equity policies, without the backing of an adequate education system, means that BEE holds greater threats to economic transformation than was envisaged when the programme was designed.[171] Enforcement of employment equity targets were undoubtedly premised on the existence of an adequate pool of talent, which — if lacking — compromises the overall success. These factors existentially threaten the success of implementation B-BBEE.

5.2.4 Skills development

Skills development is possibly one of the most critical elements in achieving economic empowerment. From the perspective of both the public and the private sector, skills development would render workers empowered for life, being able to advance themselves to higher employment positions, or merely increasing productivity levels which are essential for economic growth and development. Economic growth and development is essential in the broader scheme of empowerment for South Africa. Adequate skills and training are also critical if South Africa wants to stay competitive

170 Lünsche 2006:88.

171 Johnson 2009:433; Hoffman 2008:98.

globally and wishes to attract much needed foreign investment. Foreign investment, as well as local economic growth, is essential to expand employment. The skills development element (together with the socio-economic development element) is one of the elements with the most far-reaching grassroots empowerment potential, particularly because of its direct relevance to workers.[172]

Kalula and M'Paradzi[173] voiced well-founded criticism of the reduction in weighting of this element (together with the socio-economic development element) in the final codes, compared with the 2004 and 2005 drafts. This is indeed counter-productive because this element is probably one of the most essential elements when considering the real broad-based empowerment of workers in particular.

The lack of good education and adequate skills are in all probability responsible for previously disadvantaged persons remaining unduly dependent on advantaged partners, instead of creating their own wealth.[174] It would seem that very little progress has been made in the area of skills development.[175] Kalula and M'Paradzi[176] attribute the lack of improvement to poor implementation, apathy and resource scarcity. A study, done on behalf of Numsa in the metals industry, attributes the lack of progress to the absence of strategic and coherent strategies by large corporations to develop skills amongst their workers. The exception however is the skills training and development relating to operational requirements undertaken in the tyre and motor industry. These firms seem to facilitate sophisticated human resources and collective bargaining to promote and implement skills development.[177]

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172 Kalula & M'Paradzi 2007:11.

173 Ibid, at 14.

174 Ibid, at 21. It has also been suggested that lack of skills and high levels of unemployment could be causing broader socio-economic and political problems. The xenophobic attacks and unrest of 2008-2009 was partly blamed on the employment competition posed by immigrant workers with higher skills. See Beaumont 2008:18.

175 Hausman 2008:9; Jack (2007a:109) attributes this lack of progress to companies being unconcerned with actual training of workers and the underlying rationale of the skills development element. The skills development levy is operated as yet another tax.

176 Kalula & M'Paradzi 2007:21.

177 Bardien 2005:23.

In theory, the interaction between the skills development element on the scorecard and the Skills Development Act and Skills Development Levies Act provides an effective framework for skills development. In practice, however, the Skills Development Act has failed to practically realise the potential for vocational training, Adult Basic Education programmes (ABE) and Recognition of Prior Learning (RPL) which it theoretically purposed to do. Most companies have come to view the levies as merely another tax to be paid,[178] and various Sector Education and Training Authorities have been wound up due to mismanagement.[179] It is submitted that the inclusion of skills development as an element to measure broad-based black economic empowerment has yet to change the attitude of corporate South Africa towards skills development levies. However, skills development was the second-best performing element on the national scorecard in the findings of the study commissioned by the Presidential Black Business Working Group in 2007. The problem would seem to be the low level of involvement by SETAs.[180]

The relative success of learnership programmes does contribute to progress in the area of skills development. In 2004 the Minister of Labour established the Employment, Skills Development Lead Employer pilot project with the objective of accelerating the intake of leanerships in the small and medium business sectors. This project stands to benefit 6 000 learners, particularly unemployed matriculants and graduates to train in the Chemicals Industry. Similar programmes have also been launched in the banking sector and by Telkom.[181]

The indicator measuring in-service training programmes is perhaps one of the most effective in achieving empowerment. Six out of the total of 15 available points under the skills development indicator is allocated to in-service training programmes. Companies

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178 Jack 2007a:109.

179 Hausman 2008:9. Minister of Higher Education and Training, Dr Blade Nzimande, has recently vowed to clean up corruption and mismanagement in SETAs and restructure the organisation of these institutions by end of 2010. See Blaine 2010:4.

180 DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:19. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5March 2010).

181 Nedlac 2004:46.

are thus encouraged to employ people on a training level which would contribute to job creation and skills development.

Another contentious point under the skills development indicator is that companies or measured entities are allowed to include the salaries paid to black learnerships when calculating their score under this indicator. This gives a boost to the amount of money spent on skills development and may in certain instances result in companies reaching their targets relatively quickly without having to spend much further on training.

The skills development spending indicator in the generic scorecard has an element for skills development spent on black people with disabilities with a further adjustment for gender. Three points out of a total of 15 are allocated to this category. It has been argued that the points and targets set for this particular category of employees are disproportionate if considering the target set in terms of employment equity.[182] However, this group faces particular difficulties and their economic empowerment should be prioritised. On the other hand, as is true with any of the indicators carrying high points and high targets, it promotes fronting which is counter-productive vis-a-vis the objectives of the programme.[183]

The operation of the skills development element against the broader background of education and employment equity has been problematic. In the public sector, aggressive employment equity policies have been blamed for the exodus of skilled and experienced white staff. Although the lack of technical and artisan skills is stinging the private sector as well, it is particularly visible at state-owned entities, especially those who provide services of strategic importance, for example Eskom.[184] The utility provider has been haunted by its aggressive employment equity strategy because it has led to an exodus of staff in key skill categories, such as engineering, technical and project management. As noted above, the ambit of the skills shortage was partly responsible for the breakdown in power supply experienced during 2008. Development of critical skills in the engineering and technical areas is essential for the delivery of services as well as for government's

182 Jack 2007:279.

183 Ibid, at 280.

184 Lünsche 2006:88.

infrastructure development. In 2006, Eskom had established an extensive database of former employees retired, emigrated or working in other sectors of the economy in the hope of garnering the knowledge of these persons to aid in their expansion programmes. The utility company had also established mentorship programmes in order to promote skills transfer and development. Learnerships, bursaries and other student support initiatives were created in order to address skills shortages.[185] The success of these initiatives would have to be ascertained over the medium and long term in light of the problems the company are still experiencing.

Furthermore, skills development has added, indirect implications for employment which is not always considered. In a study done by Harvard's Centre for International Development, it was found that a decrease in highly skilled jobs will necessarily lead to a decrease in demand for lower skilled jobs, i.e., the lack of engineers may result in a loss of hundreds of blue collar jobs.[186] The rationale is that because job creation and expansion is critical for the eradication of income inequality, it is essential to retain as many as possible highly-skilled workers, which include reversing the emigration trend of this group of individuals. This is especially true in the mining, manufacturing and agricultural sector where job losses have been most severe and where the greatest scope for employment of low-skilled workers exists. Unfortunately, an unintended consequence of the employment equity and management control elements of the BEE scorecard is an increase in demand for a small group of highly skilled black graduates while, it has been argued, at the same time creating a negative perception with white university graduates and senior management, which has led to an exodus of these people. Hausman states that "[e]ncouraging the retention of *all* high skilled South Africans and the attraction of foreign high skilled persons will be crucial to limit wage inequality and facilitate the creation of jobs for the less skilled and thus achieve shared growth."[187]

In order to actualise grassroots empowerment, job creation at lower-skilled job levels is essential. However, during the last decade the job market's highest demand was

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185 Ibid, at 89.

186 Hausman 2008:8.

187 Ibid. Emphasis added.

for highly-skilled jobs with very little demand for lower-skilled jobs.[188] This has been detrimental to the broader South African population because what is most available is lower-skilled labour. If the reasoning above is correct, immigration of high-skilled individuals and retention of highly-skilled individuals has become critical.

By enforcing the management and employment equity elements, firms are attempting to comply with the scorecard and employing blacks in senior management positions, but this, together with the shortage of skills in higher-skilled positions, will lead to companies being faced with increased skill constraints at senior management level.[189]

Despite the above evidence which stresses the real importance of skills development for successfully achieving an economically just society, there are voices that are critical of the value attached to skills development in the scorecard. For example, Ndlovu would like to see more emphasis on the ownership and control elements of the scorecard and less on skills development.[190] This is, however, a short-sighted approach to the overall issue of empowerment which is unsustainable over the long term.

Skills development in the mining sector has been criticised by the ministry of mining following a review of the progress made in terms of the mining charter. The minister accused the mining companies of focusing on *basic* skills development instead of the development of critical skills. This has resulted in the continued absence of historically disadvantaged persons in core occupational categories of employment in the sector.[191]

At the end of the day, the education system plays a direct role in the skills shortages experienced by South Africa. A sustainable black middle class is reliant on the provision of good education in order to produce skilled individuals. This is exemplified by the lack of black chartered accountants. In June 2005 there were 23 493 chartered accountants in

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188 Ibid, at 4.

189 Ibid, at 11.

190 Ndlovu 2007:103-104.

191 Mpofu 2009b:1.

South Africa. Of these 543 were black, 341 coloured and 1 482 Indian. Despite an increase in the number of candidates sitting for the exams in November 2004, the overall pass rate was 67 percent, but with only a 42 percent pass rate among black candidates. The biggest barrier to expanded entry into this sector is the lack of numeracy skills among scholars with the overall enrolment for higher grade mathematics consistently declining.[192]

It would seem that part of the solution for the Brazilian economic empowerment programme was conditional social grants. Parents only receive social grants if they send their children to school. This, together with a successful land reform programme, has seen Brazil decreasing the income gap, with South Africa overtaking Brazil as the most consistently unequal country in the world.[193] This serves to emphasise the importance of education and skills development as part of a programme of economic upliftment and empowerment.

5.2.5 Preferential procurement

The preferential procurement element of the BEE scorecard is essential for the achievement of B-BBEE. The preferential procurement element carries the key to the cascade effect through the value chain of the national economy which makes BEE compliance a national business imperative. It is the key to the voluntary compliance fundamental of B-BBEE. It can be argued that the business sector's voluntary compliance and the system of self-policing is what actually makes it viable, for if government had to operate and police the system, with its generally less than efficient systems and bureaucracy, BEE would have shown less progress.[194] The idea started with

192 Bridge-David 2005:1; Temkin 2002:2.

193 Commey 2009:28.

194 Johnson 2009:395.

using the leverage of government purchase power to advance and promote economic development,[195] but also with specific reference to the development of SMMEs.[196]

Government's spending on procurement makes it instrumental in achieving the objectives of B-BBEE, but its success is dependent on certain conditions, i.e., its ability to control and eradicate corruption in the tender processes and adopting a strict quality monitoring system.[197]

This element, together with the enterprise development element serves to advance SMME development which is viewed as an important driver of economic growth and empowerment. With regard to the development of SMMEs, the question can be raised about the relative effectiveness of this initiative. In its 2007 BEE survey the Financial Mail concluded that affirmative procurement was one of the most successful elements of B-BBEE measured in terms of the scores achieved by top empowerment companies under this element of the scorecard, but could not convey any data on the relative success of this element for the development of SMMEs.[198]

Very little data is available on the procurement practices of entities as well as on the impact government preferential procurement policy[199] has had.[200] In the survey of the metals industry conducted on behalf of Numsa in 2005 (mentioned above), it was found that less than 10 percent of procurement of technical input or materials was done from BEE firms. The main rationale for this is the absence of BEE firms providing intermediate inputs or offering technical design, research and development services.[201] The lack of BEE firms with the required technical offerings is proffered against the failure of large state-owned enterprises, i.e. Eskom, which have subscribed to a policy of preferential procurement and enterprise development since 1995 without yielding any

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195 Between 1999 and 2005 Eskom spent approximately R29 billion with BEE firms. Transnet on average allocate 40 percent of its procurement budget to BEE firms. Lünsche 2006:88.

196 Jack 2007a:109.

197 ILO 2007:65.

198 Claasen 2007:80.

199 PPPFA.

200 Bardien 2005:22.

201 Ibid.

substantive results in establishing such firms. Large multinational companies in the industry remain the main beneficiaries of procurement in this sector.[202] Anglo American has reported a 42 percent increase year-on-year from 2008 to 2009 in spending with firms owned by previously disadvantaged people.[203] It is difficult to measure the effect of procurement spending as it filters through the economy and then to marry it to a specific company's procurement record.[204]

This element has not been without its operational controversies. Wakeford argues that big corporate entities are masking their underperformance in broader empowerment by bullying businesses in their supply chain — which are most likely small and medium-sized enterprises. In this way big corporations are boosting their own empowerment rating without putting in enough effort to tackle internal empowerment and transformation elements. This is also true of big multinational corporations with offshore listings.[205]

The inherent costs involved in BEE procurement has lately emerged as a factor to be considered when evaluating the overall efficacy of the programme. Again using Eskom as an example of this trend, which also holds true for other enterprises, it has emerged that the premium paid in order to procure from BEE companies has inadvertently added to operation costs to such an extent that it has now become a burden for the utility company. Problems with supply by BEE enterprises were also partly blamed for the power outages of 2008. These costs do flow through to consumers and can have unintended negative consequences which were not fully appreciated at the time when the idea of procurement as economic empowerment was conceptualised.[206] This emphasises the necessity of quality monitoring systems and adequate research on cost related issues.

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202 Ibid, at 23.

203 Mpofu 2009b:1.

204 Claasen 2007:80.

205 Wakeford 2004:13.

206 Brent-Styan 2009:1.

The necessity for expanding the pool of preferential suppliers for procurement will require investments in skills development, as well as providing support structures for the development of entrepreneurship.[207] SMMEs in particular should be promoted. The question of the relative success of this endeavour will rest in this element's interaction with the enterprise development element, but also with the success with which the government's SMME development programmes operate.

5.2.6 Enterprise development

Optimally, companies should operate their preferential procurement element in conjunction with the enterprise development element. Therefore, once a company has assisted in the establishment of a new enterprise, procurement from the new enterprise would sustain that enterprise through the difficult times that new enterprises usually experience.[208] What could be problematic is that procurement from this new firm would not necessarily add to the measured entity's BEE rating. The new firm might not obtain a BEE rating for some time and in turn not qualify for the measured entity's scorecard. Besides empowerment credentials, it might also prove difficult for medium-sized companies to continue procuring from these newly established firms if competitiveness becomes critical, as is the case in times of economic downturn, when companies are more likely to focus on profit margins only.

The sustainability of this element could also prove difficult when the company looking to do enterprise development finds it problematic to identify newcomers inside the core value chain of the business which would most likely benefit from continued procurement.

Both the enterprise development and socio-economic development elements can be costly for many businesses,[209] especially small and medium-sized enterprises, and

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207 ILO 2007:65.

208 Jack 2007:447.

209 Balshaw & Goldberg 2008:33.

particularly during an economic slump. It could be said that placing excessive financial burdens on companies by indirectly requiring compliance defeats the object of greater economic participation by the broader masses.

Enterprise development is the element which showed the least progress in the 2007 baseline study conducted on behalf of the Presidential Black Business Working Group. One of the objectives of the study was to calculate a national scorecard for B-BBEE compliance in South Africa. The enterprise development element showed only a 12.2 percent compliance.[210]

5.2.7 Socio-economic development

Together with general corporate social investment programmes, this element is premised on the growing realisation amongst companies that they do not operate in isolation, but owe a greater responsibility not only to their shareholders, but also their employees, customers, broader society, and future generations.[211] It is part of the greater transformation which includes a greater ethical consciousness of "giving back" which is also essential to achieving the larger political transformation in South Africa.[212] This is an element which is potentially very capable of achieving real broad-based economic empowerment, because it centres on what companies achieve in the communities within which they operate.[213] Contributions which would qualify under the Socio-Economic Development indicator illustrate the potential for broad-based empowerment. These are, for example, developmental capital advanced to beneficiary communities;[214] payments made by the company to third parties to perform socio-economic development on its

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210 DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:14. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

211 The Brenthurst Foundation 2010:1-2; Trialogue reporter 2009:8.

212 Balshaw & Goldberg 2008:16.

213 Kalula & M'Paradzi 2007:12.

214 Codes of Good Practice: Code Series 700, Statement 700, para 3.2.4.5.

behalf;[215] and provision of training or mentoring to beneficiary communities which will assist them to increase their financial capacity.[216] Once again it should be pointed out that the reduction in weighting of this element (together with the skills development element) in the final codes, compared with the 2004 and 2005 drafts, is counter-productive because of its potential to advance the achievement of truly broad-based empowerment of all historically disadvantaged individuals.[217] The mining sector in particular has been criticised for their lack of investment in this element after a review of the progress made on the implementation of the mining charter. The Minister of Mining, Susan Shabangu, has lashed out at mining companies for not adequately contributing to the sustainable socio-economic development of the communities within which they operate, as well as the labour-sending areas.[218]

Another vehicle utilised to achieve community development has been the transferring of assets to a community in which the company operates. This has been prevalent with mining houses, because a strong link with specific identifiable communities can be made.[219]

Corporate social investment, which is what this element encompasses, carries within itself the risk of being reduced from a lasting development investment to a chequebook charity element. This compliance-driven approach could destroy the spirit of corporate social investment, with companies spending without really considering the long-term developmental benefit of their programmes.[220] Overstressing compliance leads to companies viewing their spending under this element as just another form of tax to be paid. This attitude will detract from the overall objective of promoting sustained access to the economy for poor people.[221] This element stresses the need for focusing on ideas

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215 Ibid, at para 3.2.4.7.

216 Ibid, at para 3.2.4.8.

217 Kalula & M'Paradzi 2007:14.

218 Mpofu 2009b:1.

219 Anonymous 2007c:21.

220 Rumney 2008:1; Trialogue reporter 2009:8.

221 Jack 2007:342.

which will contribute to people becoming financially independent.[222] This, however, requires a high level of creative engagement by enterprises which in certain instances merely view the contribution as another tax levy.

Another unintended consequence of the inclusion of this element is that companies, driven by an attitude of compliance, are now equating sustainable development spending with BEE compliance. The definitions for social and economic development in the Codes necessarily exclude certain aspects which are also important to communities and society at large, for example, environmental issues.[223] Companies now cut spending on projects which would not qualify for BEE compliance. These sometimes included projects more focused on innovation and social entrepreneurship, which, despite its importance to communities, now no longer form part of company budgets for corporate social investment. It would seem that the restrictive definition of beneficiaries is to be blamed for this situation.[224]

5.3 Evaluation and conclusion

Accurate and insightful criticism has been levelled at the government's broad-based black economic empowerment programme. It is true that it has created a super-wealthy elite few. It is also true that the focus remained on ownership and control even after the government realised the necessity of a more broad-based approach. Rectifying this cannot be expected to happen overnight and it should be kept in mind that the process of empowerment will move at incremental steps and that it is unrealistic to expect to reach the set targets for 2014.[225] It seems to be historically impossible for any country intent on

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222 Ibid, at 453.

223 These could also include programmes aimed at promoting arts, culture, health care, community support programmes, education, sport, etc.

224 Munshi 2008:55.

225 The government's target was to have a minimum of 35 percent of the economy transferred into black hands by 2014.

re-engineering the racial make-up of its economy, to succeed in accomplishing this objective within a timeframe as ambitious as that set by the South African government.[226]

5.3.1 Measuring progress

Although the Codes of Good Practice encompass a highly detailed and complex set of guidelines, the formulation thereof is not always clear. In the first place the wording is not always clear. For example, on the enterprise development scorecard of the Codes, at paragraphs 2.1.1.1 and 2.1.1.2, a conjunction — "or" — should have been interposed in the sentences. The wording of the guidelines also further complicates the application thereof. Cliffe Dekker states that the Codes provide for target calculation in a "profoundly convoluted mechanism for deriving a notional net profit after tax".[227] Secondly, where the Codes make provision for the application of the "industry profit margin" it is not clear at all how this is to be determined and no real indication is given as to when the turnover should be applied.[228] Application of the Codes is an administratively complex exercise which proves especially challenging for smaller enterprises compared to larger organisations.[229]

The notion of adopting a specific policy for B-BBEE, presupposes that there would be planned or organised implementation, accountability, transparency and evaluation of the progress made as well as the effectiveness — economic and otherwise — of the policies. Very little research has been done on the implementation of the BEE indicators other than ownership, control and employment equity. It thus becomes very difficult for policy makers to evaluate the success of the measures implemented. This is despite the fact that the Act and the Codes of Good Practice[230] expressly call for continual review of

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226 Reed 2003:17.

227 Cliffe Dekker 2007:55.

228 Ibid.

229 Shubane & Reddy 2005:6; Balshaw & Goldberg 2008:33.

230 Codes of Good Practice: Code Series 000, Statement 000, para 13.2.

the progress and effectiveness of the policy. In the B-BBEE Act[231] the functions of the Black Economic Empowerment Advisory Council are set out to include the review of progress in achieving black economic empowerment. What is disconcerting is that the government only announced the establishment of the Council in 2009, six years after commencement of the Act.[232] And so far as the annual review called for in the Codes of Good Practice is concerned, only one study (in June 2007) has been undertaken since publication of the Codes.[233] This study did highlight a degree of uncooperativeness from the government's side to the broader process of empowerment. This is evident when considering the lack of transparency and accountability of government departments and state-owned enterprises in their participation in the 2007 study. This is despite the fact that the study was commissioned by the Presidential Black Business Working Group and the additional efforts made by the Presidency. Participation was requested from all government departments and state-owned enterprises (including SETAs, Universities and Science Councils). However, submissions were received from only one government department, two SETAs, one state-owned enterprise and one university.[234] This does not foster a culture of participation and compliance within the private sector. It is essential that a mechanism be put in place to regularly facilitate the collection and analysis of information in order to evaluate progress and determine future policy directions. It has in fact been contended that the current information available on BEE is neither sufficient nor credible.[235] This not only impairs the overall effective progress that the programme stands to make, but creates uncertainty which translates into an impediment for investment. At the inaugural meeting of the BEE Advisory Council (held on 4 February 2010), Minister of Trade and Industry, Rob Davies, stated that the DTI will in future do

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231 B-BBEE Act: section 5.

232 President Jacob Zuma eventually announced a list of candidates for the Council in December 2009. See Ensor 2009a:1.

233 See DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

234 Ibid, at 3. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

235 Hausman 2008: Recommendation 21.

annual reviews of the impact of B-BBEE, and make the required adjustment of targets when necessary.[236]

Consequently, one of the most troubling aspects of the B-BBEE programme is the lack of a directly measurable success rate. It is extremely difficult to quantify the outcomes of the policies, because not all of the aspects of the programme can be objectively measured. When looking at employment equity, reports filed with the Department of Labour provide objective answers to levels of representation by black people in enterprises. But even measuring black ownership in the JSE could prove a challenge due to the liquid nature of trading, although listed companies provide the easiest access to information about its black ownership complement. For example, in the petroleum industry, companies such as Caltex, BP, Shell and Total South Africa are not listed on the JSE and therefore empowerment transactions done by these firms do not reflect in a BEE survey of companies.[237] The same could be said for company directors: listed companies are more easily measured, but this does not clarify the scenario of the overall representation of black management control. It should however also be added that even when dealing with listed companies, difficulties exist in correlating published financial reports with the different elements of the scorecard.[238]

In its 2009 Top Empowerment Companies Survey, Empowerdex and the Financial Mail reported that there are five companies listed on the JSE with a BEE score of more than 80 percent, and that 35 listed companies had a score of more than 65 percent (at which level the DTI recognises the company as fully compliant).[239] However, concern does exist that progress made on the BEE front will evaporate due to the global recession and the continued effect on economic growth. Although companies will guard against losing all BEE credentials, it will, in the short term, become harder to expand and

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236 Jacks 2010:1.

237 Hirsch 2005:228.

238 DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa – Executive Report: Baseline Study 2007*:3. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

239 Compare these figures with 2005 when only one company scored more than 80 percent and only four over 65 percent: Wu 2009:8.

improve scoring, especially when profits come under pressure and spending patterns are revised. Irrespective of any arguments to the contrary, the international financial crisis and economic slowdown will have an effect on the overall implementation of B-BBEE programme. Areas of skills development, enterprise development and socio-economic development will most likely be directly affected, due to the cash expenditure involved in these elements. Companies will have difficulty in meeting their obligations in this regard due to additional pressure on cash reserves caused by the credit meltdown and shareholder pressure for results.[240] Other macro-economic factors also play a role in the successful implementation of B-BBEE strategies, for example, the Reserve Bank's decisions to raise interest rates could impact negatively on BEE. Government's policy approach which fails to integrate BEE within its broader macro-economic policies has also been subjected to criticism.[241] This will be addressed in the following section.

Differing opinions about methods of calculation of scores could also pose difficulty for measuring progress. The highly complex nature of determining an enterprise's BEE score is complicating the process of compliance. Ultimately, a BEE rating *per se* does not provide any real evidence of the level of success attained in achieving real change in the lives of those who are economically most excluded. No evidence is produced to link B-BBEE to economic growth and expansion. A good BEE rating does not guarantee successful business operation, and does not directly correlate to economic growth and job creation. Thus, the scoring mechanism does not directly speak to the actual black economic empowerment achieved. Measuring the success of the programme will require more than merely referring to the scorecards of companies. Economic empowerment is the objective of the overall programme and economic empowerment achieved needs to be measured in order for the programme to be constitutional. No comparative analysis of the impact on different interest groups is possible if the level of success achieved has not been quantified at some level.

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240 This has been acknowledged by Mining Minister Susan Shabangu specifically with respect to the socio-economic development element which will be taking a back seat in the mining industry. See Mpofu 2009b:1.

241 Gqubule quoted in Jacks 2008:17.

5.3.2 Government's macro-economic policies and B-BBEE

Eventually, the success of economic empowerment should not be the responsibility of private sector or public sector in isolation. The success of meeting empowerment targets as set out in the B-BBEE scorecard is inextricably linked to broader economic conditions and their management. The level of success that can realistically be achieved from applying the Codes of Good Practice is dampened if enterprises have to operate in an economically constrained environment. It could even be argued that it places an undue burden on enterprises which face the untenable position of either conforming or going out of business, while government policies do not provide an optimal business environment to facilitate compliance with regulation. While the objectives of empowerment are undeniably crucial for South Africa, it cannot without a doubt be concluded that the B-BBEE programme, in its current form and operating without being integrated within the broader macro-economic policy framework, can be the solution to the issue.

Although reforms pertaining to the way the B-BBEE programme is implemented could be recommended, it is also of critical importance that certain reforms or change of emphasis are necessary on a level of macro-economic and fiscal policy.

Sustainable development and economic growth will serve to eradicate income inequality, poverty and human deprivation only if the quality of such growth is geared to be pro-poor and pro-job creation.[242] Some analysts are critical of the label of BEE as a growth strategy. The implementation of the B-BBEE programme has coincided with a limited economic growth rate.[243] On the other hand it has been pointed out that it is the macro-fiscal and -monetary policies which are to blame for poor growth and that this has hampered the successful implementation of the strategy.[244] A worrying aspect of the South African economy is that economic growth has mainly been propped up by rising domestic demand, driven by the emerging black middle class. It has been stated that in

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242 UN Development Programme (UNDP) 2003:xv.

243 Shubane & Reddy 2005:7.

244 Gqubule 2006b:40.

2000, black consumers outspent white consumers for the first time, mainly through the growing black middle class and a group of super-wealthy blacks. Shubane and Reddy[245] argue that empowerment is ultimately a programme aimed at creating a black middle class. The economic activity of the middle class[246] in society, comprising spending, investing, lending, etc., solely based on the size of the group, poses the most potential for economic growth. Although this has been called the economic meaning of South Africa's democratisation,[247] the growth has been financed through rising current account deficits, which shows that domestic demand has been growing more rapidly than GDP.[248] Economic growth which is driven by domestic consumer demand still amounts to economic growth, it will, however, be untenable for sustained economic expansion over the longer term. What is even more troubling is that the rise in demand, coupled with increased investment, has been concentrated in sectors such as finance, real estate and services, i.e., sectors which do not necessarily promote overall economic growth and increased job opportunities for the broader population.[249] Ultimately, B-BBEE will have to address broader economic issues, especially promoting and growing exports,[250] in order to add real value to economic empowerment, as well as stability and growth for South Africa. In order to achieve an annual growth rate of 6 percent (which is proposed as the growth rate at which the economy will start making dents in the unemployment figures), South Africa needs higher investment rates which, in turn, requires an increase

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245 Shubane & Reddy 2005:15.

246 This refers roughly to the middle income group in society. "Middle class" is an extremely difficult group to precisely define and for purposes of this discussion it should be seen as representing the economic middle class.

247 Johnson 2009:395.

248 Hausman 2008:2.

249 Ibid.

250 This is particularly challenging for South Africa. Even though this is almost certainly the correct way of achieving sustained economic growth and expansion, South Africa has shown very little vitality in this area. Hausman (2008:2) reports the following statistics: "In the 44 years between 1960 and 2004, the real value of exports grew by only 34 percent (about 0.7 percent per year). By contrast, export growth was 169 percent in Argentina, 238 percent in Australia, 1 887 percent in Botswana, 385 percent in Brazil, 387 percent in Canada, 390 percent in Chile, 730 percent in Israel, 1 192 percent in Italy, 4 392 percent in Malaysia, 1 277 percent in Mexico and 120 percent in New Zealand, to name a few relevant comparators."

in foreign direct investment. This, however, is not forthcoming due to South Africa's high import-propensity resulting from the weak manufacturing base.[251]

Foreign investment is essential in the overall pursuit of higher economic growth and expansion. The Institute for Management Development, a Swiss-based organisation, releases an annual competitiveness survey in which it rates the world's 55 industrialised economies. In 2007 South Africa fell from a position of 38, to that of 50. The major reason cited for the decline in South Africa's ability to compete globally is the government's black economic empowerment and affirmative action policies.[252] These figures correspond with similar findings of the Heritage Foundation, an US think tank,[253] which in 2009 ranked South Africa the 61st freest country, from a total of 179 countries.[254] It lists BEE as a factor which acts to curtail financial and investment freedom in South Africa, stating that "race laws and unclear regulations hamper foreign investment".[255] It further states that government "exerts extensive influence over the economy through affirmative action mandates that threaten private property rights".[256] The World Bank's annual Doing Business Index ranks countries according to ease of doing business. It rates countries on the following aspects: ease of doing business; starting a business; dealing with construction permits; employing workers; registering property; getting credit; protecting investors; paying taxes; trading across borders; enforcing contracts and closing a business.[257] In 2009 South Africa ranked 34th from 183 countries.

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251 Johnson 2009:412.

252 Ibid, at 381.

253 It should however be added that the Heritage Foundation is generally considered to be a conservative research foundation. The annual listing is compiled in association with the Wall Street Journal.

254 The Heritage Foundation 2009a: Index. Available at http://www.heritage.org/index/Default.aspx (accessed on 8 December 2009).

255 The Heritage Foundation 2009b: South Africa. Available at http://www.heritage.org/index/Country/SouthAfrica (accessed on 8 December 2009).

256 Ibid.

257 See World Bank 2009. Available at http://www.doingbusiness.org/EconomyRankings/ (accessed on 8 December 2009).

The need for foreign investment as part of the overall strategy of economic growth and development — the precursors to a more equal and just society — is self-evident. What is also clear from the above is that BEE is not regarded favourably by foreign companies. There is evidence that could be construed that government action has also led to disinvestment. One of the largest empowerment deals to be concluded to date saw R14 billion in foreign investment leave the country and a major construction company giving up a major share in the (at the time) booming construction industry.[258] Johnson argues that a motivating factor for early BEE ownership deals, besides garnering government goodwill, was to disinvest from South Africa and to rather diversify overseas holdings.[259] In fact, the author asserts that it was exactly this that prompted Anglo American's exodus to London.

Before adoption of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Mining Charter),[260] a draft copy of the original Charter was leaked to the media which serves as a good example of the type of reaction that can be expected when policies are presented which were not fully researched, considered and formulated: After reports of the charter surfaced — which provided for 51 percent black ownership of all new mines within 10 years and 30 percent black ownership of existing companies before any licenses would be issued for expansion projects — it caused a severe knee-jerk reaction in the markets, because it was perceived

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258 This transaction, concluded in April 2007, had Holcim Switzerland selling 85 percent of its 54 percent stake in Holcim South Africa to AfriSam, a BEE consortium. See Johnson 2009:382-383.

259 Johnson 2009:387.

260 Mining Charter. Available at http://www.thedti.gov.za/bee/beecharters/MiningCharter.pdf (accessed on 6 October 2009). The Mining Charter has the following objectives:

- To achieve 26 percent ownership for historically disadvantaged South Africans of the mining industry assets of each mining company in 10 years.
- Acceleration of the achievement of employment equity in the industry as well as addressing skills development in order to eliminate skills shortages.
- The adoption of policies specific to the mining sector to achieve positive private sector involvement in the socio-economic challenges around mining and mining communities, which includes promotion and expansion of employment.
- Promotion of equitable access to the country's mineral resources to all people of South Africa and substantially increasing opportunities for historically disadvantaged people.
- Adoption of preferential procurement policy for all stakeholders in the mining industry.

to be an attempt at nationalisation of the mining industry. This also points to the potential impact on South Africa's international trade relations. The share price of Anglo Gold lost eight percent of its value on the JSE on the day the draft was leaked and 11 percent of its value on the London FTSE 100. Overall, shares in large mining companies, for example BHP-Billiton Ltd, Xstrata and Anglo American Plc, fell on average 20 percent in just a few days after the draft was leaked.[261] It has been said that since the release of the new minerals bill and the leak of the draft charter in July, by August the largest nine mining stocks listed lost 23 percent of their value — amounting to a staggering R173 billion.[262] On a macro-economic scale, South African equity and bond portfolio investment declined from a net capital inflow of R15.7 billion[263] in the second quarter of 2002 (before the leak) to a net outflow of R12.9 billion[264] in the third quarter of 2002. Amidst criticism from various directions, the government was quick to respond that the draft was merely a discussion document and open to negotiations. Fears were however not allayed until the final charter was signed in October 2002.

Another example of this trend of disinvestment can be provided. At the time when the Mining Charter became an accepted fact, BHP-Billiton, the world's largest mining company, not only shelved its plans to construct a zinc smelter in South Africa, but rather invested billions in the construction of a new aluminium smelter in neighbouring Mozambique.[265] This was part of a number of multinationals' exit strategies from South Africa due to, what they perceived to be, the uncertainty of property rights and the possible threats of expropriation resulting from the high level of discretionary powers held by state officials in terms of the Mineral and Petroleum Resources Development Act (which came into effect in 2004). The Fraser Institute (an independent Canadian economic and social research and educational organisation) in 2005 published its annual list of countries ranked according to the investor-friendliness of mineral policies. South

261 Twidale 2002:9; Johnson 2009:408.

262 Wray 2002:1.

263 Reserve Bank Quarterly Bulletin 225:27.

264 Reserve Bank Quarterly Bulletin 226:27.

265 Johnson 2009:406.

Africa's position had plummeted to 53 out of 64 jurisdictions surveyed.[266] In the 2009 publication, South Africa ranked 49th out of 71 jurisdictions[267] and in 2010 the South African position had dropped to 61 out of 72.[268] The Asian economic expansion had set off a commodities boom, but South Africa had failed to capitalise on this. This is despite the fact that Asian growth had led to huge investment in other commodity-rich countries. Johnson[269] argues that it is as a result of the Mining Charter that the exact opposite actually occurred. Between 2004 and 2006 there was a staggering 32.7 percent decline in mining investment, which resulted in the loss of 20 000 jobs, in spite of the reigning international boom[270] and a rise in mining output in the same period.[271]

Despite the merit in transformation of the mining sector, it has been contended that the government's intervention in the areas of ownership and control in the mining sector has partly translated into poorer performance of the sector, a decline in both the investment in and performance of the sector at a time when the same sectors has internationally experienced an increase in development as well as high commodity prices.[272] The general uncertainty created by the government's actions and interference within this sector may well have caused more to harm the economy as a whole than the gains created for individuals benefiting from BEE deals within the industry.

Johnson[273] argues that the greatest barriers to growth in South Africa are in fact affirmative action, BEE and the Mineral and Petroleum Resources Development Act, which incorporates the Petroleum and Mining Charters. Although this is an overstatement, it holds some truth if the overall impact of the mining charter on the South African economy is taken into account. The commodities boom attracted more than US$

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266 McMahon & Lymer 2005:8. In the 2003/2004 survey South Africa had ranked 34th out of 53 jurisdictions surveyed.

267 McMahon & Cervantes 2009:14.

268 McMahon & Cervantes 2010:10.

269 Johnson 2009:414.

270 Ensor 2006:2.

271 Bloomberg 2006:2.

272 Hausman 2008:12.

273 Johnson 2009:413.

200 billion in global investment. Yet South Africa, which should have seen a huge proportion of this coming to its shores, recorded a contraction in its mining investment over the same period.[274] In 2004 the commodities expansion was gaining momentum internationally at the same time as the coming into force of the Mineral and Petroleum Resources Development Act and the tabling of the royalty bill,[275] which in effect is an additional tax on all extractions. Instead of expanding investment, which would necessarily have lead to an increase of economic growth, jobs and earnings from exports, mining investment contracted with 20 percent, with a further contraction of 14 percent in 2005.[276]

Fred McMahon of the Fraser Institute (responsible for the annual international survey of mining companies), is quoted as saying that it is "a real shock that in a place like SA, with great mining potential, investment is at its weakest levels."[277] The Fraser Institute publishes a policy potential index as part of its annual survey. This index is a composite index which measures the effect that government policy has on exploration. These policies include uncertainty concerning the administration, interpretation, and enforcement of existing regulations; environmental regulations; regulatory duplication and inconsistencies; taxation; uncertainty concerning native land claims and protected areas; infrastructure; socio-economic agreements; political stability; labour issues; geological database; and security. The index ranks countries according to the level of encouragement of investment. The region most encouraging of investment can obtain a maximum of 100 points, with the least encouraging scoring 0. In the 2008/2009 survey South Africa was given a score of 41, compared to countries such as Zimbabwe (18); Democratic Republic of the Congo (24); Ghana (51); Namibia (52); Mali (53); Botswana (65).

By opening the economy to new entrants, especially from previously disadvantaged groups, BEE could stimulate economic growth. This is however not what has been

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274 Naidoo, McNulty & Theobald 2008:34.

275 Which was later enacted as the Mineral and Petroleum Resources Royalty Act 28/2008.

276 Naidoo, McNulty & Theobald 2008:34.

277 Quoted in Naidoo, McNulty & Theobald 2008:34.

happening so far. By only benefiting a small elite, economic expansion will not be achieved and efforts should be made to expand the scope of empowerment beneficiaries.

Keeping the need for increased investment in mind, it is true that overregulation of the economy could actually deter investment. For example, Sasol has in the past labelled BEE as one of the risk factors it faced in the South African economy.[278] Possible alternatives or complementary initiatives for the B-BBEE programme and its complex regulatory system should be investigated as a means to achieve empowerment.

5.3.3 The ethics of B-BBEE

The B-BBEE programme also raises some ethical questions pertaining to the involvement of government employees and ministers in business dealings whilst holding office and garnering political influence. It could rightly be asked whether persons in government — whether employed by government or holding senior or ministerial positions — should be allowed to derive any personal benefit from the government's business dealings with companies. This benefit could be as a result of their involvement in companies with which the government does business, for example the awarding of procurement contracts. It could also be asked whether there should be a cooling-off period applicable to persons who leave government employment to enter the private sector before they or the companies in the private sector which subsequently employs them should be allowed to profit from dealings with the state. Information gathered whilst in the state's employment should not be exploited for the personal gain of individuals. Due to the small size of the pool from which companies can draw for management positions, it has become lucrative to head-hunt trained black people from government employment for the private sector. There is however a fine line between pursuing opportunities in the private sector, and abusing position and power.[279]

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278 Reed 2003:17.

279 Cargill 2005:25-26; Schultz-Herzenberg 2010: Available at http://www.polity.org.za/article/trading-public-knowledge-for-private-gain-is-the-revolving-door-spinning-out-of-control-2010-02-23 (accessed on 24 February 2010).

Personal financial benefits derived from state business by government officials and politically-connected individuals have recently created some controversy. This is an area that requires that clear guidelines pertaining to the ethics of these issues be formulated and enforced.[280] Although the government has been vocal about proposing guidelines to regulate officials' participation in the business sector, it is not clear whether such a framework has been established. At local government level in particular, officials have come under fire for being more interested in self-enrichment than ensuring service delivery to the very people who elected them.[281] Public service should ultimately be about serving the people, and not about financial gain. Globally speaking, the main reward for service to the people is not considered in mainly financial terms, but rather as a matter of inherent professionalism and committed service to the people.[282] This accentuates the very complex relationship between business and politics, especially in a situation where the government has committed to economically establishing itself. However, it should be illegal to exert influence, stemming from a position in government, to gain an interest in or procure an interest for someone else in a project, even if such influence is exerted without the promise of remuneration.[283] There is a conspicuous lack of rules or provisions relating to ethics in both the Codes of Good Practice and the B-BBEE Act.

Parliament's standing committee on public accounts (Scopa) has recently called for a ban on any state official or public servant from tendering for government business, or influencing the outcome of awarding tenders for their benefit.[284] In August 2009 the auditor-general reported that 2 319 state officials held interests in corporations which are engaged in business dealings with departments in the national and provincial

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280 February 2010: Available at http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D2019%26OTID%3D26%26PID%3D44 (accessed on 25 February 2010).

281 Cargill 2005:22.

282 Makgetla 2005:9.

283 Ibid.

284 Ncana 2009:4.

government.[285] Cabinet is rightly concerned with the high level of private involvement by public officials. The Public Service Commission has estimated that between 45 percent and 72 percent of civil servants in senior management positions were involved in private sector partnerships or held directorships in companies which would probably result in conflicts of interests arising.[286] The Minister of Cooperative Government and Traditional Affairs, Sicelo Shiceka, has unveiled that policy proposals — involving the banning of civil servants from having outside business interests and introduce a cooling-off period for civil servants looking to enter private sector — would be handed to cabinet in 2010.[287]

The circumstances surrounding the sale of Telkom shares could be used as illustrative of the convergence of opportunism and cronyism that occurs when no adequate framework exists to deal with public sector involvement in private sector business. It also highlights the disregard which these kinds of deals show toward achieving actual broad-based benefits. In 2004, Thintana (a foreign shareholder of Telkom, comprising US and Malaysian interests), announced their intent to sell their holding in Telkom. The buyer, the Elephant Consortium, consisted of a group of highly connected individuals, including an aide to then President Thabo Mbeki, Smuts Ngonyama and former Director-General of Communications, Andile Ngcaba (who was responsible for the sale of the Telkom shares to Thintana in the first place). What made this particularly problematic was the fact that the consortium could not raise the required cash within the prescribed time limit, which resulted in the PIC (manager of the Government Employees Pension Fund) coming to the rescue of the buyers. It bought the

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285 The Minister of Finance, Pravin Gordhan recently stated that 1 200 civil servants are being investigated for either tax or tender fraud. Ncana 2010:4. In an ongoing audit performed by the Western Cape provincial government, it was found that at least 65 government employees have been conducting business dealings, to the value of R57.3 million, with the provincial government without proper approval for such dealings. Legalbrief 2010b. Available at http://www.legalbrief.co.za/article.php?story=20100531090215876 accessed on 31 May 2010).

286 Lund 2009. Available at http://www.fin24.com/articles/default/display_article.aspx?ArticleId=1518-1786_2560957 (accessed on 12 November 2009).

287 Ibid. This could be construed as a general failure of the Department of Public Service and Administration's 2002 Public service anti-corruption strategy. Available at http://www.dpsa.gov.za/documents/accc/Public%20Service%20Anti-corruption%20Strategy.pdf (accessed 1 June 2010).

shares and warehoused them for a period of 6 months to give the consortium time to raise the funds. Although the PIC did keep some of the shares, the bulk of these shares was sold to the consortium partners, giving these individuals shares with great value. This was an ideal opportunity for the government to make a strong statement against narrow-based individual enrichment of politically connected individuals at the expense of the broader masses and the ethics of BEE, but unfortunately, it proved to be an opportunity missed.[288]

Another example highlights the marked nepotistic character of relations between beneficiaries and government officials that some of these BEE deals have displayed, which raises even more serious ethical questions. In 2003 the Competitions Tribunal of South Africa held hearings on the issue of Anglo-American increasing its stake in Kumba Resources to a controlling stake of 49 percent. The then chief executive of the IDC, Khaya Ngqula and the IDC's BEE vice-president lobbied strongly against such a move and instead proposed a transaction granting control to an unnamed BEE consortium. Despite Anglo-American's request for disclosure of the identity of the consortium being denied, it did come to light that the consortium consisted of, *inter alia*, Moss Mashishi and Reuel Khoza. The involvement of Khoza — CEO of a large parastatal, Eskom — was deeply frowned upon. Mashishi played a leading role in another BEE consortium in which he partnered with Graca Machel, wife of Nelson Mandela, and Wendy Luhabe, wife of Sam Shilowa, then the Gauteng premier. Although these political connections and possible conflicts of interests are worrisome, they are further complicated by Luhabe being the IDC's chairperson, the entity most opposed to Anglo-American's acquisition of the controlling stake. The IDC was in favour of granting permission to the BEE consortium instead. Suspicions were raised that other IDC officials were also partners in the consortium. On Anglo-American's threat to completely abandon Kumba — which would not have been able to become operational without the Anglo expertise — hurried denials that the IDC wanted to take control of Kumba for itself or on behalf of the consortium followed.[289]

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288 Cargill 2005:26; Hirsch 2005:222.

289 Johnson 2009:399-400.

Irrespective of any interpretation that the government, BEE beneficiaries, or the media may give of crony capitalism, narrow-based empowerment, or nepotism in the award of contracts or equity, the matter not only poses ethical problems and issues, it emerges as fundamentally irreconcilable with the objectives of the B-BBEE Act, and the interests of transparency and good governance.

5.3.4 Preferential government procurement

The government policy tool of preferential government spending and its operation were addressed above.[290] Some of the problematic issues associated with preferential procurement involve international allegations of protectionism. Hence international companies may find the practice of using preferential procurement practices unacceptable.[291] It could be argued that preferential procurement has a negative impact on international competition and the benefits of free trade.[292] However, it could be said that short-term curtailment of international competition to achieve social or economic objectives is justifiable.[293] Internationally, preferential procurement is regarded as an exception to the principle of non-discrimination. This is consistent with the formal approach to equality, which South Africa rejects. Preferences in contracting are seen as an extension of the substantive approach to equality which aims to remedy past injustices.

It is necessary to consider the effectiveness of preferential procurement as a policy tool. Arguments have been framed regarding the lack of information available for the purpose of measuring the actual progress made towards achieving the objectives of targeted procurement. This could prove to be detrimental to the overall success of the policy.[294] Where no clear and quantifiable objectives and targets are set for projects, it becomes almost impossible to evaluate the levels of success. A proper assessment of the

290 Chapter 3, para 3.4.1.

291 Arrowsmith 1995:235; McCrudden 1999:11.

292 Arrowsmith 1995:245.

293 This is in line with Article V of the World Trade Organisation Agreement on Government Procurement. Arrowsmith 1995:246.

294 Watermeyer 2000:231; Bolton 2007:258; Manchidi & Harmond 2002:104.

successes achieved with procurement is essential in order to balance the costs involved against the benefits achieved. In other words, a proper evaluation would have to determine whether there is a proportional balance between the advantages achieved through, and the costs associated with the process of achievement. Watermeyer summarises the needs for procurement programmes as follows:

> "What has been needed is a cost effective procurement system which provides, encourages and promotes a government's socio-economic objectives in a definable, quantifiable, measurable, verifiable and audible manner, within a fair, equitable, competitive, cost effective and transparent environment, without:
>
> - over-taxing the administrative capacity of government;
> - creating unfair competition within sectors of the economy;
> - abusing or lowering labour standards;
> - exposing government to unacceptable risks;
> - compromising value for money; or
> - compromising the efficiency and effectiveness of the private sector in their ability to deliver."[295]

On the other hand, studies undertaken in South Africa have shown that a fair amount of success has been achieved through targeted procurement, especially in the construction sector. With regards to increasing capital flow to rural, underdeveloped, disadvantaged communities, Watermeyer praises the success of the construction of the Malmesbury prison complex and notes the project "proved to be more efficient at channelling money into communities than some focused poverty alleviation programmes in South Africa involving the construction of community buildings."[296]

According to Manchidi and Harmond the development of small businesses owned or controlled by previously disadvantaged persons (Affirmable Business Enterprises) is

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295 Watermeyer 2000:231.

296 Ibid, at 247.

central to the achievement of empowerment and social justice.[297] The targeting and support of SMMEs through procurement are central to the success of using procurement as a tool to achieve economic development.[298]

From the discussion so far it should be clear that preferential procurement has sizable potential to advance broad-based black economic empowerment. Preferential or affirmative procurement could aid in economic growth, job creation and social and economic development. As stated earlier, this, in fact, is the key to creating a truly egalitarian society based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

There is a delicate balance created through the PPPFA and its Regulations between empowerment as objective, and affirmative procurement within the broader context of the constitutional principles of procurement, namely equity, cost-effectiveness, fairness, transparency, and competitiveness. This is evident when considering how the preferential points system attempts to differentiate between contracts with higher and lower values. It demonstrates the interplay between cost-effectiveness and equity, an interaction which advances transformation of public procurement in South Africa. The balance that must be retained between all five constitutional principles also makes it clear that tenderers will not be entitled to tenders solely based on the fact that they belong to a group singled out for preference. In line with the government's macro-economic policy, heeding the difficulties posed by maladministration and corruption, through transparency and sound management, and governed by the basic values and principles underlying public administration,[299] procurement should be used as an instrument to advance social and economic justice. Lack of specific data makes it difficult to measure the specific contribution of public sector procurement to black economic empowerment.[300] It has however been concluded that the use of preference points systems in public procurement

297 Manchidi & Harmond 2002:103.

298 Rogerson 2004:184.

299 Constitution of the Republic of South Africa: section 195.

300 Noon 2009:630.

has led to an increase in the participation of enterprises owned by previously disadvantaged individuals in government contracts.[301]

Government has had mixed success with this effort to date. Despite lofty ideals and principles, government procurement has been tainted by corruption and mismanagement. This has received wide-spread media coverage and government has vowed to crack down on this practice. For example, the Treasury department is in the process of establishing a special unit to investigate tender corruption.[302] The Minister of Finance, Pravin Gordhan stated that four tender-fraud cases were currently being investigated, valued at R2 billion, with 1 200 civil servants being investigated for either tax or tender fraud.[303] The ethical issues raised by this were also highlighted in the previous section. This does however raise serious questions about the overall success of this programme to achieve broad-based black economic empowerment. Questions regarding the overall lack of accountability, transparency and good governance in the management of the process do, unfortunately, persist. According to Minister Gordhan, the focus will in future increasingly fall on transparency and accountability.[304] This is also due to the fact that tax payers' money is spent on procurement. All constitutional principles of procurement should be regarded and the costs should be weighed against the benefits. Wasteful expenditure should be avoided through the implementation of the monitoring programme alluded to above.[305]

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301 Ibid.

302 Brown 2010:3.

303 Ncana 2010:4.

304 National Treasury 2010:22. Available at http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf (accessed on 8 March 2010).

305 For example, the issue of cost implications of public sector procurement was also highlighted recently when it came to light that the Department of Defence had to pay a premium of R76 000 (or approximately 20 percent) for a single tractor (the Department needs a total of 90 of these tractors) from a construction company instead of from a Level 3 (Level 3 contributors are enterprises that scored between 75 and 85 on the generic scorecard) rated company. Gibson 2010. Available at http://www.beeld.com/Content/Suid-Afrika/Nuus/1928/b3ed52bd3f184d0bafd458690b1ac745/08-03-2010-11-57/Trekker_kos_R76_000_meer (accessed 9 March 2010).

5.3.5 Government management of the B-BBEE process

The government has come under fire for inadequate management of the process of BEE, leaving it to manage itself to a large extent.[306] Inadequate management of the B-BBEE programme carries the risk of actually widening the inequality gap instead of diminishing it.[307] The DTI failed to timeously produce a strategy to align the regulations of the PPPFA with the Codes of Good Practice. Furthermore, serious delays ensued before a formal verification regime was established.[308] This uncertainty and mismanagement of the regulatory framework for implementation of the programme merely added to confusion and caused administrative chaos. The government has now realised the importance of harmonisation of standards and policies for government procurement and new draft regulations under the PPPFA were published in August 2009,[309] which set out to bring public sector procurement practices in line with the approach in the B-BBEE Act and Codes of Good Practice. Although these draft regulations were expected to come into effect during April 2010,[310] it has become clear that the draft regulations were still lacking in certain aspects.[311] For example, the differentiated points allocation (80/20 and 90/10 for contracts of different monetary value) is criticised as placing too little emphasis on BEE, and weightings of 60/40 or 50/50 are suggested. It is also suggested that a greater weight be attributed to BEE for contracts up to R50 million, instead of the current R1 million.[312]

Criticism against the government's ambitious job-creation targets, especially in times of global economic downturn, followed President Jacob Zuma's State of the Nation

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306 Ndlovu 2007:103; Temkin 2010b:12.

307 Jack 2005:29.

308 Radebe 2008:19.

309 General Notice No 1103 of 2009, Government Gazette No 32489, 14 August 2009.

310 As of May 2010, the revision process of the regulations has not been completed. Treasury has stated that a revised version of the draft regulations are being finalised, but no indication has been given as to when these can be expected. Marais 2010. Available at http://www.fin24.com/Business/More-strife-over-state-procurement-20100517 (accessed 18 May 2010).

311 Ensor 2009b:2; Temkin 2009:15; Pressly 2009a:13; 2009b:5; Benjamin 2009:4; De Waal 2009. Available at http://www.sake24.com/articles/default/display_article.aspx?ArticleId=6-1607_2561913 (accessed on 20 November 2009). Marais 2009:6.

312 Zilwa 2009:3.

address in June 2009. The President announced that the government aspired to create 500 000 new job opportunities by end of 2009, and a further 4 million jobs by 2014 through expanding the public works programme. It was said that these targets were farfetched and unrealistic, and that the government lacked the management capabilities to create that number of jobs.[313]

It would also seem that the focus of the government has moved slightly away from BEE following the change in political leadership. Some commentators aver that BEE was the passion of former President Thabo Mbeki, together with his Minister of Trade and Industry Mandisi Mpahlwa, and that the current leadership do not share their optimism for the project, owing in a certain sense to their stronger focus on relations with the alliance partners, the SACP and Cosatu.[314] Widespread calls for review of the programme have sounded from within the ranks of the ANC itself.[315] It seems that the more leftist regime has created a political and technical vacuum. This does not mean that the programme stands to be scrapped, although proposals to this end have been made. Nomonde Mesatywa, chief director for BEE in the DTI, has stated that despite the challenges facing the programme, it would not be dismantled.[316] However, Minister of Trade and Industry under President Jacob Zuma, Rob Davies, has stated that BEE cannot be the sole responsibility of the DTI, but should cut across all departments. Under the new government, the emphasis will now fall on elements with a more broad-based character, namely employment equity, skills and enterprise development.[317] It seems that the SACP also favours this position, namely empowerment driven through job creation and rural development.[318] Cosatu has recently stated that B-BBEE should actually be

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313 Isa 2009:1.

314 Johnson 2009:394; Mbanga 2009:28.

315 Radebe 2009:10. Radebe avers that part of the reason for the heightened calls for review of the programme from political sources could be attributed to the birth of a new political party, Congress of the People (Cope) from within the cadres of government. While still affiliated with the ANC, Cope founders benefited from ANC BEE programmes, but are now seen as running counter to their previous patrons. On the other side, Cope is intent on ensuring that BEE does not remain the sole preserve of the ANC.

316 Mesatywa 2009:9.

317 Mbanga 2009:28; Radebe 2009:10.

318 This was the position taken by Jeremy Cronin (Deputy Minister of Transport since 2009; and Deputy General-Secretary of the SACP since 1995). See Mbanga 2009:28.

subordinated to job creation.[319] This approach has more merit than the preoccupation with equity ownership and control that has been the dominant issue during the last 15 years. Standard Bank Chief Executive Sim Tshabalala has stated that in a country "where poverty and inequality pose the biggest risk, it is perfectly rational for government to prioritise rural development and job creation."[320] Rampant calls for review, however, do create uncertainty in the market and this will merely retard transformation and confuse foreign investors.[321]

In light of suggestions that the entrepreneurial activities should be promoted, and the generally accepted premise that a large part of the success of real broad-based empowerment lies in the promotion of SMMEs, an evaluation of the government's success in this field would be fitting. Support for and expansion of the number of small black enterprises is fundamental to promoting economic transformation and enabling meaningful participation of black people in the economy. In the section above, which focused on the funding mechanisms for empowerment, the failures of certain agencies were discussed. Attention is again drawn to the particular failures of the agencies which were mandated to deal with small, medium and micro enterprise development.

In addition to the IDC, the NEF, and Khula,[322] the government created the National Small Business Council[323] and Ntsika Enterprise Promotion Agency[324] to assist in the achievement of this objective. The Small Business Council was liquidated in 1998 due to financial mismanagement, huge levels of debt, and chronic leadership issues. Ntsika Enterprise Promotion Agency suffered a similar fate of fraud and mismanagement. By 2001 Khula was battling to retrieve misappropriated funds. This was followed by calls from the ANC Youth League that both Khula and Ntsika (together with the Umsobomvu

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319 Ensor 2010a:2.

320 Mbanga 2009:28.

321 Radebe 2009:10.

322 Discussed above.

323 Replaced by the Small Enterprise Development Agency in terms of section 9 of the National Small Enterprise Act 102/1996 as amended by Act 29/2004.

324 Ntsika Enterprise Promotion Agency is established by the National Small Business Act 102/1996, incorporated into the Small Enterprise Development Agency in terms of Section 17 of the National Small Enterprise Act 102/1996 as amended by Act 29/2004.

Youth Fund[325]) should be wound up due to its failure to fulfil its mandate or make any significant progress.[326] The NEF suffered an even worse fate at the hands of its leadership. Although government has now established the Small Enterprise Development Agency to advance SMMEs, it has been argued that the government's strategy lacks the much-needed total support for these businesses and, instead, merely provides financing and credit. The lack of support, and the skills deficiency experienced by the small business owner pertains to areas such as management, marketing, entrepreneurial risk assessment, accounting and distribution.[327]

Small business development is essential for the dismantling of ownership concentration prevalent under the apartheid government. This was replaced by a similar system of control after the first wave of BEE transactions, and not remedied by the government's new approach of B-BBEE.[328] Ownership concentration, market concentration and monopoly threaten competitiveness and democracy,[329] and it is important to understand that the most effective way of combating this type of concentration is through the development of entrepreneurship through SMMEs. The answer is not necessarily in the reshuffling of existing ownership patterns. Although the government has done a lot to support the development of SMMEs, as discussed above, the implementation of its policies in this respect has had mixed results. There have been successes, but also teething problems, especially a lack of regulatory reform.[330]

Southall[331] argues that the ANC initially envisaged a strong black middle class created by B-BBEE which would fulfil a certain patriotic duty by also spreading wealth

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325 The National Youth Development Agency was eventually established by merging the Umsobomvu Youth Fund and the National Youth Commission. National Youth Development Agency Act 54/2008, which commenced in February 2009.

326 Engineering News 2000. Available at http://www.engineeringnews.co.za/print-version/making-small-business-a-big-issue-again-2000-08-11 (accessed on 3 December 2009); Johnson 2009:401-402.

327 Johnson 2009:402.

328 Hirsch 2005:194.

329 Ibid, at 196.

330 Ibid, at 203.

331 Southall 2007c:8.

to historically impoverished communities, but that this ideal was far removed from the reality of a general attitude of overt consumerism and the pervasive spirit of "get rich quickly" that ensued. This is regarded as the source of the cronyism and corruption rife in BEE dealings founded on the sole virtue of capitalising on political connections. Although BEE is essential for the transformation of the economy, it seems that the challenges are immense. Southall asks whether the state can, through the means of affirmative action and B-BBEE, actually shape a society based on socially responsible and sustainable capitalism.[332]

Johnson argues that the government has been unable to attract the foreign investment the country needs to obtain growth and generate employment, due to its ideology and unwavering ambition to control more and more of the economy. Whereas the government could have attracted foreign direct investment, invited foreign skills immigration and relaxed labour laws in order to promote employment — which would have generated growth and employment — the government insisted on going the way of increased control.[333]

5.3.6 B-BBEE and grassroots empowerment

The question remains whether the economic transformation that has taken place so far has actually succeeded in enabling meaningful participation of black people in the economy. If the objective is real participation, then success should be found in real change being felt in the lives of the larger part of the group it intends to benefit.

In 1996 4.2 percent of South Africans (1 755 838) lived on less than US$ 1 per day, which is the generally acceptable measure of extreme poverty. This number increased dramatically to peak at a level of 5.8 percent of the population (2 631 992) in 2002, but decreased equally dramatically to reach a level of 1.4 percent in 2008, which means that

332 Ibid.

333 Johnson 2009:441.

678 291 people lived in extreme poverty in South Africa.[334] Nonetheless, this decrease had not been as a result of people finding employment and making an economic contribution, but rather due to the increase in social grants received from the state.[335] Since democratisation in 1994, notable progress has been made in the provision (the quality of services not being questioned) of social services, such as health services, education, housing, and social security. This has been done through continued and aggressive spending by the government. However, the United Nations has stated that despite these efforts, inequality and poverty have increased and South Africa is still among the most unequal in the world.[336] Compared with a Gini coefficient[337] of 0.62 in 1996, the rating for South Africa in 2008 was 0.66, which means that the South Africa of 2008 is more unequal than in 1996. More specifically, in 1996 the Gini coefficient for black people was 0.54, and this worsened to 0.61 in 2008.[338]

The South African Institute of Race Relations reported that in 2008 19.6 million people lived in relative poverty. That is more than 40 percent of the population, but remains the lowest number since 1998. Relative poverty is defined as living on less than R871 per month per member of the household surveyed. A staggering 49 percent of black people lived in relative poverty in 2008. This figure in 1996 was 50.6 percent and peaked at an all-time high in 2002 at 58.2 percent (20 809 612 people).[339] It would be impossible for the government to eliminate relative poverty through social grants and the only viable option to decrease this figure is through expanded employment. In the second quarter of 2009 there were 4 125 000 unemployed[340] people — a rate of 23.6

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334 SAIRR 2009a:110.

335 Coomey (2007:31) reported that in 2007, 57 percent of black people lived on less than US$ 1 a day, the internationally accepted definition of poverty.

336 United Nations Development Programme 2003:xv.

337 The Gini coefficient measures income inequality with a score of 0 meaning perfect equality and a score of 1 (the worst) meaning total inequality.

338 SAIRR 2009a:90. Tangri & Southall 2008:701.

339 SAIRR 2009a:111.

340 Unemployment is defined here using the same definition as Statistics South Africa. Statistics South Africa defined the unemployed as follows:

- they had not worked in the survey reference week of the *Quarterly Labour Force Survey*;

percent unemployment.[341] Of these, 87 percent, or 3 587 000, were black. This confirms the statement that B-BBEE as a policy has yet to spread empowerment and growth to the broad masses, and confirms the submission that job creation through economic growth and skills development and education is most likely the answer to questions of economic empowerment, rather than complex codes and programmes. The most effective way to eradicate poverty and income inequality would be through job creation and skills transfer and education.[342]

The most troubling aspect of evaluating the B-BBEE programme is thus probably this lack of grassroots empowerment and the growing inequality and poverty in South Africa. This reality should be contrasted with the initial objective — what Thabo Mbeki used to call the creation of a prosperous black bourgeoisie, the emergence of a fabulously rich new business class.[343] Despite massive equity transfers taking place,[344] very little of the effects thereof have trickled down to the poorest masses.[345] It would almost seem that BEE has been about transfer instead of transformation of economic power.[346] This comes 15 years after democracy, and years after the implementation of the Employment Equity Act and the implementation of B-BBEE.

BEE is a forward-looking growth strategy. It is not primarily aimed at eradicating poverty. Although aimed at growth and empowerment which would inevitably lead to increased job creation, higher levels of employment, the development of entrepreneurial

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- they had actively looked for work or tried to start a business in the four weeks prior to the reference week of the survey;
- they were available for work in the reference week of the survey;
- they had not actively looked for work in the four weeks prior to the survey, but were starting at a definite date in the future.

341 SAIRR 2009a:37.

342 Beaumont 2008:18.

343 Lapper 2009c:3.

344 Reference is once again made to the annual survey done by accountancy group Ernst & Young where it was reported that between 1990 and 2009 black owners acquired almost R500 billion in assets, with the bulk of acquisition — R150 billion — traded during 2007 and 2008. Lapper 2009b:2; Stokes 2009:42.

345 See also Hoffman 2008:96.

346 This is the view of (as he was then) secretary-general of the ANC, Kgalema Motlanthe. See Seepe 2007:15.

and other skills, which would in turn alleviate poverty, it is contended that empowerment is not solely a welfare programme and should not be viewed as assuming the responsibility of other government departments, for example, social development, education, labour, etc. However, when the programme fails to meaningfully contribute to growth and empowerment, its overall impact should be scrutinised.

What became clear is that BEE, narrow-based or broad-based, has been a policy which has continually had two underlying, competing objectives, namely growth and redistribution. While redistribution by whatever means may have more immediately visible results as regards empowerment, it is only through increasing growth that a long-term empowerment of all is truly attainable and sustainable. Although the private sector has a large and important role to play it is eventually the government, through policy and practice, which ultimately is responsible for creating the environment where prosperity for all will prevail.

The slow pace of both creating economic growth and disappointing results in black economic empowerment carry the risk of political instability. As noted above[347] huge economic or wealth inequality between racial, gender or ethnic groups, and in the South African instance sometimes between groups of differing political affiliations, may cause social unrest.

Broad-based black economic empowerment is not a panacea for all South Africa's problems. Excessive government intervention through regulation and legislation could potentially do more harm than good. Conversely, if empowerment is left solely at the behest of the private sector without any government input, the pace of economic wealth creation which is absent of any racial divide would lack the necessary impetus to make real strides in change. This is evident from the complacency which characterises white business, a complacency which is slow to contribute to, or effect black economic empowerment. It is perhaps this very complacency which eventually led to the formation

[347] See also Strategy for B-BBEE:4.

of the BEECom.[348] It should therefore be continuous process in which public and private sector players function as partners in this endeavour.

[348] See also Tangri & Southall 2008:704.

Chapter 6

Evaluation and recommendations

6.1 Evaluation

6.1.1 Introduction

The discussion in Chapter 5 considered B-BBEE in the context of its practical implementation. It provided information concerning the practical implementation of the Codes of Good Practice and the elements of the scorecard used to measure compliance levels. It was also illustrated how both intended and unintended consequences — both positive and negative — flow from the design, formulation and implementation of the B-BBEE programme. The discussion highlighted certain aspects that were perceived to be relevant to the assessment of the constitutionality of the programme.

It should be stated emphatically at the outset that the constitutional validity and necessity of the overall objective of the B-BBEE programme is beyond question. In the discussion dealing with the historical legacy of apartheid, it was shown how severe economic (and other) inequalities were created by legislative policies which enforced racial segregation and discrimination, denying the majority of South Africans their rights to self-determination and meaningful economic participation. Apartheid left in its wake a large group of people denied ownership of property, productive assets and, generally, bereft of economic power. Simply dismantling discriminatory legislative and policy barriers will not succeed in remedying the consequences of discrimination. Removal of discriminatory provisions and proceeding on the assumption that all are equal would merely entrench existing, systemic inequalities.[1] As emphasised throughout this study, a definite need exists for positive measures to address existing race-based economic injustice. Recognition of this need led to the inclusion of provisions in the Constitution

[1] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 74.

which highlight the importance of remedial or restitutive measures to remedy injustice. These provisions ranged from rights which provide for access to social and economic services to the right to fair labour practices. Remedial measures are also foreseen by the constitutional provisions governing the way in which the public administration is to function.

The most obvious constitutional provision which authorises legislative and other measures aiming to eliminate the effects of systemic discrimination is the equality provision in the Constitution.[2] In addition, a number of other constitutional provisions directly and indirectly mandate the adoption of measures specifically aimed at correcting economic injustice. The South African Constitution is a transformative constitution in which the necessity to remedy the injustice of the past is explicitly recognised, and particular direction is provided for the future of the country. The foundational constitutional principles and values concern not only the eradication of discrimination, but also the establishment of an egalitarian society. The main tenets of the latter are non-discrimination and transformation. Government itself is tasked with taking the lead in eliminating existing economic inequalities, not only through the specific provision in section 217 of the Constitution which allows for preferential treatment when procuring goods and services, but also by the constitutional values and principles governing the public administration as outlined in section 195. The constitutional developmental objectives and imperatives identified in paragraph 4.2.5 provide further impetus for devising measures seeking to remedy existing economic inequalities through accelerated economic growth, which would facilitate increased participatory access in economic activities for previously excluded groups.

In Chapter 4 above, B-BBEE was considered in the context of constitutional limitations. What could be termed "limiting provisions" provide guidelines for, or a framework within which, restitutive measures are to be formulated and implemented. As with most legislative provisions, remedial or restitutive measures may impact negatively on a number of constitutional rights of groups affected by the adoption of such

[2] Constitution of the Republic of South Africa: section 9.

measures.[3] The general limitation clause in section 36 of the Constitution *explicitly* lays down conditions for the valid limitation of constitutional rights. However, empowering constitutional provisions also implicitly provide requirements for determining the validity of measures. For example, the transformative constitutional imperative also provides for certain guidelines limiting the way in which affirmative action measures are formulated, designed and implemented.

B-BBEE is the government's flagship economic empowerment initiative. The adoption of this programme with its more broad-based approach sprang from a general concern with the limited results of the first phase of empowerment transactions which mainly comprised large equity transactions. It was demonstrated above that this programme seeks to advance empowerment on a number of fronts through the different elements contained in the scorecard. By using its own procurement budget, together with the expanded relevance of BEE criteria in issuing of licences and concessions,[4] government has ensured that the programme will have a widespread impact on the economic landscape. Moving away from the initial, narrowly focused empowerment strategy which emphasised ownership reform, the objectives related to B-BBEE were to effect transformation, development, empowerment and involvement of all black people in the economy. Specific focus was also placed on the participation of communities and workers in the economy and the increase of skills training, access to infrastructure, as well as on rural community development. Whilst the government started with the noblest of objectives for the creation of a society based on economic justice and the achievement of broad-based empowerment, it can be argued that the reality of the outcome of this specific programme testifies to the contrary. In the following discussion certain problematic factual issues pertaining to the formulation and implementation of the B-BBEE programme will be placed in their constitutional framework. Certain suggestions and recommendations will then be offered for the purpose of remedying some of the constitutional concerns identified, and to reconcile the programme's actual impact with

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3 See for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: para 76.

4 BEE criteria are also applied when determining qualification criteria for the sale of state-owned enterprises and developing criteria for entering into partnerships with the private sector. See B-BBEE Act: section 10.

the stated objectives thereof. From this discussion it will be clear that the programme touches on numerous constitutional provisions and raises complicated policy issues. The goal of the recommendations is not to address all possible concerns relating to the B-BBEE programme, but to offer possible solutions to issues identified in this study.

6.1.2 Section 9(2) and the *Van Heerden* case

The leading case on remedial measures undertaken under section 9(2) of the Constitution[5] is *Minister of Finance and Another v Van Heerden*, which was discussed in previous sections. This case leaves several critical questions unanswered and poses a number of problematic interpretative problems regarding the scope of application of the judgement. What becomes increasingly clear is that the way the Constitutional Court proposes to evaluate affirmative action programmes leaves the constitutionality of these programmes unaffected, to a large extent, by the outcomes they achieve or by their actual impact. This is largely due to the fact that an enquiry of this type relieves the Court of any duty to evaluate affirmative action programmes in a detailed and contextually relevant manner.

When an affirmative action measure is challenged in terms of section 9, the Constitutional Court directs the enquiry through section 9(2). As was explained earlier,[6] the Constitutional Court essentially laid down three requirements for a valid affirmative action programme in *Van Heerden*. These requirements centre on the targeted group, the design of the measure, and whether or not the measure promotes the achievement of equality.[7]

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5 Constitution of the Republic of South Africa. This section is known as the affirmative action clause.

6 See para 4.2.8.3.2 above.

7 See *Minister of Finance and Another v Van Heerden*: para 37. These requirements were discussed in Chapter 4 para 4.2.8.3.2 above.

The first element in this enquiry relates to the targeted group. When evaluating B-BBEE against this criterion it is clear that the group of intended beneficiaries[8] of the B-BBEE programme clearly fall within the definition of persons or categories of persons previously disadvantaged by unfair discrimination. The programme is formulated to advance the economic empowerment of, and achieving economic justice for a group excluded from meaningful participation in the economy by a long history of racially discriminatory policies. The fact that certain individuals or groups of individuals seem to have been repeat beneficiaries of the programme, and could now actually be classified as being empowered, is something that the programme does not adequately address.

What is at issue here is the under- or over-inclusiveness of the programme. The group of intended beneficiaries includes a small group of repeat beneficiaries.[9] A large part of the group of intended beneficiaries, however, is repeatedly excluded from benefiting from the programme. This may be deduced from the myriad of information offered in Chapter 5, dealing with the levels of unemployment, lack of quality education and skills development, and relative levels of poverty still affecting the previously marginalised, and is further borne out by statements from the government.[10] It can thus be concluded that the programme is under-inclusive. In this regard there are two ways in which the *Van Heerden* judgement could be interpreted. If the Court's requirement for dealing with the targeted group of beneficiaries is afforded a narrower application[11] with regard to remedial programmes, the under-inclusive character of the B-BBEE programme may lead to a finding that the programme is indeed irrational. This is because of the distinct disparity that exists between the group of intended beneficiaries and the group of actual beneficiaries.

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8 The intended beneficiaries are defined in the B-BBEE Act as part of the definition of broad-based black economic empowerment and black people. "Broad-based black economic empowerment" means the economic empowerment of all black people (which is defined as a generic term comprising Africans, Coloureds and Indians) including women, workers, youth, people with disabilities and people living in rural areas.

9 See earlier discussion in Chapter 5, para 5.2.1.

10 See statements made by Deputy President Kgalema Motlanthe in his inaugural speech to the BEE Advisory Council. Available at http://www.info.gov.za/speeches/2010/10020415051002.htm (accessed on 8 May 2010). See also Jacks 2010:1; Munshi 2010:50; Johwa 2010a:3.

11 This seems to be the approach advocated by Mokgoro J in her minority judgement. *Minister of Finance and Another v Van Heerden*: para 105.

On the other hand, if a more deferential approach is followed, the Court will be hesitant to question this under-inclusiveness of the programme. This would seem to be the majority's approach in the *Van Heerden* judgement. Following the reasoning of the Court, the number of "empowered individuals" within the targeted group would not affect the rationality or legality of the programme. The Court stated that "[i]n the context of a s 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion".[12] Therefore, membership of a group previously disadvantaged by unfair discrimination, and not the current status of the individuals concerned, is determinative of the rationality of the programme. This constitutes an even thinner concept of rationality compared to what is generally accepted under the rule of law.[13]

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12 *Minister of Finance and Another v Van Heerden*: para 40. The Court further stated that "[i]t is clear that the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned".

13 See further discussion in para 6.1.8 below. Rationality is one of the principles of the rule of law. The rule of law requires that there be a rational relationship between the exercise of a public power and the purpose for which it was granted. If not so, the exercise of the power would be arbitrary (*Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*: para 85). *Prinsloo v Van der Linde and Another*: para 25: "[T]he constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation." This clearly requires a justification for state action. Determining the rational relationship between state action and the purpose thereof is an objective enquiry. In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* the Court stated it as follows (at para 86): "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle." The Court in *Van Heerden* stated that rationality requires that the means chosen should be reasonably capable of achieving the desired outcome (see para 41). This would seem to mean that rationality under the rule of law requires an objective probability that the chosen means would achieve its stated purpose. See also De Ville 2003:201. Membership alone of a group who were previously disadvantaged, without having regard to the dynamic nature of the group with reference to the current circumstances of members of the group, does not contribute to a finding that the measure would reasonably be capable of achieving its objectives.

However, ignoring the fact that a group of already empowered individuals is included in the group of intended beneficiaries, and not addressing the problems that this creates, will impact on the continued efficacy of the programme. The careful formulation of beneficiaries and their continuous redefinition would add to the overall success of achieving empowerment. The Court's approach does not allow for such an assessment. A rational and objective inquiry into the overall effects of the programme, particularly the transactions conducted under the ownership element of the scorecard, would identify the number of repeat beneficiaries. A continuous redefinition of the targeted group seems essential to the sustained efficacy of the programme. A narrower interpretation of the first criterion, i.e. a less deferential approach to the definition of the group of beneficiaries, is therefore preferred in this regard.

Regarding the second criterion for constitutionality, it can be concluded that the B-BBEE programme is designed to advance the said objectives and is reasonably capable of achieving the desired outcomes. A rational connection can be made between the ameliorative programme and its stated objectives. The programme uses a mechanism by which a number of scorecard elements measure compliance in different areas of interest which are designed to achieve empowerment in various fields. Points awarded for compliance add up to a total score which is subsequently used on a sliding scale for preferential treatment when dealing with the government (in regard to the issuing of licences, concessions or other authorisations, awarding public sector procurement contracts, determining qualification criteria for the sale of state-owned enterprises, developing criteria for entering into partnerships with the private sector). In terms of the Court's formulation of this condition, there is no requirement to show the necessity of the programme or whether or not less onerous ways exist in which to achieve the same objective.[14] There is also no requirement of proportionality or questions regarding the level of precision with which the programme is designed. This pre-empts any enquiry into the programme's impact on disfavoured or excluded groups, or the actual effectiveness and level of success achieved by the mechanism chosen to implement the achievements of its stated objectives.

[14] *Minister of Finance and Another v Van Heerden*: para 43.

The first and second criteria are very much intertwined and the success of the overall remedial programme will depend on the effectiveness with which these two factors are addressed. It could thus be said that a narrower interpretation of the first factor which would require a more precise definition of beneficiaries and regular revision of the favoured group, together with an inquiry into the efficacy of the programme as part of the second factor, would stand to benefit the advancement of the constitutional equality value.

The third requirement deals with whether the measure promotes the achievement of equality. It is a broadly formulated element which, to a certain extent, could import elements of fairness, but limits this to situations where substantial and undue harm is imposed on excluded groups or in instances where a manifest abuse of power is present. The Court states that the evaluation of this requirement should be undertaken against the background of the constitutional vision of non-discrimination and transformation.[15] The type of equality promoted by this third condition has to be substantive equality. However, the rationality test proposed by the Court in the *Van Heerden* case to assay the constitutionality of affirmative action measures is inherently incapable of providing a framework within which a determination can be made about whether or not a measure under review promotes equality in a substantively fair manner.[16]

This requirement, within the broader context of the standards laid down for constitutionality, highlights one of the anomalies created by this judgement. The Court's formulation of the conditions for the constitutionality of affirmative action measures, which appear to involve a rationality test only, excludes fairness. However, in its own application of the requirements to the facts of the *Van Heerden* case, it becomes clear that considerations usually associated with a fairness enquiry could come into play. In the first instance, the Court states that consideration of the third criterion requires an

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15 The Court noted the following: "In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened." *Minister of Finance and Another v Van Heerden*: para 44.

16 Pretorius 2009:416.

"appreciation of the effect of the measure in the context of our broader society".[17] This clearly refers to the impact of the measure or programme under review on all the affected parties. The Court further considers factors such as the historical context of the implemented programme, the fact that the proposed measure has a limited lifespan, the position of the complainant and the negative impact of the measure on the disfavoured group.[18] These factors are indicative of an evaluation of the fairness of the programme and go beyond the mere rationality criteria initially laid down by the Court in its formulation of requirements of constitutionality. The anomaly makes it difficult to predict with any certainty the eventual impact of the *Van Heerden* decision on affirmative action jurisprudence.

The discussion in Chapter 5, with particular regard to the implementation of the B-BBEE programme, raised questions pertaining to ethics[19] and revealed instances of abuse of power in the implementation of BEE. Furthermore, the government's failure to adequately address the ethical issues surrounding BEE could prove its indirect complicity in the abuse of power. The ethical concerns raised with regard to B-BBEE indirectly cause undue harm to the majority of beneficiaries excluded from the programme by the unethical actions and practices highlighted above. The Court specifically pointed out that the abuse of power and the imposition of substantial or undue harm would render a measure fundamentally unable to promote the achievement of equality, and would therefore result in a finding of unconstitutionality.

Unless a stricter approach (as advocated above) to the first two criteria for constitutionality is applied, it can generally be concluded that the B-BBEE programme will likely pass constitutional muster if tested against the framework devised by the Constitutional Court in *Van Heerden*. The Court's approach does not allow for anything more than a superficial engagement with the issues related to affirmative action and remedial programmes. The consideration of the ameliorative purpose of a programme as

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17 *Minister of Finance and Another v Van Heerden*: para 44.

18 Ibid, at paras 45-46. The Court, for example, finds no impairment of the dignity of the complainant, and holds that the complainant was never part of a group previously discriminated against. See para 54 of the judgement.

19 See discussion in Chapter 5, para 5.3.3 above.

the predominant basis for the constitutionality thereof, pre-empts a full substantive equality analysis and the protection of dignity. This approach all but guarantees the constitutionality of any programme with a remedial label. Due to the extreme complexity of the B-BBEE programme and the convergence of a multitude of interests and rights, it is submitted that the rationality enquiry applied by the Court in the *Van Heerden*-case is grossly inadequate and that only an evaluation based on all contextual factors, including a full fairness and proportionality inquiry, would adequately address the scope of the issues at hand. Deferring to the legislative authority in an instance as complex as B-BBEE programmes, and the impact thereof, is tantamount to relinquishing the Court's judicial duty.

6.1.3 The scope of application of the *Van Heerden* case

It was noted above that the judgement in *Van Heerden* raises questions about its scope of application. Conflicting results follow when the judgement applies only to actions brought in terms of section 9 of the Constitution, or to actions in terms of other constitutional provisions where the defence of affirmative action could be raised. In *Van Heerden* the Court makes the following statement regarding the foundational constitutional values of democracy and fundamental human rights and the Constitution's 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."[20]

This seems to indicate that the Court accepts that remedial measures should be evaluated within the framework of the Constitution as a whole.

[20] *Minister of Finance and Another v Van Heerden*: para 25.

The Court also states that "[i]f a measure properly falls within the ambit of s 9(2) it does not constitute unfair discrimination."[21] That implies that the measure under review is deemed compliant with the requirements of unfair discrimination in section 9(3), and therefore passes muster in terms of section 9 only. The clearest indication from the Court that section 9(2) is a defence only if a challenge is based on unfair discrimination in terms of section 9(3), and, therefore, that the requirements set out by the Court only applies when evaluating affirmative action measures when the challenge is based on section 9, is given in the statement by Moseneke J:

> "*When a measure is challenged as violating the equality provision*, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination."[22]

If the *Van Heerden* judgement is only applicable to challenges brought under section 9, it means that affirmative action measures complying with the three criteria listed by the Court provide a complete defence only against claims of unfair discrimination in terms of section 9(3). This creates a peculiar contradiction: a valid affirmative action measure under section 9(2) cannot be evaluated for fairness in terms of section 9(3), but an affirmative action measure challenged under the right to fair labour practices[23] is afforded a comprehensive contextual fairness and proportionality analysis. In addition, an affirmative action measure constituting administrative action could be evaluated for reasonableness in terms of section 33[24] of the Constitution, but not evaluated for reasonableness in terms of section 9.

This approach also leaves questions regarding specific constitutional provisions

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21 Ibid, para 36.

22 Ibid, para 37 (own emphasis).

23 Constitution of the Republic of South Africa: section 23.

24 Right to just administrative action.

which contain affirmative action clauses, for example, section 25[25] and section 217.[26] In section 25(5) provision is made for remedial measures to correct the racially discriminatory nature of property ownership in South Africa. The Constitution states that reasonable measures should be taken within the available resources to facilitate equitable access to land to all citizens, subject to the proportionality analysis of the limitation clause. Remedial measures in terms of section 25 are therefore subject to a reasonableness and proportionality inquiry, as opposed to mere rationality in terms of section 9(2). Section 217(2) of the Constitution provides for remedial action in public sector procurement, such procurement being governed by the constitutional principles of fairness, equity, transparency, competitiveness and cost-efficiency. The constitutionality of affirmative procurement measures would then be evaluated within the broader framework of fairness, which differs markedly from the mere rationality requirement for section 9(2) affirmative action measures.

Should the *Van Heerden* judgement apply to all affirmative measures, irrespective of whether the action is brought in terms of section 9 or not, a narrow rationality approach to the analysis of affirmative action measures will apply. This would then mean that if empowerment measures are challenged in terms of the right to fair labour practices, this right will be reduced to the right to rational labour practices. It would imply that if empowerment measures are challenged in terms of the right to reasonable administrative action — insofar as an affirmative action measure constitutes

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25 The constitutional property clause provides for affirmative or restitutive measures in section 25(5) and (8) which provide:

25(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

25(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

26 The constitutional provision governing procurement provides in section 217(2):

Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

administrative action — the right is reduced to a right to rational administrative action. When preferential criteria are considered in the course of public sector procurement, the application of the narrow approach in the *Van Heerden* judgement could in certain instances mean that the specific constitutional values governing procurement, namely fairness, equity, transparency, competitiveness and cost-efficiency, are afforded less consideration in favour of the mere rationality requirement as set out in *Van Heerden*. This interpretation of the *Van Heerden* judgement and its scope of application leave the provisions of the Constitution devoid of substance and stripped of the possibility of meaningful interpretation. It also creates peculiarities for the B-BBEE programme in its wider constitutional structure. B-BBEE was discussed in terms of its empowering and limiting constitutional framework in Chapter 4, and various constitutional provisions directly or indirectly empower the government to implement remedial measures. These provisions pose different requirements for validity, or set certain standards to determine compliance. If the above interpretation of the *Van Heerden* judgement is followed, the requirements for validity posed by these other empowering and limiting provisions (besides the affirmative action clause in section 9) will be irrelevant to an evaluation of the constitutionality of the B-BBEE programme.

An interpretation of section 9(2) of the Constitution, which would render rational affirmative action measures as insulated against any inquiry into their reasonableness or proportionality (in terms of section 9(3)), is incompatible with the basic principle that the Constitution forms a unity, and that the five subsections of section 9 are to be read in a harmonious way. The narrow and constricted reasoning adopted in *Van Heerden* appears incorrect. A broader interpretation of section 9(2) would be compliant with the purposive approach to constitutional interpretation. The importance of a purposive approach to constitutional interpretation has been emphasised by the Constitutional Court in a number of cases,[27] and a recognition of the harmonious nature of the subsections of section 9 was in fact included in the *Van Heerden* judgement itself.[28] Section 9(2) should therefore not

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27 *Ferreira v Levin NO; Vryenhoek v Powell NO*: paras 172, 213; *S v Makwanyane*: para 9; *S v Zuma*: para 15; *S v Mhlungu and Others* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC): para 8; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*: para 47.

28 *Minister of Finance and Another v Van Heerden*: para 28.

be regarded in isolation. If this were to be the case, section 9(2) would be incompatible with other constitutional provisions. It would mean that even if an affirmative action programme or measure is clearly in conflict with another constitutional provision, for example, reasonableness as an element of administrative justice,[29] but is found to pass the section 9(2) test, it would be deemed a constitutionally valid programme in spite of its incompatibility with other constitutional provisions.

Section 9(2) should thus not be interpreted so as to exclude the applicability of any other constitutional provision. The Constitution as a holistic unit should be preserved throughout the process of interpretation. Transformation as a constitutional principle should not be interpreted to the exclusion of proportionality, a principle fundamental to a constitutional regime. When proportionality and fairness are removed from the process of constitutional interpretation and adjudication, the Constitution fails to work as an instrument of integration, and yields polarising consequences.

The constitutionality of the B-BBEE programme should therefore be evaluated against the totality of constitutional provisions enabling affirmative action measures and the provisions limiting the implementation of these programmes. The next part of the discussion will thus place problematic operational issues of B-BBEE, as identified in Chapter 5, within the framework of these provisions, thereby highlighting the intricate interaction of various constitutional provisions within which B-BBEE operates.

6.1.4 Government's macro-economic policies and B-BBEE

One of the problematic issues regarding the implementation of the B-BBEE programme is the government's failure to create broader economic conditions within which to maximise the successful implementation of the B-BBEE programme. Indicative of this is the disinvestment by large companies and the lack of foreign direct investment, which is partly due to investor policies. Contraction in the mining sector, with concomitant job losses, despite international expansion in this sector, has been alluded to,

[29] Constitution of the Republic of South Africa: section 33.

and is also partly attributable to government policies. Lack of investment in and growth of the manufacturing sector and exports, together with an inadequate economic growth rate, were identified as part of the broader macro-economic factors which present specific challenges for the implementation of the B-BBEE programme. A sustainable high economic growth rate, for example, is one of the essential components for the efficient operation of the enterprise development and procurement elements of the scorecard. The continued success of new enterprises, established under the enterprise development element, depends on their ability to function independently of the procurement done by the entity responsible for assisting in its initial formation. Operating in a substructure of vibrant economic activity and expansion is therefore one of the constituents of the sustainability of these new enterprises. The procurement element is premised on economic activity which clearly depends on economic expansion. The effective operation of this element, centred in the buying-selling cycle of businesses, and which would operate at a heightened level of efficiency if these business activities are expanded, is thus also dependent on increased economic growth and expansion.

It was also demonstrated above[30] that the success of financing equity transactions currently used when facilitating equity transfer under the ownership element is based on the continued growth in the share price of public companies or increasing dividend payments. The sale of shares or dividend payments, or a combination of these, is usually used to service the debt sustained in terms of finance agreements. One of the factors contributing to increased share prices and returns on investment is economic expansion. There is thus a tangible link between the operation of the B-BBEE programme and scorecard and the government's macro-economic policies regarding economic growth.

In Chapter 4 an economic development imperative was identified as a directive principle of state policy. This imperative is the driving force behind economic empowerment and the achievement of social justice and substantive equality. The correction of economic inequalities is premised on both the redistribution of economic holdings and the acceleration of economic growth so as to increase access to economic opportunities for previously excluded groups. An adequate, state-driven developmental

[30] Chapter 5, para 5.2.1.

role is essential for economic growth and expansion. The above macro-economic policy shortcomings could be seen as a failure of the government to steer its policies in the direction of economic development and expansion, as mandated by this directive principle, and therefore a failure to fulfil its constitutional obligations in this regard. In other words, the government's current broader economic policies fail to create the circumstances necessary to facilitate the optimal implementation of B-BBEE and with it the realisation of human rights and the achievement of economic justice. Although optimal realisation of economic growth as such is not, in a legal sense, a requisite for constitutional government policy choices, adequate developmental growth initiatives are essential to ensure the relative efficiency of the programme over the longer term. The sustained and proven failure of broader government policies to facilitate the necessary economic growth could point to non-compliance with the developmental imperative as a steering principle of government policies. It could also contradict the central role which development must play in the public administration in terms of section 195 of the Constitution.

The Constitution is also fundamentally committed to transforming society into one which reflects the fundamental constitutional values. This transformative imperative requires that government policies be aligned to move in the direction of a society based on human rights, social justice and fundamental human rights. Included in these policies are the government's macro-economic and fiscal policies which designate the realm within which the B-BBEE programme, as an affirmative transformative programme, must function. Therefore, if the government's economic policy does not reasonably contribute to the achievement of social and economic justice, it fails the test of transformative constitutionalism. The strength and dynamic growth character of the government's economic policies will determine the success and relative speed with which society will move from an inegalitarian to an economically and socially just society. Disinvestment, lack of foreign direct investment, low and generally inadequate economic growth and the subsequent failure to create enough employment opportunities were shown to characterise the impact of the government's current macro-economic and fiscal policies on the broader economic performance. This compounds the failure to address inequality in a meaningful way, and thus fails the transformative constitutional imperative, which

includes the notions of substantive equality, access to social and economic services, and social and economic justice. As was stated earlier,[31] transformative constitutionalism does not simply require the eradication of discriminatory policies and legislation, but necessitates positive action to drive transformation. The notion of transformative constitutionalism mandates policies which would accommodate a dynamic process of transformation and prohibits policies which would actually hamper this process.

Together with the developmental imperative, transformative constitutionalism requires that the government provide for an economic climate which would enable the "social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential."[32] The *status quo*, elaborated in Chapter 5, speaks of a reality which clearly fails this aspiration. It can therefore be stated that the government needs to address these broader economic issues in order to comply with the constitutional economic developmental imperative and the principle of transformative constitutionalism. Inaction is clearly prohibited, but grossly inadequate action or action which actually impedes the realisation of BEE objectives would surely also not pass muster.

Although the developmental directive principles and legislative commands do not give rise to individually enforceable subjective rights, these are indeed enforceable as objective legal norms. Due to the fact that decisions regarding the choice and implementation of economic policies are best suited to the legislative and executive branches of government, it would be more appropriate for courts to apply legislative commands and directive principles as interpretative guidelines.[33] When courts deal with issues regarding the achievement of economic equality and justice, the constitutional developmental objective should be considered when evaluating the effectiveness, fairness and rationality of legislative measures or other policy instruments so enacted and implemented. For example, when the Court has to evaluate a measure for its reasonableness in the realisation of socio-economic rights, it has to make a contextual

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31 See Chapter 4, para 4.2.2 above.

32 Albertyn & Goldblatt 1998:249.

33 De Wet 1996:72.

assessment under the specific circumstances. The reasonableness assessment is based on the evaluation of a number of criteria identified by the Court through the course of its socio-economic rights jurisprudence. These criteria include, *inter alia*, considering the flexibility of the programme, its capacity to facilitate the realisation of the rights in question, etc. These do not present a closed list of factors and it is submitted that the existence of a developmental directive principle could be added to the list of considerations. For example, when a Court evaluates the reasonableness of the B-BBEE programme in realising access to social and economic rights, the analysis must be made in a way which is consistent with the recognition of constitutional directive principles.

6.1.5 Measuring of progress

A concern regarding the implementation of the B-BBEE programme identified in Chapter 5 is an inadequate research and monitoring system. The overall lack of adequate research regarding the levels of implementation of elements other than ownership, control and employment equity creates difficulty in measuring the levels of success achieved. This also adds to the inflexibility of the programme in the sense that undesirable and unintended outcomes or implementation malfunction cannot be timeously identified and addressed. The lack of a directly measurable success rate excludes the possibility of an evaluation of the reasonableness, fairness and proportionality of the programme, which analysis is required when a measure is evaluated in terms of section 36 of the Constitution. The same evaluation regarding the reasonableness, fairness and proportionality of the programme is also required if the constitutionality of affirmative action measures is addressed in the way suggested above in paragraph 6.1.2.[34]

Objectively viewed, government action should be rationally related to the objective it seeks to achieve. This is one of the fundamental principles of the rule of law.[35] Any

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[34] The suggested approach advocates for a full fairness and proportionality inquiry into the constitutionality of affirmative action measures. See also the suggestions made in para 6.1.3 above regarding the scope of application of the *Van Heerden* judgement.

[35] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*: para 86.

government action or policy choice which fails to pass this threshold requirement of rationality would be unconstitutional.[36] Without a concrete system with which to show the initial need for a specific measure, and account for the way in which a specific legislative programme subsequently addresses the identified need, it would be difficult for the government to establish the rationality of its policy choices. In the case of B-BBEE, the need for remedial steps to realise economic and social justice is well established.[37] Continuous monitoring and analysis of the progress made are essential in order for the government to objectively justify the implementation of the specific programme.

Responsiveness, accountability, openness and effectiveness as fundamental normative elements of the Constitution provide the framework and values within which governmental action (which includes the government's formulation, implementation and administration of the B-BBEE programme) should be evaluated. As noted in the discussion of the foundational constitutional principles, the latter have specific bearing on the way programmes are designed, implemented and monitored. This should always be done in a manner which is rational, open and justifiable. Accountability requires the government to both justify and explain the specific policy choices it makes. In the absence of an adequate monitoring system, the government will be unable to account for the progress made in the achievement of the programme's objectives. Insofar as the programme poses limitations on individuals' rights, the absence of a monitoring system will compromise the government's ability to account for the reason for the particular form of implementation of the programme.

A programme which lacks an appropriate monitoring system furthermore undermines the values of responsiveness and openness, which go to the bedrock of South African society. A monitoring system would ensure that the state provide "effective,

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36 Ibid, para 90.

37 This need was established through evidence provided from studies done by, for example, the SAIRR which were alluded to earlier (para 5.3.6), and the information provided in Chapter 2 above dealing with the historical context of this study. The Baseline study conducted by the DTI in 2007 further provides evidence of the need for remedial measures.

transparent, accountable and coherent government."[38] Responsiveness and openness also mandate that inefficient provisions and programmes be identified and corrected.[39]

6.1.6 Education, training and economic empowerment

Several areas of concern regarding the success of skills development initiatives were addressed in the previous chapter, which was placed within the broader context of education. Specific facts regarding the quality of education were highlighted, supporting the submission that there is a general lack of enough suitably qualified candidates.[40] It was also shown how this scarcity carries serious implications for compliance with the employment equity targets set out in the scorecard. Arbitrary enforcement of employment equity targets could have detrimental results for overall economic development, and could, moreover, threaten the optimal implementation of B-BBEE programmes.

Quality education and skills development increase economic independence, which serves the goal of economic justice and subsequently decreases dependence on governmental social security. Education and skills development free the potential of each person and improve their quality of life. It could be said that education, knowledge and skills are the true measures of empowerment.[41] Transformative constitutionalism is concerned with providing greater access to education and other social and economic rights.

Reference should be made to socio-economic rights, which include the right to education. Socio-economic rights have a dual link to B-BBEE: firstly, the inclusion of socio-economic rights in the Constitution is part of the impetus toward remedial

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38 Constitution of the Republic of South Africa: section 41.

39 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*: para 627.

40 See above paras 5.2.3 and 5.2.4.

41 This is supported by a statement of Dr Blade Nzimande, Minister of Higher Education and Training. See Johwa 2010b:3.

measures. This is because of the interrelatedness between socio-economic rights and the right to equality and dignity, and the establishment of a society founded on the values of human dignity, the achievement of substantive equality and the advancement of human rights and freedoms. In Chapter 4 it was also stated that B-BBEE is an indirect measure to establish access to socio-economic rights.[42] Facilitating access to socio-economic rights such as education, promotes the realisation of other rights in the Bill of Rights, specifically that of equality.[43] Access to education and the quality of education are clearly essential components for the optimal operation of B-BBEE. Without the necessary emphasis on education, the employment equity and skills development elements will operate under strain. Skills development can also be viewed as an extension of education, and the government's efforts in promotion thereof could therefore also be examined as part of a broader analysis of its facilitation of access to socio-economic rights. The central issue is then whether it can be concluded that the state's provision of services (education and other socio-economic services) fulfil the requirements of being reasonable measures which lead to the progressive realisation of these rights.[44] A determination would therefore have to be made about whether or not the government's efforts in the field of education, with specific regard to skills development, are being adequately provided for through the skills development element.

The facilitation of skills development programmes through SETAs, and government support for skills development articulated through these institutions to private enterprises, are lacking in substance. It was shown in Chapter 5 that the interaction between the skills development element and the Skills Development Act, the Skills Development Levies Act, and the operation of SETAs has largely been unable to produce the initially envisaged results. This shows that the state's approach to skills development has not succeeded in providing comprehensive and coherent consideration of the related issues. The government should respond to this weakness in the

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42 See Chapter 4, para 4.2.7.

43 *Government of the Republic of South Africa and Others v Grootboom and Others*: para 23.

44 Constitution of the Republic of South Africa: section 26(2), 27(2), 29(1)(b). *Government of the Republic of South Africa and Others v Grootboom and Others*: paras 34, 46; *Minister of Health and Others v Treatment Action Campaign and Others*: para 25.

implementation of skills development by actively promoting and adopting more proactive programmes (similar to the type of initiatives referred to in Chapter 5) in order to expedite the realisation of the rights concerned. Failure to address these issues could point to inefficiency and a failure to timeously address shortcomings in the programmes, a factor that could bring the reasonableness of the measures implemented to realise socio-economic rights into question. The state has the available means to make these improvements due to the amount of levies collected by SETAs in terms of the Skills Development Levies Act. It cannot be conclusively stated that the skills development element and the educational policy of the government as part of the fundamentals of successful B-BBEE, have succeeded in meeting the obligation to provide greater access to and quality of education. However, the generally deferential approach to adjudication of socio-economic rights issues adopted by the Court would in all likelihood prevent it from making any substantive orders relating to this aspect.[45]

The current failure of the government to provide access to quality education is evidenced by the information provided above[46] regarding the findings of the SAIRR on matric pass rates, and references to the low levels of student success in mathematics. This subsequently leads to ill-preparedness for tertiary studies and an inability to advance training and qualification in areas of critical skills, for example, engineering and accountancy. The inadequate standard of education is further emphasised by the national benchmark test project, which shows low levels of proficiency in mathematics and literature.[47] The inefficiency of SETAs was again highlighted recently when the Minister of Higher Education and Training announced that four SETAs were to be placed under administration for poor performance.[48] Although plans are now being made to restructure and improve the operations of the SETAs, without the implementation of such reforms the system would remain inflexible, unresponsive and unbalanced in its approach to facilitating skills development. These are clear indications of the unreasonable nature

45 *Soobramoney v Minister of Health, KwaZulu-Natal*: para 29; Bilchitz 2005 *et seq*:56A-24; Swart 2005:215-216 also highlights the general ineffectiveness of orders granted by the Court.

46 See para 5.2.3 above.

47 Details of the findings were provided in para 5.2.3 above.

48 Johwa 2010b:3. The government is planning to restructure SETA administration and better align its operation with workplaces, as well as universities and colleges.

of the programme — which is the substructure for the operation of the B-BBEE skills development element — with regard to realising access to socio-economic services. Despite financial resource allocation to education amounting to approximately 19 percent of total government expenditure,[49] the level and quality of education has not shown marked improvement over the last couple of years.[50] With a significant reprioritisation of public expenditure announced in the 2010/2011 budget, involving increased spending on education (as well as health, job creation, etc), it stands to reason that adequate financial resources have been allocated to this critical sector, which is important in establishing the reasonableness of a policy. However, budgetary support from the government is not sufficient to establish reasonableness. Reasonableness further requires that the government policies be implemented by institutions with an adequate capacity to implement such policies. This could be questioned if the results achieved so far are considered. It would seem that the education and training systems currently in place, together with the functioning of the skills development element of the B-BBEE programme, do not represent a system capable of aiding in the realisation of the socio-economic rights in question.

Democracy, improvement of the quality of life for all, equality, dignity, and fundamental human rights are core foundational values which act as guidelines when interpreting the B-BBEE programme and its implementation, as well as a yardstick against which B-BBEE should be tested. Any evaluation of the constitutionality of the B-BBEE programme, especially in relation to skills development, should be informed by these foundational constitutional values, particularly the aspiration to improve the quality of life for all and freeing the potential of each person. Meaningful participation in economic life as integral to a society based on dignity, equality and freedom is premised on the possession of the necessary skills and knowledge. Successful implementation of B-BBEE hinges on the achievements of the government and the private sector in this field. Skills development was the second best performing element on the national

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49 South African Government Information 2010. Available at http://www.info.gov.za/aboutsa/education.htm (accessed on 9 June 2010).

50 This was acknowledged in the Budget Review 2010:120. Available at http://www.treasury.gov.za/documents/national%20budget/2010/review/Budget%20Review.pdf (accessed on 9 June 2010).

scorecard according to the findings of the study commissioned by the Presidential Black Business Working Group in 2007, where issues were also raised regarding the low level of involvement by SETAs.[51] In light of the problematic issues highlighted in Chapter 5, it would therefore appear that reliance on the implementation of the B-BBEE programme and its scorecard would not sufficiently address the skills shortages, which are exacerbated by the problems besetting education.

6.1.7 Ethics and B-BBEE

As noted earlier, public administration is the vehicle through which much of the political, fiscal, social and economic transformation in South Africa is to be achieved. The public administration sector will be directly involved in the implementation of the B-BBEE programme through the operation of section 10 of the B-BBEE Act, which explicitly requires all organs of state to consider the Codes of Good Practice when dealing in procurement activities. Serious questions about ethics and corruption remain a problem in the implementation of B-BBEE. This stands in direct contrast with the constitutional values and principles which govern public administration. The specific values and principles included in section 195 resonates the underlying democratic values of the Constitution.[52] The values of openness, transparency and accountability are foundational constitutional principles, but are again specifically emphasised in section 195(1) which lays down the basic values and principles governing the public sector. The linkage between the public administration values and foundational constitutional principles of openness, transparency and accountability is also explained in the case of *Van der Merwe and Another v Taylor and Others*, where the following was stated:

> "Section 1 of the Constitution, read with s 195, indeed sets high standards of professional public service as applicants submit. It requires ethical, open and accountable conduct towards the public by all organs of State. These are basic values for achieving a

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51 DTI 2007. *The progress of Broad-Based Black economic empowerment in South Africa — Executive Report: Baseline Study 2007*:19. Available at http://www.thedti.gov.za/bee/ExecutiveSummary.htm (accessed on 5 March 2010).

52 For a discussion of these constitutional values, see para 4.2.6 above.

> public service envisaged by our Constitution, which requires the State to lead by example. … In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals."[53]

The importance of ethical and accountable public administration was also stressed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* with the following statement:

> "The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated."[54]

At all levels of government, but especially at local government level,[55] self-enrichment, at the expense of service delivery, contradicts the delivery of public service in an impartial, fair, equitable manner,[56] as well as public administration which is accountable[57] and which fosters transparency.[58] The ethical issues raised in the previous chapter pertain specifically to public administration. It is therefore clear that both ethical issues and corruption stand in clear violation of the specific constitutional principles governing public administration.

The maintenance and promotion of a high standard of professional ethics[59] is undermined by the involvement of government employees and ministers in business dealings whilst holding office and exercising political influence. Unethical dealings and corruption in the public administration sector furthermore reduce the efficient, economic

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53 *Van der Merwe and Another v Taylor and Others*: paras 71-72.

54 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*: para 133.

55 Cargill 2005:22.

56 Constitution of the Republic of South Africa: section 195(1)(d).

57 Ibid, section 195(1)(f).

58 Ibid, section 195(1)(g).

59 Ibid, section 195(1)(a).

and effective use of resources, which is an explicitly stated constitutional principle underlying the public administration.[60] This also works to the detriment of the developmental imperative provided for in section 195 of the Constitution.

Although the government has stated its intention to formulate and enforce guidelines applicable to the ethics of public service employees, its failure to promptly do so calls the accountability, good governance, openness and transparency of key players in the implementation of the B-BBEE programme into question. This would imply that the substructure within which B-BBEE operates is lacking in these aspects of constitutionality. In the 2010 Budget Review the government, through the National Treasury, committed itself to a reform of the government system in order to reduce the incidence of corruption (as well as to lower costs) and to create a system characterised by greater transparency, competitiveness and cost-efficiency.[61]

Preferential public sector procurement has also posed specific challenges in respect of ethics and corruption, which can probably be ascribed to the total monetary value spent annually on government procurement and the large number of transactions involved. The specific constitutional principles governing public procurement were discussed in Chapter 4. They include fairness, equity, transparency, competitiveness, and cost-effectiveness as provided in section 217 of the Constitution. Procurement systems which leave room for and contain elements of unethical and corrupt activities are directly inconsistent with these principles. However, with regard to the premium paid when awarding procurement to contractors in the advancement of remedial objectives, this should always be weighed and balanced against the other constitutional principles governing public sector procurement on a case-by-case basis. The preferential procurement guidelines in use, as well as the proposed guidelines,[62] present a balanced way of dealing with the variety of competing values and interests at play. There seems to be a rational balance between the costs involved in implementing the affirmative

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60 Ibid, section 195(1)(b).

61 National Treasury. Budget Review 2010: 12. Available at http://www.treasury.gov.za/documents/national%20budget/2010/review/Budget%20Review.pdf (accessed on 9 June 2010).

62 Referred to in Chapter 4, para 4.2.9 and Chapter 5, paras 5.3.4 and 5.3.5 above.

procurement programme and the broader objectives it seeks to achieve. However, when procurement is done without adhering to the totality of guidelines, it could prove to be overly costly and irrational, with little regard to other essential objectives such as service delivery, transparency, good governance, equitability and competitiveness.[63]

6.1.8 B-BBEE and grassroots economic empowerment

One of the most troubling aspects of B-BBEE is the fact that it has to date been incapable of effecting meaningful grassroots empowerment.[64] The adoption of the *broad-based* empowerment programme has failed to stem the continued narrow-based

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63 Specific reference to the examples provided in Chapter 5, para 5.3.4 above. Due to the fact that the adjudication and award of tenders also constitute an administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act, the fairness of the award process is emphasised. In *Logbro Properties CC v Bedderson NO & Others*: para 8 Cameron JA stated that there is an "ever-flexible duty to act fairly" on provincial tender committees, and by implication, also on national and local government tender authorities. This fairness also encompasses a duty to weigh the relevant factors pertaining to transparency, good governance, competitiveness, service delivery, as well as the remedial value of procurement, in order to make a decision based on the facts of a specific case. See also *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*: para 13, where it was emphasised that fairness depended on the circumstances of each case, subject to the principles of transparency, competitiveness and cost-effectiveness. For example, in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 2 SA 481 (SCA); 2008 5 BCLR 508 (SCA) the Supreme Court of Appeal set aside a disqualification of tender which followed the appellant's failure to sign a Declaration-of-Interest form which was completed and initialled. The condonation of the non-compliance (not signing the Declaration) was done in the public interest and in serving the values of fairness, competitiveness and cost-effectiveness. The disqualified party's tender would have provided the required services (removal, transport and treatment of medical waste from provincial hospitals in Limpopo) for approximately R440 000-00 per month, whereas the tender was awarded to a consortium whose tender came to approximately R3 640 000-00 per month (para 17). The Court held that the definition of an "acceptable tender" in the PPPFA (in other words, the definition which would regulate whether or not condoning the non-signatory of the form in question is acceptable) should be interpreted "within the context of the entire s 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution" (para 18). It should also be noted that what would constitute an acceptable tender and acceptable compliance will also depend on the facts of each case (see *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*: para 15). This approach highlights the importance of balancing all relevant factors in the circumstances and consideration of the totality of constitutional principles, set out in section 217 of the Constitution, when making decisions regarding the award of tenders. See also *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*: para 14. In *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others*: para 54 the Court emphasised the importance of considering all factors, and not only the tender price, relevant in the awarding of points.

64 See discussion above in Chapter 5, para 5.3.6.

empowerment which it set out to remedy. A lingering point of criticism levelled against B-BBEE is its creation of a small elite group of repeat beneficiaries to the exclusion of the broader masses. This could partly be ascribed to the general overemphasis placed on the equity and control elements under the programme, which typified the initial narrow-based form of empowerment.

As previously stated,[65] ownership and management control are essential elements of B-BBEE and the correction of economic inequalities. It is furthermore true that due to the high visibility of ownership and board composition of especially listed companies, it is inevitable that the emphasis would fall on these elements of the scorecard and the programme. Nonetheless, this does not justify the continued disregard shown for the true broad-based elements of the scorecard, or the tolerance of the dysfunctional operation of these elements. The effect of creating a relatively small group of repeat beneficiaries ultimately does not improve the quality of life of all citizens. Despite the fact that some individuals (who were actually themselves beneficiaries of the initial and continued narrow-based empowerment) have rebuked claims that B-BBEE has in fact only created a small group of super-rich beneficiaries,[66] it is a generally accepted fact. It has even been admitted by Deputy President Kgalema Motlanthe in his address to the BEE Advisory Council.[67] This represents a clear failure to transform South Africa into a society based on substantive equality. The *Van Heerden* judgement noted the promotion of equality as the third requirement when assessing the constitutionality of affirmative action measures. If this assessment is made in a meaningful and contextualised manner, it would clearly show how this failure of B-BBEE places strain on the programme's overall ability to promote the achievement of substantive equality for a significant portion of the historically disadvantaged part of society.

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65 See Chapter 5, paras 5.2.1 and 5.2.2.

66 See Chapter 5, para 5.2.1 above.

67 See statements made by Deputy President Kgalema Motlanthe in his inaugural speech to the BEE Advisory Council. Available at http://www.info.gov.za/speeches/2010/10020415051002.htm (accessed on 8 May 2010). See also Jacks 2010:1; Munshi 2010:50; Johwa 2010a:3.

It has been demonstrated[68] that the financing models for ownership transfer deals are unsustainable and generally structured in a way which does not comply with sound business principles. It was also contended that the high levels of indebtedness created by buying equity eventually lead to the dilution of the very black ownership which B-BBEE sets out to create. These concerns, together with the unrealistic targets set in the scorecard, point to possible failures in the design of the programme and specifically the operation of the ownership element.

The programme's creation of a small group of super-wealthy individuals does not present a problem *per se*, but when this result is considered together with the fact that substantial *broad-based* empowerment has generally not been achieved, it exacerbates the problematic nature of the first. In Chapter 5 statistical and numerical evidence was provided which showed an increase in levels of unemployment together with a failure to expand employment opportunities. Levels of income inequality and poverty have increased and no improvement has been achieved with regard to South Africa's ranking in terms of the Gini coefficient. In fact, South Africa consistently ranks as the most unequal country in the world. This is so despite the fact that there is a public interest in full employment and skills development, because these advances would lessen the dependence on public funds for social grants.[69] Deputy President Motlanthe, in the address referred to above, admitted that "the 'broad-based' part of BEE has seemed elusive. In the main, the story of black economic empowerment in the last 15 years has been a story dominated by a few individuals benefiting a lot."[70]

In the discussion of the *Van Heerden* judgement above, it was stated that one of the requirements for constitutionality of affirmative action measures is that these should be rational. This requires that the programme be reasonably capable of achieving its remedial objective. Insofar as the Court follows a deferential approach in the application of these requirements, the *actual* effectiveness and level of success achieved by the

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68 See Chapter 5, para 5.2.1 above.

69 Currie & De Waal 2005:491.

70 See statements made by Deputy President Kgalema Motlanthe in his inaugural speech to the BEE Advisory Council. Available at http://www.info.gov.za/speeches/2010/10020415051002.htm (accessed on 8 May 2010). See also Jacks 2010:1; Munshi 2010:50; Johwa 2010a:3.

chosen mechanism in the achievements of its stated objectives is not a determining concern in the evaluation of its rationality. The inquiry is merely concerned with the stated objective of the programme or plan under review.

As indicated above, this superficial analysis of measures which carry the label of affirmative action is unsatisfactory. When some of the operational inefficiencies as set out in Chapter 5 regarding the lack of achievement of more inclusive empowerment are considered, questions about the rationality of this programme should be raised. If the more contextualised approach to determining the constitutionality of affirmative action measures under section 9(2), suggested above,[71] is followed, the enquiry into fairness and proportionality would have been able to identify these issues, without necessarily second-guessing the legislature's policy choices. The government's slow response to identifying these serious deficiencies in the programme and adapting the design thereof (which is partly due to the lack of adequate monitoring discussed earlier) should bring the reasonableness of the programme under review. At present, there is no clear rational and reasonable connection between the programme and the outcomes of its implementation. The fact that the majority of intended beneficiaries are in effect excluded from the benefit of the programme, or has yet to see any benefit resulting from the programme also poses questions about the way in which the programme was designed. It is clear that when remedial programmes are designed, the target group should be historically disadvantaged, but it should also be designed in a manner which would *actually* achieve benefits for a significant portion of these groups.

In the Preamble to the B-BBEE Act it was clearly envisaged that the programme objective would be to "increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution". It was also explicitly recognised that the exclusion of the vast majority of South Africans from ownership of productive assets and the possession of advanced skills, and the low levels of income earned by this majority were items foremost on the agenda of the programme so as to increase the effective economic participation of the majority of South Africans. The focus would therefore be on

[71] See para 6.1.2 above.

involving a broad spectrum of previously excluded people in economic activity — through increased employment opportunities — which would subsequently deliver a more equitable income distribution. The recognition of the importance of increased economic growth in order to effect higher employment rates is also clear from the Act. The factual information provided in Chapter 5 shows that until now the programme, together with certain macro-economic circumstances, has been unable to produce meaningful employment opportunities. This translates into a lack of grassroots empowerment or a failure to "increase the effective participation of the majority of South Africans in the economy".[72] The lack of actual broad-based and effective participation of the majority of the intended beneficiaries presents tentative evidence that the reasonableness and rationality, as required in terms of the preferred approach for constitutionality in terms of section 9, as offered above, of this programme can be questioned. It cannot be stated that the design of the programme is rationally or reasonably able to achieve its stated objectives.

The lack of grassroots empowerment of the B-BBEE programme established previously also touches on the notion of social justice. In light of the devastating legacy of apartheid, the achievement of social and economic justice is of particular importance for South Africa. Social and economic justice concerns the dismantling of unequal relations between people which originated from systemic forms of discrimination. Social justice, with economic justice as a component, occupies a central position in the transformative imperative of the Constitution. It mandates the removal of social and economic barriers, which entail that the achievement of social and economic justice should be part of the underlying objectives of remedial measures such as the B-BBEE programme.

The concept of social justice is concerned with progressively widening access to social and economic rights, realising a just social order and the increase in the quality of life and standard of living of members of society. The failure of the B-BBEE programme to achieve meaningful participation in economic activities for the majority of South Africans, together with the fact that it has shown a tendency to continually work for the

[72] B-BBEE Act: Preamble.

benefit of a limited group of individuals, does not in fact contribute to the process of healing the divisions of the past and establishing a society based on democratic values, social and economic justice, and fundamental human rights.[73]

Proportionality and remedial justice are central to the concept of social justice. The scorecard elements dealing with skills development, enterprise development and socio-economic development are directly concerned with issues of social justice, with the employment equity and preferential procurement elements contributing to economic justice.[74] Therefore, in order to evaluate these elements against the objectives and requirements of social and economic justice, they ought to be measured in terms of proportionality and remedial justice. The weighting of the different scorecard elements is relevant here. If the spread of points awarded to each element is considered against the background of the importance of achieving social and economic justice, it becomes clear that, in light of the current achievements, the ownership element, and to a lesser extent the management control element, are disproportionately favoured on the scorecard. The lack of adaptability[75] of the scorecard, especially considering the most pressing needs for broader-based empowerment identified above, adds to the scorecard's lack of proportionality and failure of remedial justice. It thus fails the achievement of economic and social justice. It could further be concluded that the B-BBEE programme does not advance the foundational constitutional principles.

There is also a close connection between the positive measures required in order to achieve a society based on social justice and the value of transformative constitutionalism, which is a central tenet of the South African Constitution. The B-BBEE programme's general inability to achieve grassroots empowerment therefore does not only speak to its failure to achieve social and economic justice, but also shows the programme's inadequacy to adhere to the principle of transformative constitutionalism. The B-BBEE programme does not succeed in transforming the South African society

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73 De Wet 1995a:39; De Wet 1996:24; Braithwaite 2000:186. The central constitutional commitment to social justice shows characteristics of remedial or restitutionary equality.

74 This division should not be seen as defining the elements absolutely. It is used here as a way of expressing the broader nature of each element.

75 The rigidity of the scorecard is further addressed below.

from one which carries the legacy of apartheid to the constitutionally envisaged one. The creation of a small group of beneficiaries and the programme's overemphasis of equity and control fail to effectively rid society of the devastating economic consequences of discriminatory rule and does not promote economic justice for society in the broader sense.

Transformative constitutionalism, with its strong ties to substantive equality and dignity, is sensitive to the manner in which the most vulnerable in society are treated regarding their social and economic needs. In order for B-BBEE to be compliant with this value, it should show a marked improvement in the lives of those most affected by the impact of economic inequality. The results achieved, particularly the lack of job opportunities created so as to reduce the level of unemployment and the achievement of levels of economic independence, provide evidence of the limited level of success with which B-BBEE empowerment has been able to meet the social and economic needs of society's most vulnerable group. Although B-BBEE was not in essence designed as a poverty relief scheme, its stated objectives clearly speak to this effect. Research done by the SAIRR discussed in Chapter 5,[76] showed that in 2008, 19.6 million South Africans (40 percent of the population) lived in relative poverty. Previously marginalised groups are still worst affected and 49 percent of black people live in relative poverty. In Chapter 5 it was also indicated that the only viable way of addressing this will be through expanded employment and not through the payment of social grants by the state. It would therefore be reasonable for the B-BBEE programme to increase its focus on elements which specifically deal with this pressing issue. The evidence provided demands that any rational and reasonable empowerment initiative should predominantly focus on grassroots economic empowerment. In the absence of such a focus, or the underemphasised focus that these issues receive from the B-BBEE programme in its current form, questions are raised about the reasonableness of the design of the programme and its ability to serve social justice and transformative constitutionalism.

These arguments also support a conclusion that B-BBEE has, overall, failed to reasonably realise access to socio-economic rights. It was noted above that socio-

[76] See Chapter 5, para 5.3.6 above.

economic rights have a dual link to B-BBEE. Economic empowerment increases an individual or group's access to and enjoyment of these rights. In this respect B-BBEE should comply with the requirements set out by the Court to evaluate socio-economic programmes, i.e., B-BBEE must be a reasonable and progressive means to facilitate access to socio-economic rights within the limitation of available resources.[77] As noted above in the discussion of education and empowerment, these requirements more specifically mean that implemented measures or programmes should expeditiously and effectively aim to progressively realise constitutional rights, within the broader framework of the state's financial means, and that these programmes should be comprehensive, coherent, balanced, and flexible, with clearly stated objectives and responsibilities for the government.[78]

The only facet of the B-BBEE programme which directly deals with socio-economic rights is the socio-economic development element on the scorecard. This element counts for only 5 of the total of 100 points. This stands against the total of 30 points allocated to ownership and management control elements, which have no direct influence or impact on the realisation of social and economic rights or broader objectives of grassroots empowerment. This shows a comparatively disproportional emphasis on activities which do not directly impact on the objective of facilitating access to socio-economic rights. No explicit provision is made in the scorecard for recognition of job creation initiatives of enterprises, and none of the elements, besides possibly the socio-economic development element, in their current format are flexible enough to accommodate recognition thereof. The reason for stating that the socio-economic development element could possibly accommodate efforts related to job creation is based on the definition of socio-economic development contributions in the Codes of Good Practice, which states that these contributions consist of "monetary or non-monetary contributions actually initiated and implemented in favour of beneficiaries by a Measured Entity with the specific objective of facilitating sustainable access to the economy for

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77 *Soobramoney v Minister of Health, KwaZulu-Natal*: para 29; *Government of the Republic of South Africa and Others v Grootboom*: para 38; *Minister of Health and Others v Treatment Action Campaign and Others*: para 35.

78 *Government of the Republic of South Africa and Others v Grootboom*: paras 39-44, 46, 66, 68, 82; *Minister of Health and Others v Treatment Action Campaign and Others*: paras 67, 70, 80.

those beneficiaries."[79] Enterprises are afforded considerable leeway concerning the activities measureable under this element.[80] However, it is not certain that employment creation initiatives will be recognised under this element. Even if such activities could be included for measurement under the socio-economic development element, they only stand to score a maximum of 5 points, which does not reflect the fundamental importance of these activities for the realisation, both direct and indirect, of socio-economic rights and broad-based empowerment. The element in question does not add to the coherence of the overall objective of realising socio-economic rights.

The lack of flexibility in the scorecard to provide additional recognition for enterprises which exert special impact on real broad-based grassroots empowerment, arguably the most critical aspect of any empowerment programme, detracts from the broader objectives of the programme. The activities allowed for recognition under the socio-economic development element exclude many activities which could prove to be more beneficial to communities in terms of facilitating realisation of socio-economic rights, for example, activities related to environmental concerns and health care. This shows that this element could perform better if more flexibility is allowed, especially with regard to its achievement of socio-economic rights-related objectives.

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79 Codes of Good Practice: Code Series 700, Statement 700, para 3.2.1.

80 Ibid, at para 3.2.4. The Codes provide a non-exhaustive list of possible Socio-Economic Development Contributions:

(a) grant Contributions to beneficiaries of Socio-Economic Development Contributions;

(b) guarantees given or security provided for beneficiaries;

(c) direct costs incurred by a Measured Entity in assisting beneficiaries;

(d) overhead costs of a Measured Entity directly attributable to Socio-Economic Development Contributions;

(e) developmental capital advanced to beneficiary communities;

(f) preferential terms granted by a Measured Entity for its supply of goods or services to beneficiary communities;

(g) payments made by the Measured Entity to third parties to perform socio-economic development on the Measured Entity's behalf;

(h) subject to paragraph 3.2.5.1, provision of training or mentoring to beneficiary communities which will assist them in increasing their financial capacity; and

(i) subject to paragraph 3.2.5.2, the maintenance by the Measured Entity of a socioeconomic development unit which focuses only on support of beneficiaries and beneficiary communities.

6.1.9 B-BBEE and the limitation of rights

As was stated above, remedial measures may impact negatively on the constitutional rights of groups affected by their implementation. Insofar as B-BBEE limits the constitutional rights of groups excluded from its benefits, it is necessary to evaluate the programme's impact on the rights of excluded groups. The critical question is then whether B-BBEE (as an affirmative action programme which limits certain constitutional rights of individuals or groups excluded from benefiting from its implementation) is justifiable in an open and democratic society based on human dignity, equality and freedom. When dealing with a limitation of rights, the Court utilises the notion of proportionality[81] to evaluate the constitutionality of the limitation under review. This evaluation will fundamentally deal with the purpose of the measure under review and the proportionality of the relationship between the means and the ends.

As was explained above,[82] the notion of constitutional property as protected in section 25 of the Constitution is wide enough to include the type of property at issue in the B-BBEE programme, namely the shares in corporations which are dealt with under the ownership element of the scorecard. It was also concluded that state regulation, through the B-BBEE programme and its Codes of Good Practice which creates a cascade effect, making B-BBEE compliance a business imperative, can be deemed a deprivation of property. This stems from the operation of the ownership element that dictates a reconstitution of shareholding in a measured entity. The question which remains is whether or not this deprivation may be deemed as arbitrary. As explained earlier, in light of the *FNB* judgement, the issue of arbitrariness turns on a contextual consideration of the facts based on a proportionality-type analysis, i.e. deprivations are tested for substantive arbitrariness. Non-arbitrariness requires that there be an "appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the

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81 It is used in terms of section 36 (the general limitation clause) and the enquiry into unfair discrimination under section 9(3).

82 Chapter 4, para 4.3.5.3.

public purpose this is intended to serve."[83] Therefore, there should be sufficient reason for the deprivation. This is established by considering a number of contextual factors.[84] Whether the ownership element of the B-BBEE scorecard could be regarded as arbitrary deprivation would depend on the interplay between the level of interference with ownership and the importance of the remedial objective of the programme. In some instances the partial reduction in shareholding could have more serious effects than in other cases. It is important to keep in mind that this evaluation has to be done on the basis of the relevant facts of each case, and that this would eventually be determinative of whether the ownership element of the B-BBEE programme constitutes arbitrary deprivation of property.[85]

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83 *FNB* case: para 98.

84 In *FNB* judgement the Court states that there must be an "appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve" (see para 98). The existence of this "appropriate relationship" establishes sufficient reason for the deprivation which would render it non-arbitrary. The Court lists a number of factors to be applied in order to establish "sufficient reason", which include the following (see para 100 of the judgement):

(a) "Sufficient reason" is to be determined through an evaluation of the relationship between the means employed (the deprivation) and the ends sought to be achieved (the purpose thereof);

(b) This will require the consideration of a complexity of relationships;

(c) When evaluating the deprivation under review, regard must be held for the relationship between the purpose of the deprivation and the person whose property is affected;

(d) Regard should also be held for the relationship between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation in respect of such property;

(e) A more compelling purpose would be required where the property in question is ownership of land or a corporeal movable, as opposed to a case where the property concerned is something different and the property right something less extensive;

(f) A more compelling purpose for the deprivation would have to exist where the deprivation in question embraces all incidences of ownership as opposed to where only some incidences of ownership (and those incidences only partially) are embraced;

(g) Depending on this interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution;

(h) Sufficient reason has to be established on consideration of all the relevant facts of each particular case.

85 Consider an example where the measured entity, a private company which is owner-managed, institutes a broad-based ownership programme for the benefit of its employees, which programme transfers 30 percent of the equity in the enterprise to a trust with the employees as the beneficiaries. The trust (being established for the purpose of the transfer of the shares in the company) has no

Due to the wide definition given to the right to fair labour practices, several aspects of the B-BBEE programme are of particular concern, especially those which reside under the employment equity and skills development elements. For example, when promotion and training of individuals belonging to excluded groups are considered, it is clear that the points system of the programme — together with the far-reaching commercial implications that non-compliance has for an enterprise and the rigidity of the scorecard — could result in their opportunities being limited. The fairness or unfairness of this would ordinarily depend on the circumstances of the case. The determination of fairness would comprise a balancing of the interests of the employer (regarding the commercial success and sustainability of the enterprise) and employees (in achieving social justice and democratisation of the workplace).[86] A problematic aspect of the scorecard is the rigidity with which the elements are treated. There is no allowance for the contextual approach used when dealing with affirmative action under the Employment Equity Act in the scorecard. The employment equity element does not allow for the value judgement concerning the fairness of labour practices in individual cases as prescribed by the Constitutional Court.[87] Insofar as this acts to exclude certain groups from employment opportunities, the B-BBEE scorecard should be evaluated for its proportionality.

In order to determine the proportionality of a measure, it is critical to acknowledge that the remedying of economic injustice is an important objective[88] as it expressly

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collateral to offer a financial institution as security to secure a loan with which to pay for this 30 percent equity share. The enterprise, realising the importance of B-BBEE compliance, facilitates the transfer of the equity at a large discount in order to give the trust the opportunity to obtain this equity stake. This could constitute an infringement of the property rights of the shareholder in the enterprise, due to the fact that they are left out-of-pocket for the amount of the discount. Although the overall objective of B-BBEE is very deserving and important, the amount of discount granted to the new shareholders could pose a substantial interference with regard to the established ownership rights of shareholders who have to part with a portion of their current shareholding, which would also have an effect on the amount of dividends they would receive in future.

86 Cooper 2006 *et seq*:53-16.

87 *National Education Health and Allied Workers Union v University of Cape Town and Others*: para 33. The Codes (Codes of Good Practice: Code Series 300, Statement 300, para 3.1.1) provide that an entity would receive no points under the Employment Equity element unless 40 percent of every target set is met.

88 See dictum of Sachs J in *Minister of Finance and Another v Van Heerden*: para 140 where he stated that "where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context-based proportional

reaffirms and reinforces constitutional values.[89] It is clear that this objective will weigh heavily in favour of remedial measures when determining the proportionality of the overall programme and the impact of the individual scorecard elements. For example, when dealing with a possible infringement on the right to freedom of trade, occupation and profession posed by the B-BBEE programme, the remedial objective would likely sway the balance to a finding of constitutionality, barring proof that the programme acts as an absolute barrier to freedom of occupation. An infringement which poses an absolute barrier to freedom of choice of occupation will trigger a level of stricter scrutiny in evaluating the measure.

One of the factors to be considered in the context of a proportionality analysis is the rigidity of the scorecard elements. It would be difficult for an enterprise to achieve a fair level of compliance if the majority of elements are not measured. Very little flexibility is allowed in the treatment of the elements. The total points allocated to each element of the scorecard are not adaptable to the specific circumstances of individual enterprises. Individual entities making a particular effort in, for example, job creation, socio-economic upliftment, or skills training, which address pressing needs for broad-based empowerment, are not rewarded for these activities due to the rigidity of the scorecard. Although the objective of remedying economic injustice carries substantial weight, it should be weighed against the efficacy of the programme and the level of infringement of the rights of the excluded. An inflexible approach to measurement impacts on the level of infringement of the rights affected by the programme. Considered together with the limited advances made in the achievement of the programme's objectives,[90] it could point to unreasonableness in the design of B-BBEE. A more flexible scorecard would prove a less onerous way of achieving its objectives and may also add to the overall efficacy in achieving the programme's objectives because it provides the opportunity to address objectives of a more pressingly immediate nature, while still being able to accommodate

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interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation."

89 See *Minister of Finance and Another v Van Heerden*: para 139 where Sachs J states that section 9(2), and therefore the remedial justice concept underlying this section, should be seen as "an integral and overarching constitutional principle established by s 9[.]"

90 Highlighted in Chapter 5.

the broader goals. This approach will also facilitate a contextual approach in the making of value judgements in individual cases. It would further prove to be easily adaptable in order to accommodate changing priorities when progress has been made in certain areas of concern. If these factors are considered, it becomes clear that the rigidity of the scorecard in its current form detracts from the proportionality of the overall programme.

6.2 Recommendations

6.2.1 Introduction

In the following section certain recommendations will be made regarding the implementation of the B-BBEE programme, which could ultimately solve some of the constitutional problems identified. An increased focus on broader-based empowerment concerns by government has of late received media attention.[91] The government's recognition of the serious shortcomings of the present empowerment system is encouraging because it shows a willingness from the government's side to address the defects of the programme. The recommendations are not intended to provide all-encompassing solutions, but should add to a dynamic discussion on ways in which to improve the overall operation of the programme, with special emphasis on its constitutionality.

6.2.2 Ownership element of the B-BBEE scorecard

The first element measured on the generic scorecard contained in the Codes of Good Practice is ownership and, as with all other elements, specific targets are set for scoring under this element. In the discussion above some criticism is levelled against the unrealistic and inflexible targets set for company ownership.[92] In order to remedy this,

[91] Jacks 2010:1; Munshi 2010:50; Johwa 2010a:3.

[92] Kalula & M'Paradzi 2007:14; Jacks 2008:17.

Rumney suggests that targets for individual companies should be replaced by an overall percentage of the JSE and larger private firms. These targets should then be reviewed from time to time and ownership measurement should clearly be divided between direct individual ownership and indirect ownership through, for example, pension funds.[93] This could also address, to a certain extent, the issue of warehousing of black empowerment stakes in individual companies stemming from inflexible enforcement of ownership targets for individual companies. This is an untenable practice when considering the liquid and dynamic character of equity markets.[94] Kalula and M'Paradzi are inclined towards an approach in terms of which there is a lowering of the points allocated to the weighting of the equity or ownership elements in favour of a higher value for socio-economic development and skills elements in order to also counter the narrow-based empowerment that is necessarily associated with equity.[95]

6.2.2.1 Broadening the base of ownership transactions

The problem of a small group of politically connected individuals being repeat beneficiaries of equity deals has been addressed earlier. This was evaluated against the background of its failure to promote substantive equality for the broader population, its failure to satisfy the fundamental principles of transformative constitutionalism and social justice, as well as its lack of effecting grassroots empowerment. Kalula and M'Paradzi[96] have suggested that in order to curb the existing problem of deals repeatedly benefiting a few individuals, a cap should be placed on the total number of BEE transactions any particular individual can conclude. This would encourage a broader base of empowerment. Another suggestion would be to devise a monitoring system by means of which people's progress through the process of empowerment can be evaluated to the point where they achieve a status of "empowered", at which point they would not qualify

93 Rumney 2007:3.

94 Lucas-Bull 2007:134.

95 Kalula & M'Paradzi 2007:12.

96 Ibid, at 20.

as a candidate for empowerment deals any longer and would exit the system of empowerment. This would require the keeping of a register of all deals concluded, and the participants in those deals. This would present immense administrative burdens and, in addition, poses the problem of making value judgments regarding the relative success of particular transactions and the success achieved by individuals. Another problem concerns the value of empowerment received as a threshold for moving though the hierarchy from disempowered to empowered.

It is submitted here that the recommendations offered in the following paragraphs dealing with enhanced recognition of employee ownership schemes and first-time beneficiaries will address the problem more effectively. Valuable insight was also garnered from the way in which the Indian Supreme Court dealt with the so-called "creamy layers" of previously excluded groups. This concept is explained below in order to provide another possible means through which to broaden the base of ownership transactions.

6.2.2.2 Employee ownership schemes

A more appropriate way to accelerate broad-based empowerment equity transactions and reduce the risk of engaging with repeat beneficiaries would be to place greater focus on employee share ownership schemes. Together with increased governmental involvement in, and recognition of these schemes, they could provide broader-based beneficial empowerment. Although this is not proposed as a panacea for all the problems associated with the operation of the ownership element, they should receive greater recognition. Schemes of this nature would not only accommodate more first-time equity beneficiaries (because these types of transactions are concluded with individuals who have usually not previously participated in empowerment transactions), but would also have consequences for empowerment of workers and their families, thereby creating opportunities for individuals in lower income levels. As stated earlier, they would serve to reward employees who have been instrumental in the success of the enterprise and who still continually make productive contributions in their organisations.

Workers are familiar with the particular business enterprise and the workings of the industry in general, which makes it possible to make sustained and valuable contributions to the enterprise.

A well-designed and administered employee share ownership scheme, based on mutual good faith and sound economic principles, as part of a comprehensive black economic empowerment strategy, should therefore receive more recognition in the scorecard. These ownership schemes, through participation of their elected representatives, would establish the opportunity to deliver input in the management of the company and in this way would impart crucial management and operational skills to previously excluded persons, while at the same time adding to the diversity of the enterprise.

It is conceded that when the benefits of these types of schemes are spread over a large number of beneficiaries, the gains could be diluted to the point of becoming meaningless. However, examples of successful and very large broad-based ownership-transfer schemes were provided in Chapter 5. It should also be added that these types of empowerment instruments could find useful application particularly for small and medium-sized enterprises where close ties exist between management and workers and where by and large smaller workforces are involved and stand to benefit from the deals. These instruments would meaningfully advance the constitutional principles of social justice, economic justice and transformation.

Additional credit needs to be given to companies who enter into good faith employee share ownership schemes. Much of the financing for these deals is provided by the companies themselves, which would have to bear the burden of the costs for setting up such schemes. Companies see little cash flow benefits for selling its shares to its employees. On the other hand, when the same companies would have looked to engage with well-connected, empowered individuals, banks would possibly have been willing to provide part of the finance for the deal. This would clearly have benefited the company. It has been suggested that unions should assist workers who stand to acquire equity

shares, but it is also true that most unions have until now been unable or unwilling to provide the necessary support in this respect.[97]

In the end, as part of the broader scorecard, employee share trusts do give black managers and skilled staff the necessary incentive to stay with the company instead of moving to other firms. Increased emphasis on employee share ownership programmes would facilitate greater access to ownership and control in the economy to first time beneficiaries on a broader base, adding value for people actively engaged in the success of the business where they are employed.

Participation in employee share ownership schemes increases the effective participation of a larger group of the majority of South Africans in the economy than is currently the case, and increases their economic independence. Whereas under apartheid, the majority of South Africans were excluded from the opportunity to obtain ownership in productive assets, this situation is remedied through these individuals' collective ownership of shares in the enterprise. Awarding employee share ownership schemes more credit on the scorecard would promote activities which aid in substantially transforming the racial composition of ownership. The benefitting of larger groups promotes the achievement of economic justice and would indirectly assist in achieving substantive equality for a far larger group than is the case when only a small number of individuals are repeatedly benefited by equity transactions. The close link between substantive equality and dignity, social justice and transformative constitutionalism, illustrated above, means that well-designed employee share ownership schemes would consequently also advance the achievement of these values.

6.2.2.3 Enhanced recognition of first-time beneficiaries

As another possible alternative, additional points could be allocated to firms who enter into transactions with individuals who are first-time beneficiaries of BEE. This would encourage corporate South Africa to increase the span of beneficiaries, but will

[97] Stones 2007:10.

also reward these entities for taking on the increased risk of dealing with newcomers to their industry.[98] It is submitted that the current allocation of bonus points on the scorecard for the involvement in ownership transactions of new entrants are inefficient in promoting this objective. This is due to the definition of "black new entrants" provided in the Codes, which defines new black entrants as participants whose total equity holdings does not exceed R20 million.[99] This does not promote engagement with empowerment candidates because the upper limit set for new entrants does not efficiently filter out previously engaged participants. Additional points should be allowed for enterprises entering into equity deals with first-time beneficiaries of empowerment as this would promote economic transformation and enable meaningful participation by substantially more previously disadvantaged people in the economy. With regard to the values of transformative constitutionalism, social justice, dignity and substantive equality, this enhanced recognition would have consequences similar to those pertaining to the increased emphasis on employee share ownership schemes discussed here.[100]

6.2.2.4 India's "creamy layers"

It could prove instructive to consider the approach of the Indian Supreme Court in identifying beneficiaries for preferential treatment. The Indian conception of equality[101] is similar to the South African notion of substantive equality which includes remedial measures to eradicate lingering effects of past discriminatory policies and prevent perpetuating negative consequences of discrimination. Distinctions are made between different classes or groups who are the intended beneficiaries of preferential treatment.

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98 Andrews 2008:98.

99 Codes of Good Practice: Schedule 1, Part 2: Definitions provides that "black new entrants" means black participants who hold rights of ownership in a Measured Entity and who, before holding the Equity Instrument in the Measured Entity, have not held equity instruments in any other Entity which has a total value of more than R20.000,00000, [sic] measured using a standard valuation method.

100 Para 6.2.2.2 above.

101 The right to equality is guaranteed in articles 14-17 of the Constitution of India 1949. Affirmative action provisions are contained as directive principles of state policy in Part IV of the Constitution of India 1949, with specific reference to articles 38, 39, 39A, 41 and 46. See also articles 15(4) and 16(4) which provide additional affirmative action authorisation.

Although no restrictions are placed on the preferential treatment of the two lowest-ranking groups, the Scheduled Castes and Scheduled Tribes, the concept termed the "creamy layer" was created with reference to the third group of beneficiaries, namely the Other Backward Classes. In identifying the "creamy layer" within the Other Backward Classes, it is attempted to exclude from the benefit[102] of affirmative preferential treatment those who have already benefited from such preferential programmes or who are not deserving of preferential treatment based on other considerations, for example, level of education or economic means.

The reasoning of the Supreme Court of India was that caste or backward status alone cannot be indicative of whether an individual should qualify for preferential treatment, and that educational and social backwardness are ultimately the result of poverty.[103] Therefore, in order to determine backwardness, both membership of caste and economic and social means should be utilised to determine whether a specific individual should continue to benefit from preferential treatment.[104] It would seem that progressively more emphasis is placed on economic means in conjunction with caste membership, instead of simply adhering to the caste test to determine whether individuals should qualify for preferential treatment. In the later case of *Indra Sawhney v Union of India*[105] the Indian Supreme Court seems to have adopted caste as the criterion for determining backwardness, but did not state that it was the sole criterion for making such a determination.

Although the policies of excluding the creamy layer from the group of beneficiaries, and identifying the deserving section in the group targeted for preferential

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102 *State of Kerala v NM Thomas* AIR 1976 SC 490; 1976 SCR (1) 906. Available at http://www.commonlii.org/in/cases/INSC/1975/224.html (accessed on 31 March 2010).

103 *MR Balaji v State of Mysore* AIR 1963 SC 649; 1962 SCR Supl. (1) 439: para 460. Available at http://www.commonlii.org/in/cases/INSC/1962/276.html (accessed on 31 March 2010).

104 This principle was confirmed in the later cases of *Janki Prasad Parimoo v State of Jammu & Kashmir* AIR 1973 SC 930; 1973 SCR (3) 236 (available at http://www.commonlii.org/in/cases/INSC/1973/6.html (accessed on 31 March 2010)); *KC Vasanth Kumar v State of Karnataka* 1985 AIR 1495; 1985 SCR Supl. (1) 352 (available at http://www.commonlii.org//cgi-bin/disp.pl/in/cases/INSC/1985/134.html?query=kc%20vasanth (accessed on 31 March 2010)).

105 AIR 1993 SC 477.

treatment, have been criticised as being "strewn with conceptual landmines",[106] it could prove informative for South African affirmative action jurisprudence to consider some of the aspects related thereto in order to promote a nuanced, context-sensitive approach to the issues. The group of beneficiaries in terms of this approach is treated as a dynamic category within which changes occur regularly as opposed to a rigid, static and permanent grouping incapable of change,[107] but without over-individualising the concept of equality and affirmative action.[108] This treatment of the group favoured by preferential treatment adds to the continual evaluation of the fairness of the remedial measure, but also adds to the general efficacy of implementing it.[109] What this would mean for a programme such as B-BBEE is that repeat beneficiaries will be excluded from measurement of the scorecard. Simply because an individual belonged to a group who previously suffered from systemic discrimination and disadvantage does not mean that the individual would continue to fall under the classification of being disadvantaged after repeatedly being advantaged through the acquisition of equity. The Indian government, in identifying the creamy layer, uses criteria such as high government positions, vast land ownership, and levels of income.[110] For example, the income level criterion is regularly revised to keep up with changing economic times.[111] Morgan describes the purpose of the creamy layer test to "eliminate those who, although members of a backward class, live in a social and economic reality which distinguishes them from members of that class."[112]

Although this approach is by no means advocated as a complete solution for the elimination of repeat beneficiaries under the ownership and management control element of the scorecard, it is proposed that, on this basis, a differentiated approach to choosing individuals for empowerment is possible.

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106 Nair 2001:265 quoting Galanter.

107 Ibid, at 266.

108 Morgan-Foster 2003:79.

109 Sridharan 1999:120.

110 Nair 2001:266.

111 Chaudhury 2004:1989.

112 Morgan-Foster 2003:98.

6.2.3 Education and skills development

In the discussion of the implementation of the management control, employment equity and skills development elements of the scorecard in Chapter 5, consideration was given to the general level of skills development and the quality of education. It is submitted that the improvement of access to and quality of education, together with a serious drive to develop skills, will add to individual empowerment as knowledge and skills are the true measure of empowerment. The government should play a greater role in this area. Education should be foremost on the government's agenda if it wishes to create a society based on economic and social justice. Some even argue that education is the only sustainable instrument for economic transformation and black economic empowerment on a broader basis.[113] Increased investment, both with regard to monetary and other resources, should be prioritised in order to speed up the process of transformation and to achieve meaningful progress.[114]

The importance of skills development for economic growth, grassroots empowerment and human development was highlighted in Chapter 5. These aspects should be approached not only from the perspective of the private sector, but also from that of government, which should increase available resources[115] to emphasise the importance of a quality education system which produces well-educated people capable of fulfilling productive roles in society. Following on criticism voiced by Kalula and M'Paradzi,[116] an increase in the weighting of this element of the scorecard can be recommended. This would directly address the unbalanced character of the scorecard

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113 Seepe 2007:15.

114 As an example of the importance other developing nations attach to education it could be noted that India is currently committing US$ 38 billion to education over the next 5 years in an attempt to address both literacy rates and social inequity.

115 In para 6.1.6 above it was noted that public expenditure on education is receiving more priority in the 2010/2011 budget. Nineteen percent of the total budget expenditure is allocated to education. It should however be kept in mind that it is not only financial resources, but the management of these as well as other resources, for example human resources, together with the necessary emphasis on quality policy implementation that would ultimately contribute to service delivery in this sector.

116 Kalula & M'Paradzi 2007:14.

with its overemphasis on narrow-based elements of empowerment. By placing greater focus on elements aiding broader-based empowerment, a more specific contribution is effected towards the achievement of substantive equality, social and economic justice. Moreover, a greater focus would also indirectly advance the realisation of socio-economic rights and promote an overall service of the foundational constitutional principles and values.

The question could be raised as to whether, in light of the fact that companies view the skills development levy as yet another tax and the low level of involvement by SETAs, it would not prove more successful if the government, working with the SETAs and training institutions and authorities, were to take a larger part in coordinating skills development. The revenue collected through the skills development levy could be utilised to increase the available financial resources of the state in this regard. Consideration should not only be given to large companies, although smaller companies might find it difficult to provide the full course of necessary training. This is not only due to the costs involved, but also because of the unavailability in smaller firms of the required resources to train employees in all the specific areas required for a particular qualification. In this respect, SETAs could provide valuable input if these institutions were to increase their involvement.

The relative success highlighted in the previous chapter of learnership programmes[117] initiated by the Minister of Labour in 2004, should be further expanded. As was stated above, improved skills create job security and increase productivity. The government should increase pressure on SETAs to implement skills programmes and play a more proactive role in their specific areas of application. SETAs should actively seek partnerships with the private sector to increase available training opportunities, especially in areas where specific shortcomings in available skills have been identified. The government should also invest in programmes, such as bursaries and student support,

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117 The Minister of Higher Education and Training, Dr Blade Nzimande, said that what was critically lacking in South Africa is the availability of structured, workplace experience for learners. This is especially true for engineering-related artisans. See Creamer 2010. Available at http://www.engineeringnews.co.za/article/nzimande-wants-workplaces-to-be-sites-of-training-2010-05-11 (accessed on 12 May 2010).

with the emphasis on increasing the pool of available and suitably qualified individuals in critical skills sectors. The resources placed at the disposal of education and skills development institutions should be increased and the government should be at the helm of a moral drive which emphasises the importance of a quality education system.

In order to comply with the management control and employment equity elements, companies should do more to identify potential candidates who could be fast-tracked through training for appointment in management positions, instead of head-hunting from within the small pool of available candidates. Although this could prove to be a more long-term strategy, the scorecard should be flexible enough to accommodate these efforts and measure compliance substantively, instead of simply taking account of numerical fulfilment.

These proposals will contribute to the optimal functioning of the management control and employment equity elements of the B-BBEE scorecard, by increasing the quality and quantity of suitably qualified available candidates from which appointments could be made in order to comply with the respective scorecard elements. Investment in education and skills development will instrumentally assist in realising access to socio-economic rights, specifically education, which aids in the realisation of other constitutional rights, especially substantive equality. Increased financial and other resource investments in education and skills development by the government will facilitate a finding that government measures are reasonable in the achievement of access to socio-economic rights. The link between education and skills, and true empowerment was established above. Broadening the base of empowerment is essential for the achievement of greater grassroots empowerment. The additional focus on education and skills development advances the value of transformative constitutionalism and other constitutional principles and values, for example, dignity, equality, non-racialism and non-sexism, and the advancement of human rights and freedoms directly. This is because education and skills contribute to an individual's capacity to meaningfully participate in economic activities, which creates economic independence and aids in lessening the existing, harsh economic inequalities. It furthermore creates an environment within which South Africans can fully realise their potential, and improves the general quality of

life for all. Although education and skills development are likely to show results over a longer period, these should be prioritised in order to ensure that B-BBEE has sustainable and continued meaningful effect.

6.2.4 Monitoring progress

One of the more serious shortcomings of the B-BBEE programme identified previously was the lack of regular research and monitoring of the implementation of this initiative. This was shown to impact on the assessment of the progress made with the programme. It is impossible for the government to fulfil its obligation of accountability towards the public for specific measures adopted if no credible research is done to collect the necessary information with which to illustrate the levels of progress and success achieved with chosen measures.[118] The lack of monitoring and research pertaining to B-BBEE (recognised by the government itself)[119] rules out making an informed analysis of the reasonableness, fairness and proportionality of the programme and is contrary to the fundamental values of responsiveness, accountability, openness and effectiveness. The government's lack of research into the effect of this programme also makes it difficult to evaluate the proportionality of its impact on the rights of individuals.

It is imperative that the government devise a monitoring system which would be able to facilitate the gathering of information regarding broad-based black economic empowerment and the progress made under each element in a credible manner. The data gathered should be further processed and analysed in order to timeously identify weak areas in the overall strategy. This type of research and analysis should also be done routinely. These sentiments were also expressed by the newly established BEE Advisory Council at their first meeting. The Minister of Trade and Industry, Rob Davies, advised that the DTI should analyse the impact of implementation of the programme annually.[120]

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118 Regular evaluation of the success of implementation is an essential component in establishing the validity of remedial measures. Fredman 2002:123-125.

119 Jacks 2010:1; Johwa 2010a:3; Munshi 2010:50.

120 Jacks 2010:1; Johwa 2010a:3; Munshi 2010:50.

The government should follow through on this commitment because it is the only way to ensure focused and effective empowerment. It could even be stated that the unbalanced impact of B-BBEE in reality, with its propensity to facilitate narrow-based empowerment, would have been identified much earlier had the government done the necessary research into the implementation of the programme, which would have allowed for corrective action to be taken at an earlier stage.

6.2.5 Improving ethics and eradicating corruption

Problems and concerns regarding ethics and corruption undermine the overall credibility of the B-BBEE programme. Concerted efforts should be made to produce policies and monitoring systems[121] to address the ethical issues outlined in Chapter 5. These issues, *inter alia*, concerned the regulation of post-employment activities of government employees,[122] cooling-off periods, government officials' involvement with private enterprise, etc. Corrupt actions stemming from government officials' involvement in private-sector dealings should also receive attention. Although the SACP in 2009 called for a total ban on business interests and moonlighting by public servants, this has not crystallised into any real efforts made by the national government. The Western Cape has however introduced a bill[123] which would place restrictions on the business activities between employees of the provincial government and the provincial government itself. This is said to significantly limit the scope of possible corrupt activities.[124] KwaZulu-Natal has also recently launched a new supply-chain management system with which it seeks to eliminate tender corruption and clean up tender

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121 This notion is supported by commentators affiliated with the Institute of Democracy in South Africa. See February 2010: http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D2019%26OTID%3D26%26PID%3D44 (accessed on 25 February 2010).

122 Schultz-Herzenberg 2010: http://www.polity.org.za/article/trading-public-knowledge-for-private-gain-is-the-revolving-door-spinning-out-of-control-2010-02-23 (accessed on 24 February 2010).

123 Draft Western Cape Procurement (Business Interests of Employees) Bill, 2010. Province of Western Cape: Provincial Gazette Extraordinary No 6721. 14 April 2010. http://www.capegateway.gov.za/other/2010/4/provgaz6721-extra.pdf (accessed on 19 April 2010).

124 Shoba 2010:3.

processes.[125] The Department of Public Service and Administration will be establishing an anti-corruption unit intended to facilitate the expeditious investigation and conclusion of corruption cases.[126] The eradication of corruption in the procurement system was also emphasised in the 2010 Budget, with the National Treasury set to propose reforms of the systems. These are intended to improve efficiency, reduce corruption, and enhance competitiveness and cost-efficiency. Closer cooperation is also foreseen between the Treasury, the Special Investigating Unit, SARS, the South African Policy Service and the Financial Intelligence Centre in order to ensure fast and efficient prosecution of offenders.[127] These initiatives are important steps to ensure good governance and accountability in public spending.

The government should propose serious reforms to eradicate corruption from within its procurement system. Although government spending has the potential to make great advances in the empowerment of previously disadvantaged people, corruption and ethical problems impede the potential success. Besides the eradication of corruption, a quality monitoring system should be adopted.[128] The efforts regarding the setting of higher ethical standards and eradicating corruption will ensure that the government advances foundational constitutional values such as good governance, legality, openness, transparency, accountability and the rule of law. It is well established that good governance and the rule of law add to a climate conducive to private sector investment, which is crucial for development.

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125 Legalbrief 2010a. Available at http://www.legalbrief.co.za/article.php?story=20100505085208205 (accessed on 5 May 2010).

126 Ensor 2010b:3.

127 National Treasury, Budget Review 2010: 12. Available at http://www.treasury.gov.za/documents/national%20budget/2010/review/Budget%20Review.pdf (accessed on 9 June 2010).

128 ILO 2007:65.

6.2.6 Tax and B-BBEE compliance

In the discussion of the section 9(2) requirements for the constitutionality of affirmative action measures it was shown that it is not necessary for the government to illustrate that the policies chosen are the most effective in order to pass constitutional muster. However, it could be argued that a policy which could potentially be more effective in its achievement of its stated objectives, while at the same time having a less negative impact on those excluded from its benefits, demands consideration when analysing the reasonableness and proportionality of the measures implemented by the government. Tax incentives for enterprises attaining certain BEE recognition levels would benefit a larger number of business enterprises, in other words, this measure would encourage greater compliance with the programme on a much more immediate level. Tax incentives could function in a complementary role to the B-BBEE programme.

The perception of BEE as an overregulation of the economy, which could pose a deterrent for foreign investment, is addressed by incentivising black economic empowerment through granting tax benefits and incentives to companies in exchange for their empowerment and racial transformation strategies.[129] Tax benefits for companies are probably the most feasible solution because of the broader economic challenges which South Africa faces. While B-BBEE compliance may not provide immediate benefits for an enterprise when considering the long-term working of the trickle-down effect, tax benefits would immediately reward companies complying with empowerment objectives. B-BBEE compliance is also no guarantee of the commercial success of an enterprise. Whereas B-BBEE in its current format could pose particular obstacles for smaller entities because of reduced turnover as a result of the operation of the cascade effect of BEE, which could in turn lead to reduced employment instead of increased job opportunities, tax incentives would grant smaller enterprises manoeuvring space.

Tax incentives are recognised economic steering mechanisms or measures to effect behaviour control,[130] and definite tax benefits would prove to be a greater motivating

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129 This has been proposed by the Oppenheimers. See Reed 2003:17.

130 Ossenbühl 2000:570.

factor for enterprise compliance than the mere possibility of directly or indirectly benefiting from public sector procurement. Any policy instrument which would result in faster and expanded compliance with economic empowerment strategies will by implication have a greater impact on the establishment of economic and social justice, transformative constitutionalism and the achievement of substantive equality.

A system of tax credits could also be implemented for enterprises which create jobs and expand employment. This should be coupled with enhanced recognition and credits on the scorecard for creation of employment and accommodating first-time entrants to the job market. Support for this is found in the youth development initiative presented in the 2010 Budget Speech which proposes cash reimbursements for enterprises entering into two-year employment contracts with school leavers.[131]

6.2.7 Government's management of the economy and the B-BBEE programme

The importance of incorporating B-BBEE into the broader macro-economic framework was explained in Chapter 5. It was also shown how adequate economic growth plays a direct role in the potential success of the B-BBEE programme. Adequate economic growth impacts on a variety of scorecard elements, for example, ownership, preferential procurement and enterprise development. The government should therefore align macro-economic and fiscal policies to achieve higher sustainable economic growth. A type of economic policy should be adopted which, without forsaking good governance and sound monetary and fiscal policies, sees economic growth in excess of 6 percent annually (generally accepted as the growth rate at which the economy will start making dents in the unemployment figures). This would lead to expanded employment with concomitant reduction in dependence on social grants, a heightened focus on human development, and would thus increase the degree of control that people individually and

[131] National Treasury 2010:9-10. http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf (accessed on 8 March 2010).

collectively have over their own lives. Job creation efforts should also specifically be targeted at the level of lower-skilled jobs, since this represents the largest group of available labour and would subsequently have the most beneficial impact. Higher levels of employment for lower-skilled workers would also effect grassroots empowerment. Expanded employment also results in increased consumer demand which in turn drives further economic expansion.

Gqubule argues that the BEE Codes of Good Practice and Charters will not have any success if the government does not change course on its macro-economic policies to reflect a more developmental outlook.[132] In other words, the government should focus on economic growth, full employment, and production. The government needs to address its macro-economic policy to encourage growth in exports to effect job creation and economic advancement. Although labour market reforms could be recommended, certain fiscal policies, for example, controlling fiscal deficits, inflation targeting, removal of capital outflow restrictions and increased foreign direct investment, should also be attended to.[133]

More attention should be paid to the promotion of SMMEs and increasing support for entrepreneurial activities. With regard to the government institutions' facilitating access to capital for previously disadvantages persons, the activities of these institutions should also be aligned to add to the broader support of broad-based economic empowerment. For example, a study done by the Center for International Development at Harvard University in 2007-2008 has recommended that in order to achieve broad-based economic empowerment through job creation and economic growth, the IDC should focus on specific infrastructure projects and encouraging investment in new economic activities, rather than BEE deals *per se*.[134] In general, these funding institutions should expand their services to include more than the mere provision of finance, and should provide support and training services for new enterprises, especially when dealing with SMMEs. These institutions could provide additional support for

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132 Gqubule 2006d:106.

133 Hausman 2008: Recommendations 1, 2 and 3.

134 Ibid, Recommendation 12.

emerging businesses particularly in the areas of management, administration and marketing.

To some commentators, the lack of progress in the social and economic services, job creation and poverty relief is proof that B-BBEE is based on a flawed premise. It is seen as incongruous that blacks receiving equity in large companies and taking seats on the boards of companies would create large numbers of jobs.[135] The mere redistribution of existing wealth and control does little for economic growth which is the real driver of job creation, poverty relief and the reduction of income inequality. Overemphasis[136] on the equity and control elements did not contribute sufficiently to wealth creation in South Africa. An alternative to broad-based black economic empowerment as a model of wealth *redistribution* in South Africa is suggested by Moeletsi Mbeki. He argues that cheap capital for entrepreneurs and a far stronger focus on good education, as was the policy in South Korea, could be successful in *wealth creation* as a model of empowerment in South Africa. Greater wealth creation is essentially the key to empowerment, and wealth creation is impossible without sustained economic growth. Gill Marcus has stated that "[i]f we change the ownership in the economy, but the economy is still the same size, we have achieved only one level of success, but have not succeeded in what we want to do with the economy."[137] It is thus clear that economic expansion is fundamental to the process of economic empowerment. Accelerated economic growth, together with support and development of SMMEs,[138] furthermore also stand to dismantle ownership concentration and monopolies prevailing under the apartheid regime — factors which are detrimental to competitiveness.[139]

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135 Johnson 2009:396.

136 Sentiments also expressed by Dr Blade Nzimande, Minister of Higher Education and Training. See Johwa 2010b:3.

137 Quoted in Balshaw & Goldberg 2008:17.

138 Development of SMMEs, therefore smaller entrepreneurial businesses, has been called the cornerstone of economies, lauded as the creators of employment opportunities and economic growth. See Hobbs 1997:250. Hobbs argues that small business development and entrepreneurship are critical instruments in advancing social and economic justice. See Hobbs 1997:244-245.

139 Hirsch 2005:196.

Incorporating B-BBEE in the broader macro-economic framework, aligning fiscal and economic policies to facilitate economic growth, creating an investor-friendly climate so as to promote both local and international investment, placing emphasis on full employment, development, production and expanding exports, and expanding economic activities by promoting SMMEs, will clearly steer government policies in the direction of economic development. The subsequent increase in economic development and growth would then contribute to achieving the government's constitutionally imposed economic developmental imperative. It would also add to the effective compliance with the specific constitutional directive principle steering economic development which was identified previously.[140] When the Court has the opportunity to analyse the constitutionality of the B-BBEE programme, the economic developmental imperative would be used as interpretative guideline. This compliance would contribute to a finding that the programme aids in the achievement of economic justice and equality. It would also add to establishing the reasonableness of the programme, because it creates the overall economic environment within which remedial economic measures can function. The government's support for the developmental economic model, indirectly aids transformative constitutionalism and the achievement of social and economic justice, and contributes to the realisation of socio-economic rights. It furthermore indirectly strengthens the fundamental constitutional values of democracy, human dignity, the achievement of equality, non-racialism and non-sexism, and the advancement of human rights and freedoms.

6.3 Conclusion

The constitutional evaluation of the B-BBEE programme has been performed against the background of persisting economic inequality and injustice. Although the apartheid government and its discriminatory policies created this injustice, the persistence of these inequalities is partly blamed on a certain failure of the initial phases of black economic empowerment to achieve economic justice for the majority of the previously

[140] Para 4.2.5 above.

excluded and marginalised sectors of the population. As stated at the outset of this Chapter, remedial measures to correct lingering economic injustice are essential for the establishment of a society as envisaged in the Constitution. These measures would encompass positive measures aimed at remedying inequality and promoting economic participation for the majority of the population previously excluded. The B-BBEE programme set out to achieve these objectives. The mandate for the implementation of this programme is found in a variety of constitutional provisions which were identified and discussed in Chapter 4. Besides empowering the government to implement programmes of this specific kind, these constitutional provisions simultaneously set standards for measuring the constitutionality of and reviewing these programmes. Certain constitutional provisions also set limits to the extent to which these programmes may impact on the constitutional rights of those excluded from its benefits. An evaluation of the B-BBEE programme should therefore be done within the framework provided by the empowering and limiting constitutional provisions.

Following the analysis of some of the problems which stem from the practical implementation of the B-BBEE programme, an analysis of the way in which these problematic issues relate to the constitutional framework within which the programme functions was carried out. Limitations of rights are all analysed on the basis of proportionality. Even if a rights provision contains a special limitation clause, any unaddressed issues are addressed with reference to section 36 of the Constitution.[141] This reasoning forms part of the basis of an alternative interpretation to the Court's approach to affirmative action measures in terms of section 9(2) as set out in *Minister of Finance and Another v Van Heerden* which was offered above.

The constitutional provision which has immediate relevance to any remedial or restitutive programme is section 9(2) of the Constitution — the affirmative action clause. The Constitutional Court's ruling in the *Van Heerden* case created a number of anomalies. It was shown above how the under-inclusiveness of the programme could render the broader programme irrational if the rationality test favoured by the Court is

[141] This was explained above in Chapter 4, para 4.3.4 where it was indicated that Rautenbach's approach to this issue would be followed in this study.

strictly interpreted. The majority however, favoured a more deferential approach in which this under-inclusiveness would not affect the rationality of the measure. The rationality requirement for constitutionality of a remedial programme favoured by the Court is unable to meaningfully address the effectiveness of the remedial or restitutive programme (as a function of the criteria dealing with the targeted group and the design of the programme), which has a detrimental effect on the evaluation to be performed as part of the third requirement, namely that the programme has to advance the achievement of equality. Although the Court set out to evaluate the affirmative action programme with the deferential rationality analysis, it did import some elements of a fairness analysis in its application of the third criterion to the facts of the case. This anomalous treatment of the criteria by the Court could prove a tentative recognition on its part that mere rationality is fundamentally unable to accommodate an evaluation of whether affirmative action measures are capable of advancing the notion of substantive equality and the fundamental values of the Constitution, namely transformation and non-discrimination. This supports the argument above that a contextual proportionality analysis would be the only way to meaningfully address the numerous constitutional issues posed by the B-BBEE programme.

This analysis, based on proportionality and the balancing of all relevant constitutional values and interests, would also provide a clear answer to the issue of the scope of application of the *Van Heerden* judgement. This, therefore, means that the constitutionality of an affirmative action measure in terms of section 9(2) would not act to exclude the application and relevance of all other constitutional provisions, which would preserve the internal coherence of the Constitution. Furthermore, given the various constitutional provisions mandating the adoption of the B-BBEE programme which are identified in this study, it would seem illogical that section 9(2), to the exclusion of the variety of relevant provisions, would be the only measure to determine the constitutionality of the programme. The approach advocated here would also be in agreement with the Court's own reasoning on this point in case law.[142] This approach

[142] *Ferreira v Levin NO; Vryenhoek v Powell NO*: paras 172, 213; *S v Makwanyane*: para 9; *S v Zuma*: para 15; *S v Mhlungu and Others*: para 8; *Khosa and Others v Minister of Social Development and*

creates an opportunity to evaluate B-BBEE in the context of all relevant constitutional provisions.

The problematic issues around the implementation of the programme identified in Chapter 5 above were analysed in their constitutional context. In was firstly shown how the government's failure to create the broader economic conditions within which to facilitate optimal functioning of the B-BBEE programme falls short of its developmental imperative as a directive of state policy. This failure was further related to the programme's failure to effect the transformation required by the fundamental value of transformative constitutionalism. The hindering of a proper evaluation of the proportionality of the programme through a lack of information on the directly measurable success rate, due to the lack of adequate monitoring of the implementation of the programme, has also been illustrated. This also excludes reactive and responsive efforts by the government to identify and remedy unforeseen, inadequate and ineffective outcomes of the operation of the programme. This also fails the fundamental constitutional good governance principles of responsiveness, accountability, openness and effectiveness.

The link between the B-BBEE programme, its employment equity, skills development and socio-economic development elements and socio-economic rights, with specific reference to education and skills development, was established in this study. The importance of education and skills development for social and economic justice was also illustrated. The lack of progress and achievement in skills development, when viewed against the background of the issues identified in the education system, not only point to inefficiencies in and a strain on the implementation of the B-BBEE programme, but also to a failure to promote the transformation of South African society as envisaged by the Constitution. The failures of skills development and education further impact on the core foundational values of democracy, improvement of the quality of life of all, equality, dignity and fundamental human rights. These values also act as yardsticks for measuring the constitutionality of remedial programmes. The failure of B-BBEE in these respects

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Others; Mahlaule and Others v Minister of Social Development and Others: para 47. See also the Court's statement in *Minister of Finance and Another v Van Heerden*: para 28.

could threaten the overall efficacy of the programme, which in turn influences its reasonableness.

Ethical deficits surrounding the implementation of the B-BBEE programme fail the constitutional standards set for the public administration, as well as the constitutional principles laid down for public-sector procurement. These ethical concerns result in failure to meet the fundamental constitutional good governance principles. This lack of ethics threatens the efficient implementation of the B-BBEE programme and hinders the advancement of its objectives.

The lack of grassroots empowerment achieved by the programme to date not only relates to its failure to stem the continuation of the initial narrow-based empowerment, but also to its failure to create meaningful change in the lives of the most marginalised groups. This presents a failure to advance the achievement of substantive equality which is the main objective of affirmative action. It was illustrated how this is partly due to the relative under-emphasis of the scorecard elements which directly impact on broader-based aspects of empowerment, but also relates to the rigidity with which the scorecard elements are applied. It is logical to conclude that greater emphasis on elements such as skills development and socio-economic development could have a more immediate impact on this, together with additional elements and greater flexibility in the way individual enterprises choose to measure their compliance. This would make the measurement and compliance of the programme flexible, which would mean that on a case-by-case balancing of competing interests it would add to a finding of proportionality. Enterprises could structure their scorecards so as to best accommodate their specific circumstances, as well as sector-specific conditions, which would contribute to the reasonableness of the programme.

When dealing with remedial measures, the importance of elimination of past injustice will weigh heavily to ensure that within the broader proportionality analysis, this important goal is not disregarded in favour of context-less considerations of the impact of these measures on advantaged members of society. Assessing the constitutionality of the programme requires that the overall impact thereof on the various constitutional rights it affects, such as the right to equality, freedom of trade, occupation and profession,

property, fair labour practices, and the lack of positive advancement or realisation of the other constitutional provisions shown above, such as transformative constitutionalism, socio-economic rights, social and economic justice, must be balanced against the objective of the programme and the way it seeks to advance this goal. On the face of it, the programme is reasonably capable of achieving its stated objectives. However, the efficacy with which this programme actually accomplishes these objectives will probably weigh against a finding that there is a proportional balance between the impact of the programme and its objectives.

In Chapter 5 concerns were raised regarding the lack of grassroots empowerment that occurs in the B-BBEE programme in its current form. This was placed in the broader constitutional framework as a factor which jeopardises the transformative ambitions of the programme, as well as posing specific challenges in terms of achieving social and economic justice and substantive equality, facilitating access to socio-economic rights, and complying with foundational constitutional values.

It could be asked whether South Africa has not approached this issue from the wrong angle. Education, skills development, job creation and service delivery should be foremost on the agenda to ensure a real improvement in the lives of the people who continue to be hardest hit by years of discriminatory policies. These sentiments were echoed in the study done by Harvard University's Center for International Development. It was proposed that the BEE scorecard should be re-aligned so as to be more bottom-oriented, especially concerning employment equity and management control issues.[143] The focus should be on job creation and employing new entrants from the cadre of the previously unemployed, rather than placing more stress on the limited pool of highly skilled management candidates.[144] The government should also play a more proactive role in enlarging the group of highly qualified individuals from previously disadvantaged backgrounds. At the same time there should be heightened focus on the upward mobility in the organisations employing them.[145] Although success can only be expected to be

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143 See suggestions later.

144 Andrews 2008:98.

145 Ibid.

achieved over a longer period of time, Johnson[146] also strongly argues in favour of the betterment of health, education and housing as the ultimate solution to real empowerment. Although advances have been made on the housing front due to the mass building of RDP houses, the other two sectors have deteriorated and improvements are needed. The deterioration of education and health care calls the broader fundamentals needed for the implementation of a policy for economic transformation into question. This raises the question about whether BEE as part of the remedial measures implemented by the government has succeeded in advancing a society based on social and economic justice.

The scorecard should encourage and reward activities undertaken that achieve real broad-based empowerment, which would inevitably mean that the weighting of elements should be adjusted to reflect these priorities. This is in accordance with the suggestion of Kalula and M'Paradzi who also suggested that points awarded under the socio-economic element should be increased. The Zuma government has been vocal in their efforts to change the focus to the more broad-based elements of the current B-BBEE programme, with greater emphasis on employment equity, skills and enterprise development, and empowerment through job creation and rural development. These efforts are to be welcomed.

A more bottom-up approach to BEE requires a re-evaluation of the overemphasis of management and control elements, which diverts the focus from broader-based real grassroots empowerment by means of job creation and the training of people left at the bottom end of the income scale.[147] Companies, as the ultimate implementers of BEE, should show commitment to job creation, skills development and empowerment of workers.[148] The rigidity of the scorecard does not actually encourage or reward activities such as job creation, while this is probably the most crucial key to broad-based economic empowerment.[149] Although training and supplier development does receive recognition

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146 Johnson 2009:385.

147 Hausman 2008:11; Hoffman 2008:96.

148 Kalula & M'Paradzi 2007:20.

149 Although Code Series 000, Statement 000, para 9.2 provide that black disabled persons, black youth, black people living in rural areas and black unemployed people, should form between 2 and 3

on the scorecard, it has been proposed that these elements, together with job creation, be given greater emphasis on the scorecard.[150] The suggestion is then that firms should have more flexibility in complying with the BEE scorecard. In addition, more elements should be added to the scorecard, especially elements that facilitate an empowerment strategy from the bottom up, as opposed to the top-down strategy of ownership and management control as it currently stands.[151] These should include job creation and other elements aimed at generally increasing economic growth, empowerment and export growth. Giving companies a choice about the way in which they comply with the Codes could add to the general spirit of BEE being advanced, instead of merely encouraging firms to comply with the letter of the Codes. This could prove successful especially where sector-specific circumstances impede compliance with particular elements on the scorecard.

True broad-based empowerment should be the primary focus of the government, and a general inclination towards this approach was already clear from the first meeting of the BEE Advisory Council.[152] Concerted efforts should be made to lessen the overemphasis of equity and control as sole measures of empowerment. In terms of research and analysis of the impact of empowerment, the government should highlight the impact that broader-based elements have had, as well as strive to ensure that this is communicated to the general media and public. This would go a long way toward

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percent of the beneficiaries of all elements of the generic scorecard, this does not specifically or adequately address the plight of these groups under specific elements of the scorecard. Specific recognition is afforded black women through the "adjusted recognition for gender" under the different elements of the scorecard. The same does not apply to the specifically designated groups and this approach fails to place the necessary focus on these elements (save for the enhanced recognition given to black people with disabilities under the employment equity and skills development elements, and economic interest held by black designated groups under the ownership element). Codes of Good Practice, Schedule 1, Part 2: Definitions define black designated groups as (a) unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution; (b) Black people who are youth as defined in the National Youth Commission Act of 1996; (c) Black people who are persons with disabilities as defined in the Code of Good Practice on employment of people with disabilities issued under the Employment Equity Act; (d) Black people living in rural and under-developed areas.

150 Hausman 2008:11.

151 Ibid, Recommendation 19.

152 See statements made by Deputy President Kgalema Motlanthe in his inaugural speech to the BEE Advisory Council. Available at http://www.info.gov.za/speeches/2010/10020415051002.htm (accessed on 8 May 2010). See also Jacks 2010:1; Munshi 2010:50; Johwa 2010a:3.

changing general perceptions about BEE in South Africa. This would also be the most effective way in which to achieve substantive equality and economic justice, which are the fundamental goals behind the remedial measures aimed at correcting economic inequality.

South Africa should ultimately aspire to expand the black entrepreneurial class, thus people who start businesses from scratch, and not necessarily the black business class created by ownership deals. Entrepreneurs are the people who contribute to economic development, growth and employment expansion, and therefore indirectly to the empowerment of the masses. Given the high risk of failure of any new business,[153] these new enterprises should be assisted and supported through the enterprise development and preferential procurement elements.[154] Moreover, doing equity deals with black entrepreneurs provides benefits of real involvement for the company in which they acquire equity shares, thus, making an actual contribution to the success of the enterprise and adding value. When dealing with black business individuals who have been the beneficiaries of countless empowerment deals, very little value is added to the company. These individuals are too busy attending the large number of company board meetings to contribute anything meaningful to the daily operation of the company.[155]

The above discussion included a deliberation on ways in which the programme's efficiency could be improved in order to address specific socio-economic demands. Improved efficiency would reduce the impact of the programme on the abovementioned rights while proving to be less onerous in the achievement of the objectives. In addition, the reasonableness and proportionality of the programme would also be enhanced.

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153 Statistics show that 80 percent of new businesses fail within the first 2 years of operation. See Jack 2005:29.

154 Jack 2005:29.

155 Stones 2007:10.

Summary

The negative impact of the apartheid regime's policies on the social, political and economic conditions of the majority of the population is well established and persists into the present day South Africa. The South African Constitution acknowledges this negative legacy, but also contains a vision of the type of society it envisages for South Africa. The inclusion of values, principles and rights on which this new society is based does not, by virtue of its design, erase all the consequences of the previous discriminatory policies. Simply removing discriminatory legislation and practices cannot alleviate the injustice and poverty that resulted from 40 years of oppressive legislation and government policies.

Implicit in this constitutional vision are remedial and restitutionary measures for the achievement of the constitutional goal of a free, prosperous and egalitarian South African society. Illustrative of this fundamental commitment, several constitutional provisions, directly or indirectly, sanction remedial measures to address remaining injustices. Different types of remedial measures are envisaged, namely affirmative action programmes, a government policy of preferential procurement, and Black Economic Empowerment. The constitutional imperative for policy tools to transform the South African economy in particular, by means of black economic empowerment is therefore clear.

In this study the legacy of apartheid, with specific reference to the economic aspect thereof, is researched. From this it becomes clear that transformation in the way economic resources are divided is necessary. The enactment of specific legislation dealing with the subject resulted from the recognition of the need for regulatory intervention to give momentum to the process of reform. The B-BBEE Act and its Codes of Good Practice provide the foundation for the drafting and implementing of the B-BBEE programme. The B-BBEE programme's operation is analysed in order to draw conclusions on the constitutionality thereof.

Within the framework of the Constitution, several provisions empower the state to adopt remedial measures to correct systemic injustice. The most apparent of these is the right to equality in section 9. It provides that everyone is equal before the law and has the right to equal protection and benefit of the law and entrenches the right not to be discriminated against, either directly or indirectly, on a number of specifically enumerated and analogous grounds. Section 9(2) makes specific provision for remedial measures, not as an exception to the equality guarantee, but rather an extension thereof — a restitutionary equality conception. In the Preamble to the B-BBEE Act it is stated that one of the objectives with the Act is to "promote the achievement of the constitutional right to equality". The right to equality therefore occupies a central place in any constitutional discussion on the B-BBEE programme. The position on the constitutional validity of affirmative action measures, and therefore also the B-BBEE programme, is currently governed by the Constitutional Court's decision in *Minister of Finance v Van Heerden*, where the Court formulated three elements for a valid section 9(2) measure. The Court's approach in the *Van Heerden* case was therefore analysed in order to make a determination of the constitutionality of black economic empowerment measures. However, in order to place B-BBEE in its constitutional context the totality of constitutional provisions which touch on the programme, that is both mandating and limiting provisions, was considered.

The practical operation of the programme was analysed and that information was used to draw conclusions on the constitutionality of the programme when placed in the framework provided by the relevant constitutional provisions. Recommendations were also offered which could address some of the problematic aspects of the programme identified.

Opsomming

Die negatiewe impak wat die apartheid-regime se beleide op die sosiale, politieke en ekonomiese omstandighede van die meerderheid van die bevolking gehad het, is ‘n vasstaande feit. Hierdie impak duur tans steeds voort in Suid-Afrika. Die Suid-Afrikaanse Grondwet erken hierdie negatiewe nalatenskap, maar bevat ook ‘n visie van die tipe samelewing wat vir Suid-Afrika in die vooruitsig gestel word. Die insluiting van waardes, beginsels en regte wat hierdie nuwe gemeenskap onderlê wis egter nie al die gevolge van vroeëre diskriminerende beleide, bloot as gevolg van sodanige insluiting, uit nie. Die herroeping van diskriminerende wetgewing en praktyke kan nie die ongeregtigheid en armoede wat voortgespruit het uit 40 jaar van onderdrukkende wetgewing en regeringsbeleide verlig nie.

Inbegrepe in die grondwetlike visie is remediërende en regstellende maatreëls ten einde die grondwetlike oogmerk van ‘n vry, welvarende en gelyke Suid-Afrikaanse gemeenskap te bereik. Hierdie grondliggende verbintenis word toegelig deur verskeie grondwetlike bepalings wat, beide direk en indirek, remediërende maatreëls om die oorblywende ongeregtigheid aan te spreek, magtig. Verskillende soorte regstellende maatreëls word voorsien, naamlik regstellende aksie programme, die regering se voorkeurverkrygingsbeleid, en Swart Ekonomiese Bemagtiging (SEB). Die grondwetlike imperatief vir beleidsmaatreëls om spesifiek die Suid-Afrikaanse ekonomie by wyse van swart ekonomiese bemagtiging te transformer is derhalwe duidelik.

In hierdie studie word die nalatenskap van apartheid, met spesifieke verwysing na die ekonomiese aspek daarvan, ondersoek. Hieruit is dit duidelik dat ‘n omskepping van die huidige verdeling van ekonomiese hulpbronne noodsaaklik is. Die verordening van spesifieke wetgewing op hierdie gebied het voortgespruit uit erkenning dat regulatoriese ingryping nodig was ten einde stukrag te verleen aan die transformasieproses. Die SEB wet en die praktykskodes ingevolge daarvan is die basis vir die ontwerp en implementering van die Swart Ekonomiese Bemagtigingsprogram. Die werking van

hierdie program word ondersoek ten einde gevolgtrekkings oor die grondwetlikheid van die program te maak.

Verskeie bepalings binne die grondwetlike raamwerk magtig die staat om regstellende maatreëls te aanvaar om sodoende sistemiese ongeregtigheid te herstel. Die duidelikste van hierdie bepalings is die reg op gelykheid soos vervat in artikel 9 van die Grondwet. Dit bepaal dat elkeen gelyk is voor die reg en die reg op gelyke beskerming en voordeel van die reg het. Dit verskans ook die reg dat daar nie regstreeks of onregstreeks onbillik teen iemand gediskrimineer mag word op ‘n aantal spesifieke of gelyksoortige gronde nie. Artikel 9(2) maak spesifiek voorsiening vir regstellende maatreëls, nie as ‘n uitsondering op die gelykheidswaarborg nie, maar eerder as ‘n uitbreiding daarvan — ‘n regstellende gelykheidsbegrip. In die aanhef tot die SEB wet word die bevordering van die grondwetlike reg op gelykheid as een van die oogmerke van die wet gestel. Derhalwe staan die reg op gelykheid sentraal in enige grondwetlike bespreking van die SEB program. Tans word die grondwetlikheid van regstellende aksie-maatreëls gereël deur die Grondwethof se uitspraak in *Minister of Finance v Van Heerden*, waar die Hof drie geldigheidsvereistes vir artikel 9(2)-maatreëls neergelê het. Die Hof se benadering in die *Van Heerden*-saak word dus ontleed ten einde die grondwetlikheid van swart ekonomiese bemagtigingsmaatreëls te bepaal. Ten einde SEB in die grondwetlike konteks daarvan te plaas moet die totaliteit van grondwetlike bepalings wat daarop betrekking het, beide die magtigende en beperkende bepalings, egter oorweeg word.

Die praktiese werking van die program is ontleed en die inligting is gebruik om bepaalde gevolgtrekkings oor die grondwetlikheid van die program, binne die raamwerk wat deur die relevante grondwetlike bepalings gestel is, te maak. Aanbevelings wat sekere van die problematiese aspekte van die program, soos geïdentifiseer, aanspreek word ook gedoen.

Key Terms

Black Economic Empowerment

Equality

Socio-economic rights

Social justice

Economic justice

Transformative constitutionalism

Public procurement

Foundational constitutional principles

Limitation of rights

Public administration

Grassroots empowerment

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