

BEE AND RAWLSIAN JUSTICE

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A research report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Arts.

Johannesburg, 2010

To my two children Uyanda and Thamsanqa, you are more than what you are becoming. To my wife, there are more bridges to cross and only faith and courage will see us through. This research report is ultimately dedicated to the memory of Toti waDvungemanti waMthfongane. If I tapped into her work ethic, I would be twice the man I am in terms of achievements.

Declaration

I declare that this research report is my own unaided work. It is submitted for the Degree of Master of Arts in the University of Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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31st day of August, 2010

Abstract

The *raison d'être* for Black Economic Empowerment (BEE) and its more recent Broad Based version is to achieve racial economic equality. This paper evaluates how narrowly defined BEE – which is limited to the conferring of ownership, management and control of South Africa's financial and economic resources to previously disadvantaged individuals – measures up against Rawls's theory of distributive justice. The paper argues that the policy of BEE's ostensible implementation failures are a consequence of inherent problems in the conception of this policy – the conflation of individuals, who are real personalities with moral responsibilities, and the group, which is an abstract entity from a moral point of view. The paper further argues that the desired goals of directly addressing the economy's skewed racial profile and the requisite changes in intra- and inter-firm relational patterns of capital and control are not adequately served by the BEE policy as currently conceived. It argues that the levels and patterns of inequality that are exacerbated by this policy are not biased towards the advantage of the poorest of the poor as envisaged in Rawls's principles of distributive justice. Arguments in favour of the current strategy of BEE are evaluated, but the general gist of the argument is that the policy as currently conceived cannot move South Africa to greater racial economic equality.

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Section 1: Introduction

BEE is defined by the Black Economic Empowerment Commission as 'an integrated policy ... which aims to redress past imbalances by transferring and conferring ownership, management and control of South Africa's financial and economic resources to the majority of its citizens and ensure broader participation of black people in the economy in order to achieve sustainable development and prosperity¹. As is often the case in economics and philosophy, the seemingly straightforward definition of Black Economic Empowerment belies its intricate nature. Presently, debates and questions are raised over the validity, scope and future of BEE, and the implications of these debates both in practical and conceptual terms, are profound and far-reaching.

From the onset, I accept BEE as a part of a suite of policies founded on a constitutional basis that are collectively designed to address the legacy of past injustices. The broader definition of this policy – Broad Based Black Economic Empowerment (BBBEE) – is a multi-pronged strategy aimed at transforming all the different levels of the economy from within the different organisations and sectors within existing economic structures. This policy is aimed at increasing the number of black people who:

- (a) manage and control enterprises and productive assets
- (b) benefit through communal ownership and management of productive assets through co-operatives and other collective enterprises
- (c) are affirmed through human resource and skills development
- (d) represent all occupational categories and levels in the workforce in an equitable manner
- (e) benefit through preferential procurement

- (f) invest in enterprises that are owned or managed by black people.

While acknowledging the comprehensive and potentially far-reaching implications of BBBEE, the focus of this paper is limited to the narrower definition of BEE, namely ownership and control.

I justify this narrow focus on two accounts: that ownership and control is the cornerstone of BEE² and that it is a potential instrument for dealing with structural issues that impede economic growth and racial access³.

Given the South African government's goal of achieving racial economic equality, narrowly defined BEE seems the most appropriate to evaluate, as it is a policy designed to redistribute the ownership and control of means of production. This would correct historical economic imbalances to enable all communities to participate in and contribute to all aspects of economic activity in South Africa.

In the context of effectively dealing with past economic inequalities, I further make the assumption that narrowly defined BEE has the potential to dislodge the 'macroculture' – a 'system of widely shared assumptions and values ...that guide the actions and create typical behavioural patterns.'⁴ These are what Woolsey-Biggart and Guillen call the broad social 'organisational logics' that are 'taken for granted organisational arrangements that both prompt and constrain economic actors ...and help to determine which social roles and strategies are conceivable, efficacious, and legitimate'⁵. Put differently, this policy seeks to change institutionalised behavioural patterns within and between firms.

In this research paper, I assess BEE in the light of John Rawls's theory of distributive justice. Rawls's theory is not defended; rather it forms the theoretical framework against which the success and moral credentials of BEE can be evaluated. The cardinal objective of this report is not directed at the failures or successes of the implementation of this policy; rather, it is an evaluation at the level of principle and fundamental tenets of this policy.

Before proceeding with the outline, it is necessary to elucidate the reasons for choosing Rawls's distributive justice above compensatory justice theories, despite the historical context of the government's redistributive policies.

The classical understanding of compensatory justice, which is 'corrective justice in involuntary exchanges such as theft, assault or murder'⁶ does seem to justify an argument for compensatory justice. In addition, South Africa's historical context – legislatively enforced dispossession that resulted in gross inequalities – would ordinarily lead one to think that a compensatory theory of justice is the most suitable framework to assess BEE.

However, the correction of past injustices would require a mechanism of directly redistributing and allocating resources to the previously disadvantaged individuals (PDIs) from those who were previously advantaged by the economic system. The untenable calculus of evaluating and attributing appropriate and timely exchanges to address a strong backward-looking compensatory justice argument does not seem feasible. Given the movements of ownership and control over the last decade, one would have situations where PDIs who are beneficiaries of current legislation would have to compensate other PDIs by virtue of being current owners of means of production. Thus, the strong compensatory justice argument is fatally entangled in an unsustainable inter-generational attribution analysis, which renders distributive justice a better framework: while it addresses past injustices, it is forward looking in its implementation. In choosing distributive justice over compensatory justice, I am guided by the *Dictionary of Philosophy's* definition of distributive justice as 'the right way of allocating benefits and burdens'⁷.

Another distributive argument is the libertarian argument as espoused by Robert Nozick in his Entitlement Theory, as summarised by Julian Lamont: 'A distribution is just if everyone is entitled to the holding they possess under the distribution'⁸. He further refers to principles of justice in transfer and the principle of justice in acquisition. According to Nozick, 'An acquisition is just if and only if the position of others after the acquisition is no worse than was when the acquisition was unowned or 'held in common'⁹.

While his theory carries some appeal in that the principle of transfer is meant to specify fair contracts, the principle of acquisition is more complex in that it involves the establishment of exclusive property rights.

Given the complexity of the South African history of dispossession and the intractable complexity of establishing legitimate ownership as demonstrated in the Truth and Reconciliation process, I concluded that this distributive justice theory cannot be applied to BEE.

There seems to be a conscious decision by the South African government to adopt a forward-looking process of redistribution in the process of writing the constitution and the subsequent enactment of the current forward-looking suite of BBBEE policies. In this essay, it is argued that narrowly defined BEE is chief in this suite of policies.

Thomas Pogge's assertion that, 'A morally deeply-tarnished history must not be allowed to result in radical inequality'¹⁰, seems sound advice in the context of South Africa's economic transformation.

While I have chosen distributive justice as the framework to analyse BEE, this essay is by no means the last word in terms of the systematic analysis of the success and moral claims of BEE. I proceed with an understanding that while cogent arguments could be raised in support of compensatory justice or 'commutative justice'¹¹ as most appropriate frameworks, Rawlsian distributive justice was chosen in the light of my interpretation of the underlying spirit and intention of the South African constitution and the concomitant policies that have been written to transform South African society.

In this paper I treat BEE as an intervention that falls within the area of distributive justice since it deals with the regulation of how things such as rights, goods should be distributed in a given society.

To evaluate BEE as a justice-related government intervention I utilise the work of pre-eminent distributive justice theorist, John Rawls. This provides a concise and clearly defined framework that can be systematically applied to BEE issues. I conjoin the fundamental tenets of John Rawls's assertion that the stability of any society 'depends upon the extent to which the members of that society feel that they are being treated justly'¹² with Kant's notion of equality: 'human beings all have the same dignity and in virtue of this dignity they deserve to be treated as equals. Whenever individuals are treated unequally on the basis of

characteristics that are arbitrary and irrelevant, their fundamental human dignity has been violated'¹³. I therefore make the assumption that all notions of justice are premised on equality at the level of the individual. I further invoke Dr Jan Edward's description of the general principle of distributive justice: 'In assignment of benefits and burdens, those who are equal in relevant ways should be treated equally, those who are unequal in relevant ways should be treated unequally in proportion to their inequality'¹⁴.

The provisions of Rawls's theory of justice allow for certain inequalities that enhance the absolute conditions of the poorest of the poor (this issue is dealt with elsewhere in this essay). Because of this, I make the assumption that the theory does not detract from the egalitarian norms that underpin BEE policy; and I assume the implicit egalitarian norms that underpin both the South African constitution and BEE as a policy.

In the following sections, I intend to build arguments that will support the core charge of this essay: that BEE is fundamentally flawed because it conflates the group with the individual without a mechanism that ensures the protection of individuals.

The fundamental concept of Rawls's ideal distributive theory is founded on what he calls ideal theory. Rawls describes ideal theory as 'a conception of a perfectly just society'¹⁵. He believes that 'the reason for beginning with ideal theory is that it provides... the only basis for the systemic grasp of these more pressing problems [that we are faced with in everyday life]'¹⁶. The fundamentals of considering Rawls's justice as fairness are the equal-liberty principle, fair equality of opportunity and the difference principle. These principles only hold under ideal conditions of 'strict compliance'¹⁷.

BEE's point of departure from ideal theory lies in not focusing on principles of justice in the perfectly just society. Rather it is a practical guide to effectively move us closer to a more just society. It addresses 'non-ideal' real-world injustices of the past. As such, it is in the non-ideal theory trajectory since it is designed to address economic inequalities induced by apartheid. The preamble to the BBBEE Act espouses the notion of achieving a 'more equitable income

distribution' and 'equal opportunity'; this confers to BEE the status of a plausible measure for moving us towards a well-ordered society¹⁸.

BEE could further be justified because in a non-ideal world 'the principles of justice are prior to considerations of efficiency' as opposed to ideal conditions where ...'all efficient arrangements are declared equally just'¹⁹. According to Robert Taylor, 'the goal of non-ideal theory is to create a world in which the ideal theory can be applied'²⁰.

In this paper I argue that the desired goals of directly addressing the economy's skewed racial profile and the requisite changes in organisational relational patterns of capital and control are not adequately served by the BEE policy as currently conceived. Further, the levels and patterns of inequality that are exacerbated by this policy are not biased towards the advantage of the poorest of the poor as envisaged in Rawls's principles of distributive justice.

In Section 2, I present the aim and ideal conception of BEE as envisaged in government legislation. In section 3, I present Rawls's Theory of Distributive Justice as a framework for evaluating the efficacy of BEE. Section 4 presents how Rawls's theory would move South Africa to greater racial equality. Section 5 deals with objections, replies and counter arguments. Section 6 is the conclusion.

Section 2: Aims and ideal conception of Black Economic Empowerment (BEE)

The *raison d'être* for BEE – and its more recent Broad Based version – is to achieve racial economic equality. This policy seeks to achieve this objective through primarily broadening the economic base by unraveling the logjams that were artificially created by the previous system.

In this context, John Friedmann provides a concept of empowerment that is relevant to the policy of BEE. He defines empowerment as:

An alternative development, which places emphasis on the improvement in the conditions of life and livelihood of the excluded majority. Empowerment is the alternative development because it aims to redress the historical process of systematic disempowerment or exclusion of the vast majority of people from economic and political power²¹.

In Friedmann's thesis, the long-term goal of empowerment is to transform the structures of power and society through the improvement of the very system that excludes the vast majority of citizens.

According to Edigheji, for Friedmann's 'process of empowerment to succeed it requires a strong and proactive state'²². The role of the state in ensuring and monitoring the process of BEE will be addressed elsewhere in this essay.

While accepting the conceptual framework and the emphasis raised by Edigheji in his analysis I do not accept his thesis that the 'minimalist approach or 'narrowly defined' BEE as opposed to the 'maximalist approach' or BBBEE, necessarily lend the black capitalist class to a position of not 'seeking to transform the corporate structure rather become comfortable with it as long as they become 'stinking rich'²³. As already stated, the fundamental problem is at the key charge of this essay: this is the putative substitution of groups for individuals in building a moral system of redistributing and attributing benefits and burdens. This is compounded by two additional factors that will be addressed later in this essay. These are the pre-eminence of the private sector in developing and dictating the magnitude and direction of BEE coupled with the tenuous link of 'comrades in

business²⁴ who have neither the acumen nor the entrepreneurial foresight to influence and adapt their enterprises to the new demands of the economic environment. In a sense, the latter challenges reflect the tension that is eloquently stated by Friedmann when he posits that, 'although empowerment is centred on people rather than on profits, it faces a profit-driven development as a dialectical other'²⁵.

Professor Themba Sono provides a cogent definition of BEE when he says, 'BEE is a corrective, creative and constructive mechanism for the redistribution of justice. It involves the shifting of power – politically, commercially, economically and educationally – from the traditional centres to the new demand sectors – the black population'²⁶. His definition posits BEE as an enabling mechanism for all those who were marginalised by the system of apartheid and also speaks to those with entrepreneurial prowess and are capable of conducting their own economic endeavours without assistance or interference to be allowed to continue. Edigheji sums up the contents of this definition as 'conceptually placing at its core the simultaneous empowerment of the black people as a collective and the individual as an entity'²⁷.

This conceptual framework speaks to the empowerment that conjoins the individual and the collective in its process of empowering. The maladies of apartheid, which are being redressed with their concomitant racial, gender and class inequalities, impact on the individual as well as the collective. According to Edigheji's argument, 'BEE-related companies should therefore be socially and politically rooted with the aim of empowering the community at large by adjoining two conflicting but mutually reinforcing interests that are collective (which is developmental) and economic interest of the entrepreneur (which is profit maximising)'²⁸.

In this essay, I concur with the preceding argument as long as the individual as an entity is not conflated with the collective in the formulation of policies and the social contracts that are entered into. At the core of this analysis lies the question of values and accepted norms that underpin BEE as a policy.

In a recently published collection of essays on empowerment, Xolela Mangcu quotes Professor Fukuyama, who illustrates the significant influence of norms and values of human sociability on economic activities in the following comment:

There is scarcely any area of economic activity, from a dry-cleaning business to fabricating large-scale integrated circuits that does not require the collaboration of human beings. And while people work in organisations to satisfy their individual needs, the workplace also draws people out of their private lives to a wider social world²⁹.

Before the dawn of the democratic South Africa, the organising principles and policies and norms that governed organisations and institutions were designed to exclude the majority of South Africans. This necessitated a new social contract that would enable broader participation by all the members of the South African society. As Matthew Andrews put it, 'Racial patterns in South Africa's economy cannot be adjusted without some structural change that challenges the race-based organising logics that deem it appropriate for whites (and more particularly specific groups of whites) to be empowered insiders and other groups disempowered outsiders'³⁰.

However, in the context of this essay, BEE is intended to expose black people to the economic substance of ownership and control. As sociologist Roger Southall put it, BEE is the 'increase of black ownership, control and management of state, parastatal and private economic activity in the formal sector'³¹.

BEE has its roots in the South African constitutional provisions and social context. Equality is the bedrock of South Africa's constitution and policies such as BEE are seen as a means to achieve economic equality and not as a deviation from the right to equality.

The notion of economic justice has never been divorced from the ideal of substantive equality. The precursor of BEE, the Reconstruction and development Programme (RDP), was conceived as 'an integrated, coherent socio-economic policy framework, which seeks to mobilise all the people and the resources of South Africa towards the final eradication of the result of apartheid, the building of a pluralistic future'³². 'The programme (RDP) is a vision for the fundamental

transformation of the country. It integrates growth, development, reconstruction, redistribution and reconciliation into a unified programme³³. While the tenor of the description contains strong political rhetoric, it also specifically addresses issues such as 'racial and gender inequalities in ownership, employment and skills as serious weaknesses in the economy'³⁴. It further raises the problematic nature of South Africa's concentrated ownership patterns, which require mechanisms to increase participation and the establishment of a more racially inclusive economy.

This policy was refined and culminated in the Growth, Employment and Redistribution (GEAR) strategy. I shall not enumerate the elements of this policy here, save to say that it encompasses broader macro-economic elements that would enhance growth and economic redistribution in the South African economy in order to create a sustainable and economically equitable society in the long term. The government sought to establish the basic guiding principles of BEE to establish an enabling environment where distributive justice could effectively take place.

The basis for BEE policy emanates from South Africa's founding document, namely the new constitution, which provides the basis for policy formulation.

Judge Albie Sachs argues that BEE is one of the policies that give practical meaning to the equality embedded in the constitution in his interpretation of the three clauses of section 9 of the constitution:

section 9(1), which affirms the right of everyone to equal protection under the law; section 9(2), which is aimed specifically at the extension of equality to those who were previously denied that status; and section 9(3), which demands fairness in the pursuit of equality in a way that supports the economic and social transformation of the South African society³⁵.

Sachs asserts that:

'There is no question that BEE, devised properly, is supported and even demanded by The constitution of the Republic of South Africa, Act 108 of 1996...Just as our constitution acknowledges the historical patterns of subordination that have characterised our country's development, so it

seek to affirm law, policies and practices that advance equality and human dignity'³⁶.

Sachs's arguments further clarify the challenge of satisfying two incompatible objectives of 'overcoming all forms of structured advantage without establishing an anachronistic or disjunctive compensation for past injustices'³⁷. The preceding arguments support the futuristic orientation of distributive justice. It also contains strong egalitarian assumptions. BEE is a catalyst in the whole process of transforming race-based economic discrimination into non-racial economic equality.

Black ownership and control as the primary driver of economic transformation is justified on egalitarian grounds. Among its cardinal objectives is what the preamble to the BBBEE Act refers to as the realisation of 'the constitutional right to equality', 'a more equitable income distribution', 'equality of opportunity'³⁸.

In this essay I am in agreement with Judge Sachs's argument that BEE should be an equitable social contract that addresses past discrimination without being entangled by compensatory demands for past injustices.

Furthermore, BEE as a 'moral imperative'³⁹ is founded on the premise of equality and justice. However, the desirable 'direct enhancement to interpersonal equality'⁴⁰ that is paramount in any egalitarian society does not seem to find full expression in the conception and implementation of BEE policy. Although BEE emanates from a constitution that upholds the primacy of equality at the interpersonal level, it is not clear whether BEE policy's equality refers to 'group or interpersonal'⁴¹. While most proponents of this policy expect that it will yield a more racially equal South Africa, the 'direct equity effects'⁴² in its conception are not easy to discern.

Former president Thabo Mbeki expressed the need to 'create and strengthen a black capitalist class'⁴³. This view affirms the pivotal role played by owners and controllers of means of production in facilitating the process of transformation. As already mentioned, I concur with the view that holds ownership and control as a *sine qua non* in BEE.

This is also captured in the African National Congress (ANC) proposal for transforming the economy. The ANC acknowledges the stabilising effect of conservative macro-economic policies and their importance in establishing a platform for growth; however, they feel that other well-coordinated strategies such as control and ownership of productive assets by black people and women would add the impetus towards achieving racial economic equality.

The ANC further posits that, 'Economic growth whilst being a necessary condition to raise the living standards of the people, is unlikely to reduce the racial and income inequalities of the society unless the growth process is accompanied by creative and social programmes that address these inequalities'⁴⁴.

They argue that

BEE is part of the overall transformation and democratisation of the South African state and society, thus BEE should be aimed at maximising the number of ordinary communities who increase their share of participation, not only in creating improved material conditions, but also in determining the depth, direction and pace of economic transformation⁴⁵.

The ANC also hopes to co-opt the emergent black capitalist class to ensure joint commitment and the necessary involvement in the process of effectively addressing the legacy of underdevelopment and under-investment, which resulted in a skewed distribution of jobs and opportunities.

While the ruling party does not prescribe a cogent description of BEE, the preceding arguments capture the gist of their standpoint. I am uncomfortable in the way that the group as opposed to the individual is the primary focus of the stated argument. There is also a strong emphasis on the state as an enabler and leader in driving the policy of BEE. The discussion does not seem to contain strong egalitarian attributes. BEE must have egalitarian values and be driven by a strong sense of justice and fairness if it is to attain its primary objective.

Mashudu Ramano concurs with the ANC when he says, 'Empowerment means democratisation of ownership of economic resources, creation of a significant entrepreneurial class among blacks ...improved living conditions of blacks and elimination of race in economic activities'⁴⁶.

Saki Macozoma presents an eloquent defence of the primacy of the individual in minimalist BEE policy in his assertion that, 'The most important concept that supports BEE is the de-racialisation of the South African economy'⁴⁷. He also feels that detractors of BEE policy are not willing to face up to the fact that this process is redistributing capital and other related resources into black hands. He refutes the argument that narrowly-defined BEE policy enriches only a few individuals, pointing out that this policy is carved within a capitalist economy and therefore it will yield results akin to its economic context. Thus he argues that the concentration of black-owned and black-controlled wealth in few hands is not in itself a problem since it enables previously excluded individuals the opportunity to forge new organisations with different ethos and strategies that effectively changes the cultural compositions of business leadership. He further argues that BEE must remove all obstacles that might hinder an individual, but that it must enable new owners of business to increase the level of diversity in different industries and also alter the strategies of their new businesses.

Macozoma is by far the strongest proponent of substantive ownership and control by black people as opposed to the broad-based collective schemes that dilute individual shareholding to the extent that it preserves the status quo. He believes that BEE is succeeding in distributing wealth and opportunities. He questions how a diffused broad-based shareholding can begin to de-racialise the economy and establish new inter- and intra-organisational relationships that lead to racial economic equality and a more just distribution of opportunities.

His argument is based on his belief that the economic question being addressed by BEE is the total exclusion that is inadvertently being turned into controlled inclusion by BBBEE for purposes that are inimical to racial economic equality or a more just distribution of wealth and opportunities. He thinks that there is a clash of expectations when people expect narrowly-defined BEE to solve all the socio-economic maladies without appreciating its profound contribution in changing the composition of the corporate landscape. It is therefore reasonable to conclude that BEE is seen as the primary and most important contributor in the process of creating a distributively just society.

Implicit in the preceding arguments is the acceptance that there is a need for a formidable business class among black people. This class would form the backbone of owners and controllers of capital who would effect changes in the intra- and inter-organisational relationships.

In essence, BEE is seen as neither 'affirmative action nor a straight swap of wealth from white hands into black hands ... It is part of a growth strategy that seeks to address the South African economy's weakest point: inequality,'⁴⁸ which is a function of exclusionary policies. It works on the premise that the exclusion of the previously disadvantaged individuals from the mainstream economy proportionately reduced the number of entrepreneurs and business leaders, thus never allowing the country's economy to perform at its full potential. This would lead to a more equitable distribution of productive assets in terms of racial groupings that would broaden the economic base to everyone's advantage.

Macozoma's assertion is based on that which has been proven by experience to be untrue: the fact that most people who are taking advantage of BEE opportunities are entrepreneurs. It is also contestable whether many primary beneficiaries of the process are fully autonomous and are true partners in the enterprises that they have shareholding, or whether they are just peripheral owners tinkering with productive assets that mainly remain in the hands of previously advantaged. I accept the principle of protecting and encouraging individuals to participate in the opportunities that emanate from the policy of BEE; however, I am sceptical of the equitability of access and the meritocracy of participants.

The Congress of South African Trade Unions (COSATU) feels that BEE should never be severed from the inclusive fundamental transformation of both the state and society. Sam Shilowa, then General Secretary, commented in 1994 that a 'meaningful empowerment of workers and the black communities in the ownership, control and management of economic resources'⁴⁹ was the only acceptable form of empowerment to COSATU. According to Shilowa, any substitution of white elites by black elites without broadening the ownership of resources and enabling participation by workers in particular is a form of

'tokenism'⁵⁰. This standpoint is what informs trade unions forming their own investment companies.

This articulated premise is natural to the trade union movement; however, the issue is how you make sure that the burdens and benefits of empowerment are substantive to the majority of workers. At the level of principle, the participation by a large number of workers per se does not detract from the desired 'equity effects' that are expected from an intervention intended to lead to a more pluralistic society.

In a similar vein, the South African Communist Party (SACP) speaks of a 'democratic economic empowerment that ensures socio-political stability'⁵¹. The SACP is calling for a holistic BEE process that ensures the growth and sustainability of the whole socio-economic system. They refute any process that is embedded in the 'top-down managerialism (in the name of professionalism) that might be inherited by the new elite to protect newly acquired privilege and power'⁵².

These sentiments are only valid where the equality of opportunity or access has a bias towards the privileged and well educated. In a process of fair equality of opportunity where differentiation is a function of individual prowess or acumen, the arguments are not valid. If policy favours individuals by some other arbitrary attribute – whether colour, gender or class bases – these sentiments become valid. Thus, the key is to evaluate whether BEE can stand up to the test of equality of opportunity at the level of principle. The general tenor of this essay is that it does not.

Phinda Madi provides an insular view of BEE when he suggests that BEE occurs 'every time a black person acquires the means to earn a living'⁵³ since the objectives of BEE are far-reaching and intended to change the economic landscape in the long-term.

For the sake of completeness, it is important to look at some of the comments on the conceptual framework with respect to values and norms as alluded to at the beginning of this section.

One of the proponents of BEE eloquently asserts that:

Black Economic empowerment is not a panacea to all the social ills confronting our society. Centuries of exploitation cannot be reversed by just twelve years of economic empowerment initiatives. We must accept the consequences of the policy choices we have made to reconstruct and develop our post-apartheid economy, and devise innovative means to deal with the unintended consequences generated by our policy choices. Black economic empowerment is capitalistic in character and seeks to influence change within a capitalist order⁵⁴.

The preceding argument is forwarded by a number of commentators who imply that the possible exclusion of other members of society is a consequence of an intervention designed to redress inequalities within a capitalistic system. The premise of this argument is that the big beneficiaries of narrowly defined BEE are active entrepreneurs who are merely taking advantage of opportunities arising from a capitalist system. This illustrates the main point of departure of this essay namely the conflation of the group with the individual. At one level the beneficiaries of this process deal in races and not individuals; at another level they argue the process is capitalistic and therefore driven by a strong individualistic ethic in terms of values, with the concomitant results of excessive inequalities.

From a liberal point of view, race groups cannot approximate the primacy of interpersonal equality. Moral agency can only be attributed to individuals who can be penalised or benefited by a policy.

In the final analysis, what emerges is the divergence of views that are anchored on either a minimalist or maximalist emphasis in terms of BEE. Most of these views reflect a perspective clouded by individuals' stations in life but do not reflect an evaluation of the efficacy of BEE as a policy in terms of guiding principles and values.

Most of the arguments would require empirical evidence to sustain. In the following section I shall present the Rawlsian framework as a means to evaluate BEE at the level of fundamental principles.

Section 3: Rawls's Theory of Justice

3.1 Introduction

John Rawls's book, *A Theory of Justice*, published in 1971, focuses on defining the conception of justice. It elicited a great deal of interest from scholars, legal and political thought leaders. Rawls's cardinal objective is to achieve a social structure that will govern a well-ordered society through a social contract that balances liberty with equality. His theory is premised on the assumption that individuals are free and equal; that they have absolute rights that are based on justice that cannot be outweighed by communal considerations. Rawls argues for a pluralistic well-ordered society based on a fair, rationally negotiated social contract without any prerequisite religious or other predefined moral assumption. He posits a social contract founded on the basis that 'free and rational persons concerned to further their own interests would accept an initial position of equality as defining the fundamental terms of their association'⁵⁵. The initial position forms the basis for a consensus on the basic governance structure to 'distribute fundamental rights and duties and determine the division of advantages from social cooperation'⁵⁶. Inequality is only permissible if it advantages the least advantaged members of the scheme.

3.2 Original position and the veil of ignorance

At the core of Rawls's method of formulating the principles that govern the basic structure of society are free and equal members who are guided by justice and fairness and form part of a well-ordered society. His original position is an idealised situation where rational, free representative individuals of equal moral worth formulate principles to govern institutions to ensure the distribution of all social primary goods.

Rawls posits a cooperative scheme of governance that is a product of every individual's contribution and is fair and equitable. It is based on a system whereby every individual's choice incorporates consideration for every member of this community. Each representative individual voluntarily participates in the formulation and execution of its rules of governance.

In a similar vein as the concept of 'ubuntu'⁵⁷ the scheme is premised on cooperation in the distribution of primary social goods. The scheme of arrangement is based on the idea that every individual would act in his or her best interest, which would be in everybody's interests.

Rawls's description of primary social goods is as follows, 'For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth'⁵⁸.

Rawls assumes an egalitarian system where all participate in the overall yield of primary goods. In this framework, Rawls concedes that income differences may exist in the process of allowing individuals to practise their gifts and talents and enhancing the output in the scheme to a level that could not be reached in a system with equal incomes.

These self-interested representative participants make cooperative choices that are advantageous to all members of the scheme behind what Rawls calls a veil of ignorance. In Rawls's framework, this establishes fairness in the overall process and would result in a just set of principles being chosen. The interplay between individuals pursuing their own programmes of life while being fully cognisant of the need for social cooperation of others ensures the basic social structure is both just and fair. The parties in the scheme have general knowledge of human sciences and social context but are ignorant of morally irrelevant issues such as race, gender and social standing. In Rawls's model, it is more important to uphold the basic principles that govern their cooperation from a shared moral point of view. Thus, the choices of the principles of governance for this social structure are made from an informed and enlightened position without some of the irrelevant identities that prejudices some of the socio-economic choices that are made in real life. Every member of this scheme is principally involved in the enactment of these principles of governance.

He further posits that parties in the original position will rationally agree upon two principles of justice, which I discuss below.

3.3 The first principle (Liberty Principle)

'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'⁵⁹.

3.4 The second principle (Difference and Equal Opportunities Principles)

'Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity'⁶⁰.

Rawls differentiates between the general and specific conception of justice. The general conception is summarised as follows: 'All social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured'⁶¹.

Rawls's first principle entails the distribution of specific basic liberties; the second principle entails both the distribution of opportunities and status of authority and the distribution of wealth and income. According to Rawls, these principles are serially arranged such that the first principle precedes the second one and the first portion of the second principle precedes the second portion. None can be degraded for the sake of the other. There are only limited instances where these principles could be violated, such as places where 'there are severe limitations of liberty – the regulation of liberty of conscience and freedom of thought in ways consistent with public order, and the limitation on the scope of majority rule'⁶².

These principles assume a certain minimally decent level of existence where the citizens do not live in abject poverty or primitive non-ideal conditions.

The first principle is premised on a functional democratic system with the concomitant protection of citizens' fundamental liberties. It presupposes a citizenry that has a stake in the socio-political structure that ensure their ability to construct and develop what Rawls calls 'a conception of their own good'⁶³, which

would enable them to formulate the terms and conditions of their social cooperation. These basic liberties relate to the standard tenets of constitutional democracies such as 'the right to vote and to be eligible for public office, and the freedom of speech, assembly, conscience, thought, the right to hold (personal) property, freedom from arbitrary arrest and seizure as defined by the concept of the rule of law'⁶⁴. Rawls's first principle is fundamentally egalitarian and forms the basis of interacting for the contracting parties in this particular scheme of arrangement.

The second principle sets out preconditions for socio-economic inequalities that might arise because of policy choices. The principle must proceed from a situation of fair equality of opportunity. The first part of this principle, clause (a), is known as the Difference Principle. This clause is concerned with the distribution of social primary goods (goods, wealth, authority and responsibility) as opposed to natural primary goods (health, vigour, intelligence and imagination) whose basic structure must be arranged such that its inequalities benefit the worse off.

The Difference Principle is a high-level concept that provides the precepts of how wealth is transferred from the relatively advantaged to the least advantaged.

Clause (b) is known as the Equal Opportunity Principle. This clause encourages the community to endeavour to provide all its citizenry with equal opportunity by ameliorating inequalities that emanate from what Rawls calls accidents of birth or social conditioning. Rawls's principles have a strong consideration for the least advantaged and he introduces a concept derived from optimisation called the Maximin Rule. This game theory concept holds that 'it is rational to maximize the minimum when choosing between different alternatives'⁶⁵.

He feels that those who are disadvantaged would genuinely feel aggrieved if some opportunities were not open to them and as a consequence they were derailed from realising their life programmes.

Given the fact that Rawls's principles are based on an egalitarian conception of the good, he posits that the bases of self-respect of the least advantaged should find institutions that enable them to have a positive sense of their own worth as individuals and to be able to carry out their plans of life with self-confidence.

He asserts that self-respect emanates from a proper application of the two principles: 'when society follows these principles, everyone's good is included in a scheme of mutual benefit and this public affirmation in institutions of each man's endeavors support men's self-esteem'⁶⁶.

Before proceeding to the next section it is critical to recall Rawls's defence of the egalitarian virtues of his Difference Principle. He asserts:

We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to cultivate our abilities is also problematic; for such character depends in good part on fortunate family and social circumstances in early life for which we can claim no credit. The notion of desert does not apply here⁶⁷.

This statement from Rawls acknowledges the inherent inequality that arises from the fact that others are more advantaged at the very beginning of life and that a fair system would seek to ameliorate this imbalance. Rawls defends the egalitarian merits of his Difference Principle, which is intended to give some credence to the concept of redress by addressing imbalances that are a consequence of the 'natural lottery'⁶⁸.

He posits that the 'the principle of redress cannot be the sole criterion of justice ... but it must be compared to other principles such as the principle to improve the average standard of life or to advance the common good'⁶⁹.

In keeping with Rawls's argument, I accept that the Difference Principle suffices for the resolution of the problem of inequalities since it only allows inequalities 'that would be to everyone's benefit'⁷⁰. The only allowed inequality is that which benefits the least advantaged and by benefiting the least advantaged in absolute and not relative terms. I take the Difference Principle along with other features of Rawls theory that are stated above. I am fully cognisant of the fact that this principle is not only applicable to economic inequalities but covers other aspects such as opportunities and self-respect.

I subscribe to Rawls's defence when he argues that with opportunities and offices open to all, economic disparities will not be as accentuated. He comments:

We raise the expectations of the more advantaged only in ways required to improve the situation of the worst off. For the greater expectations of the more advantaged presumably cover the cost of training or answer organisational requirements, thereby contributing to the general advantage. While nothing guarantees that inequalities will not be significant, there is a persistent tendency for them to be levelled down by increasing availability of educated talent and ever widening opportunities⁷¹.

The more complex primary good stated in Rawls's theory is self-respect, which he calls the most important thing that cannot be distributed like other primary goods. He argues that self-respect is a function of his two principles of justice. He assumes that every concern of every member of the scheme is taken on board and each individual is affirmed such that her self-worth is maintained.

The other assumption from Rawls's explanation is that economic inequalities do not result in the least advantaged people's self-respect being undermined and that in a well ordered society, 'a rational individual does not suffer from envy'⁷². Moral value is assumed to be equal for all parties in the scheme. The effects of societal considerations that might make the least advantaged people view their wealthier counterparts as more valuable in a material sense are not taken into consideration in the analysis.

Before I evaluate BEE as a distributive policy, suffice to say that there are other theories that deal with the subject of justice but the preceding framework provides the most appropriate yardstick for evaluating BEE. I now turn my attention to the efficacy of Rawls's Theory of Justice in moving South Africa to greater economic equality.

Section 4: Rawls's Theory of Distributive Justice would move South Africa to greater economic equality

As a preamble to this part of the paper and as a basis for my argument that Rawls's theory of distributive justice would move South Africa closer to greater economic equality it is perhaps appropriate to quote him directly:

Despite the individualistic features of justice as fairness, the two principles of justice are not contingent upon existing desires or present social conditions. They can serve a standard for appraising institutions and for guiding the overall direction of social change. In order to find an Archimedean point it is not necessary to appeal to a priori or perfectionist principles. By assuming certain general desires, such as the desire for primary social goods, and by taking as a basis the agreements that would be made in a suitably defined initial situation, we can achieve the requisite independence from existing circumstances⁷³.

For ease of analysis, I assume the primacy of egalitarian values that underpin both the South African constitution and BEE policy and I contrast that with Rawls's principles, which are founded on liberal values. I shall follow the structure of Rawls's Theory of Justice and draw parallels and contrasts that show how far BEE falls short of the Rawlsian ideal.

Some of the most attractive features of Rawls's Theory of Justice are the assumptions of liberty and equality, which appraise the individual as the primary focus of any social structure that will be negotiated by the parties. Comparatively, BEE objectives emanating from constitutional provisions are to 'overcome all forms of structured advantage ... the moral purpose is intrinsically and inextricably bound up with social function'⁷⁴. Thus, the imperative to achieve economic equality must be achieved by balancing the relative sacrifice of the economic majority with the relative need of the economic minority within the economy of means and without impinging on anyone's human dignity.

Rawls, a Kantian, presents his veil of ignorance (discussed in the previous section): each individual representative person chooses on the basis of her self-interest, which is premised on a principled general consideration that applies

equally to all. Rawls's contractarianism demands consensus, which fully takes into account each individual's individuality. Each representative person must independently coalesce with the consensus. 'This arguably ensures that each individual has significant moral liberty to pursue her own projects and significant protection from interference from others. It also arguably ensures that justice is sensitive to the past and to distributive considerations'⁷⁵.

In this sense, the meaning of justice is taken to be 'comparative fairness'⁷⁶, and assumes the basis of BEE was initiated for an autonomous individual who chooses to be an entrepreneur to realise his goals.

Given this background, we can safely conclude that narrowly-defined BEE fails Rawls's liberty principle since it is conceived to correct injustice between groups as opposed to individuals.

In spite of the fact that BEE's claim to legitimacy is premised on the desirable 'constitutional right to equality', the policy is formulated in such a way that it focuses on inequality between races but not individuals. As Daryl Glaser puts it, 'In consequence of concentrating on equality amongst races but not individuals, BEE ignores interpersonal inequalities ... to the extent that it self-consciously promotes an economic elite within the black race group; BEE is premised on interpersonal inequality'⁷⁷. BEE does not contain any safeguards for individual autonomy as a participant.

To give the preceding analysis a real life bite, the following framework for analysing the empowerment of African Americans is helpful. Henderson's framework provides a practical explanation of what is envisaged in Rawls's first principle: there is a need for setting strategic goals and objectives by individuals, institutions and communities with the goal of expanding the resources of a given group. This interaction has a compounding effect that

generates even higher levels of resource attainment ... in the expansion and development of diverse resources, entrepreneurs transact and contract to a larger network of participants. This process allows the enabling and building of individual, organisational, and institutional networks, of which the empowered organisation is part. In other words,

when one force is empowered, most forces connected with it are actually and potentially empowered⁷⁸.

The chiasm followed in this process creates the balance between the individual as a participant and the group as a collective in terms of economic empowerment.

To contextualise Rawls's second principle, it is important to accept that it has to do with the 'distribution of social and economic advantages'⁷⁹. In other words, inequality in the distribution of these; goods, wealth, authority and responsibility should be arranged such that they are to the greatest benefit of the least advantaged. The second portion states that, 'positions to which greater goods and authority accrue are open to all persons'⁸⁰.

Herein lies the Achilles heel of BEE. In spite of being a policy emanating from the most liberal constitution and having the goal of systematically reversing incessant inequality in the South African economy, BEE falls short of the Rawlsian ideal, which states that 'inequalities of wealth and authority are just only if they result in compensating benefits for everyone and in particular for the least advantaged members of society'⁸¹.

While BEE is justified in that it can enhance economic growth, which would be compatible to Rawls's 'improving the standard of life or to advance the common good'. However, BEE is not a well-structured social contract with institutional support to ensure the principles are preserved to ensure effective implementation.

If one assumes that the South African constitution and BEE policies are premised on liberal values, then one cannot but wonder why BEE conflates real persons with groups in its calculus of participation in BEE opportunities. Only individuals, not groups, have moral agency. Thus, BEE as currently conceived is at cross-purposes with the pluralistic values that are based on a

political viewpoint that values individual liberty/freedom; the individual is prior to, or more important than the state – the function of the state is to protect individual liberty and freedom – individuals ought to be allowed to

pursue their own ends/goals – the state respects diversity and does not attempt to impose a single lifestyle on all individuals⁸².

The process of BEE is best described by Glaser when he says 'BEE's identification of beneficiaries involves a two-step metaphysic: first conceptualising groups as moral personalities with rights and entitlements, then particular persons as embodiments of those groups, entitled to claim whole group shares'⁸³.

A close examination of BEE policy reflects the fact that while the policy might have initially been conceived to arrest patterns of economic distributions premised on subordination and gross inequality and the promotion and affirmation of equality and human dignity, there is no strong institutional framework to ensure that these principles are carried out at the level of implementation. The primacy of the individual does not seem to find expression at every level of consideration in this policy.

This leads to the second clause of Rawls's second principle, namely the Equal Opportunity Principle. Robert Lane says, 'this seems to be the straightforward requirement that all individuals are to be eligible for the position and offices which bring greater pay and authority ... but [Rawls] hastens to remind us that this process is contingent upon "society making all individuals equally eligible'⁸⁴.

On the issue of access, BEE policy is such that the equality envisaged is not ordinarily clear to everyone as to how its principles are applied. Is it equality of opportunity or outcome?

Rawls's fair equality of opportunity calls for 'a certain set of institutions that assures similar chances of education and culture for persons similarly motivated and keeps positions and offices open to all on the basis of qualities and efforts reasonably related to the relevant duties and tasks'⁸⁵. BEE on the other hand does not have objective institutions that ensure equitable access to opportunities and offices of influence.

BEE falls far too short of this Rawlsian yardstick in that access is more open to those who are beneficiaries of what amounts to an 'unnatural lottery' of belonging to an elite group that has control of access to opportunity and can determine the outcomes. There are no set criteria of equal motivation or qualities except being

part of the privileged group. And this is significant in that it points to something much deeper than a failure of implementation (which is not the focus of this paper): Rawls's framework demands that representative individuals in the scheme of arrangement be free moral agents who can carry out their own programmes of life. The social contract they enter into must work to the benefit of the worst off people in society. If it does not, it is unjust and the government should intervene to eliminate inequality. BEE is indeed a redistributive mechanism designed to eliminate inequality between black and white people but its lack of protection for the individual has unintended consequences of excessive interpersonal inequality within the black race.

It is my contention that redistributive justice policies by their very nature are the province of governments since they carry substantive externalities that may arise at conception or implementation. These require interventions that would ensure that the policy would be to the greatest benefit of the poorest of the poor.

Conceptually, Professor Sono argues, 'BEE related companies should be socially and politically rooted with the aim of empowering the black community by satisficing between two conflicting but mutually reinforcing interests, that are socio-political or collective (which is developmental) and economic interests of the entrepreneur (which is profit-maximising)'⁸⁶.

This would enable the government – the facilitator of both the conceptualisation and implementation – to ensure that the concept is directed at the greatest benefit of the poorest of the poor.

Implicit in Rawls's second principle, which expects people of equal or similar motivation to be given equal opportunities, is the notion of meritocracy. The distribution of opportunities emanating from BEE policy is not a function of meritocracy either than the lottery of belonging to an elite group. Nor are they underpinned by a strong people-centred governance structure that ensures that these opportunities accrue to the greatest benefit of the poorest of the poor.

Another weakness lies in the practice of BEE. Contrary to what was alluded to in the previous section (that BEE is designed for autonomous individuals who decide to become entrepreneurs to carry out their own programme of life) most

beneficiaries of the BEE process take advantage of the opportunities made available by existing organisations to this elite group. These participants have neither strategy nor tangible contributions to add value to existing enterprises. Their major contribution is their percentage holding in the enterprise, which helps the organisation to be compliant with existing legislation.

This is at the level of implementation; however, it is still indicative of a conceptual problem. Rawls, as a Kantian, assumes that individuals are ends in themselves and therefore are not used as a mere means to an end. Thus his theory insists on consensus in the decision-making process of representative participants in the scheme of arrangement. BEE is private sector driven and its parameters are largely in the hands of private sector practitioners who prefer silent partners – people who come from total exclusion to participate in controlled inclusion for purposes that are sometimes inimical to the cause of transforming the South African economic landscape.

BEE operates with less stringent government involvement, thus the tenor of BEE is set by private sector organisations. In this sense it is instructive to hearken to Moeletsi Mbeki's comments about the reparations mentality of the elite that result in 'the black upper middle class dominating the country's political life but playing next to no role in the ownership and control of the productive economy of South Africa; its key role is overseeing the redistribution of wealth towards consumption'⁸⁷.

Without the active participation of the elite group in the principled and fundamental transformation of the South African corporate landscape, the objectives of BEE remain peripheral at best and far from being directed to the greatest benefit of the least advantaged people in South Africa. The primacy of the individual is paramount in Rawls's framework of distributive justice. Government's weak involvement in not only setting the parameters but also ensuring that the BEE policy benefits South Africa as a whole and particularly benefits the marginalised is a profound weakness.

Lastly, Rawls's principles are serially arranged to make sure that the second principle follows the first. Among other things that Rawls's principles forbids is the following:

Imagine ...that men forego certain political rights when the economic returns are significant and their capacity to influence the course of policy the exercise of these rights would be marginal in any case. It is this kind of exchange which the two principles as stated rule out; being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains⁸⁸.

The predominant form of BEE may not be a blatant exchange of basic liberties for economic and social gains. However, its *modus operandi* is to benefit from representativeness without any contribution in influencing the direction of policy or the relational inter- and intra-company transformation – this is a tacit exchange of liberties for economic benefit.

Moeletsi Mbeki's charge that most BEE participants are not entrepreneurs but perpetual victims whose stock and trade is an entitlement mentality that feeds on benefits from reparations seems valid when the influence of BEE beneficiaries on the economic front is evaluated.

Thus, BEE fails the Rawlsian test at the level of preserving the primacy of liberty and personal freedom to pursue one's own programme of life.

It is fair to conclude that if Rawls's principles were stringently applied they would provide the basic principles that would move South Africa to a greater level of pluralism, given their consistency and robustness as a framework for a transforming society.

I will now look at some direct comments by some policy analysts and practitioners that support the empirical evidence of failure of implementation that emanate from a conceptual weakness.

Given the fact that only individuals have moral agency and groups do not, it is therefore not surprising that while BEE reduces inter-racial inequalities, it has no effect on intra-racial inequalities. If anything it exacerbates them. Therefore, measured in terms of 'direct equity effects', BEE is not effective.

At a practical level, BEE was designed to open up the economy in such a way that it changes the intra- and inter-firm relational structures and the concomitant

networks that influence who participates in the mainstream economy. It was envisaged that this process would fundamentally change the mainstream economy's racial profile to meaningfully include previously excluded black individuals.

In practice, BEE has not effected any significant transformation of existing corporate structures. The general impression is that BEE has limited impact or that it is entrenching existing structures but co-opting some members from the previously excluded communities. There is no clear evidence in substance or implementation modalities that indicate a significant change in the values and patterns of doing business in South Africa, which could be traced to BEE interventions. In a presentation quoted by Daron Acemoglu et al, Deputy President Kgalema Motlanthe observes that 'BEE could facilitate a transfer of economic power but not a transformation of economic power'⁸⁹. There is therefore a feeling that BEE as framed has had minimal impact on existing corporate structures. Joel Netshitenze's question reflects the frustration of many observers when he asked, 'How do you ensure that the people drawn into business do not merely get co-opted into the culture they find there, but rather that they help to find a better form of South African capitalism?'⁹⁰.

As Acemoglu et al comment:

It is difficult to get beyond these numbers (The BEE deals done over the past five to eight years), however, and see whether structures, mindsets and behavioural patterns are really changing or whether the macro-culture is holding firm and elites are making minor adjustments at the edges of their networks⁹¹.

Among the imperatives that are mentioned in the enactment of BEE policy is the issue of economic growth. It proceeds from the assumption that once participation in economic opportunities is open to all, this would have a profound impact on economic growth. Acemoglu et al reached the conclusion that BEE is less likely to be a growth catalyst given the fact that it has not been established empirically which affects greater growth or equity. They assert that, 'Much of the current discussion on the impact of BEE is hopelessly misconceived in the sense that it cannot identify the true causal effect of BEE'⁹². In their empirical

investigations they found no causal link between increased levels of investment and higher productivity with BEE policy⁹³. The response from companies does not show BEE's profound impact on corporate performance perhaps because companies have not fully complied and are keen on maintaining status quo by minimally complying with BEE requirements and choosing those that will least dilute their franchises.

The above evidence leads one to believe that BEE as currently conceived has not had an extensive impact on the existing structures and patterns of capital formation.

On the general macro-economic front, some empirical evidence seems to suggest that there is a general widening in overall inequality and within the black race group. Beyond the recorded crisis of having about 8 million unemployed persons in South Africa, which in itself widens the overall level of inequality, there is a continuing trend towards greater inequality. According to Professor Jean Trichart, the overall Gini co-efficient rose from 0.60 to 0.64 in the first decade of post-apartheid South Africa. Among black people, it rose from 0.53 to 0.64, among coloured people from 0.48 to 0.56 and among Indians 0.47 to 0.50⁹⁴. These increases cannot be all attributable to BEE policy; however it is concerning that they occur behind a backdrop of heightened social intervention by government in terms of grants to the poor, and a growing black middle class. Suffice to say there is no evidence of the policy significantly deflecting the widening income inequality.

Having established that Rawls's distributive justice would lead us closer to a more pluralistic society as opposed to BEE as currently implemented, I now turn to objections, replies and counter arguments that might arise on the issue of BEE.

Section 5: Objections, replies and counter arguments

I have consistently argued that the *raison d'être* for Black Economic Empowerment policy is to achieve racial economic equality. But there might be other points of view that are raised to counter that thesis, and some of these are discussed below.

5.1 There is an agenda for BEE other than racial economic equality

Some proponents of BEE posit that this policy is necessary because there is a need to create a black business class by de-racialising the South African economy. They argue that it is necessary to acknowledge that access to the market in South Africa has been politically and racially structured and as such, the initiation of a new dispensation needs to unravel those distortions of the past. Ironically, BEE 'evinces strong elements of continuity with, as well as disjuncture from the past'⁹⁵. These proponents argue that the creation of a black business class ensures more possibilities for the working class in a new dispensation and it should not be construed as the betrayal of the poor. The import of this argument arises from the feeling that curbing black accumulation of assets from BEE transactions cannot reduce inequalities and South Africans should devise strategies that deal with the unintended consequences of building a black capitalist class. There are other forms of intervention – such as socially responsible investments – that can form part of the efforts to deal with poverty alleviation. Other social inequalities affect the greater part of society.

While accepting the need for the establishment of a black business class, it is problematic to evince vestiges of past patterns of the distribution of wealth and opportunities. It is fundamentally problematic to view BEE outside the framework of a values-based scheme of distributive justice. This would imply that that you need the business class almost at any cost, yet the key currency to participate is your proximity to political power and sometimes a higher level of education. This precipitates exclusion from participation and also points to an unequal playing field. There is no provision that seeks to protect the interest of the disadvantaged except the suggestion that they may participate in socially responsible investments – this suggests handouts. The bases of self-esteem of the worst off individuals are further marginalised in this process that relegates them to second-

class citizens. Individual autonomy is subsumed in group consideration, to a similar extent as in the previous dispensation save the fact that there is no legislation to prohibit participation.

A number of prominent black businessmen, particularly Khehla Shubane and Sakkie Macozoma, argue that BEE is taking place in a capitalist construct and therefore it bears the characteristics that specific economic dispensation. Macozoma even goes so far as to ask how you could expect a capitalist intervention to produce a socialist result.

This is a line of argument that subscribes to trickle-down theory, which holds that as the leading business people get rich they endeavour to assist the less privileged through the benefits they derived from their participation. It is almost impossible to develop a pluralistic outcome – which is the ultimate goal of BEE – through individuals without a carefully coordinated scheme of arrangement.

This is not consistent with a values-driven process that would seek to protect the well-being of the least advantaged. From a Rawlsian perspective, you need to establish guiding principles that ensure that those who are least privileged are taken care of, since all policy choices are chosen based on their strength in maximising the minimum (maximum principle)

By definition, BEE is an intervention by government to rectify past injustices and establish principles that will ensure equal access and a more economically equal society. This argument

focuses BEE discourse and practice on the career mobility/advancement of black managerial, professional and business ranks without seeking to alter the conditions that simultaneously engendered privileges for the minority on the one hand and sustained exploitation and marginalisation of the majority on the other⁹⁶.

Rawls's distributive justice is not contingent on the type of system; rather it is a comprehensive set of principles that can be applied to arrive at a more egalitarian society. This is consistent with BEE's long-term objective.

Given the predominant forms of BEE, which tend to be minority equity holding, it stands to reason that those who are involved would emphasise the capitalistic nature of the economic landscape.

It also presupposes a situation of significant control of the means of production, which is not the case. Most participants hold significant influence and can vote negatively on the company strategic direction but not enough to affect the necessary intra- and inter-firm relational patterns that change the status quo.

5.2 BEE has established role models and solidarity among previously disadvantaged individuals

Another argument advanced is that BEE has redistributed an equal sense of belonging to all South Africans, particularly previously disadvantaged members of the community. Thus there is a degree of solidarity felt by the section of the population that is not included in the redistribution of wealth and the resultant bourgeois lifestyle. Glaser alludes to this possible phenomenon in his paper on egalitarian considerations of BEE. The idea is that black people have gained positive feelings as citizens of the new South Africa people through the movement of black people as a whole from total exclusion to controlled inclusion, although this inclusion does not accrue to all members of that community. This is a form of symbolic representation that emanates from the politics of solidarity among the previously disadvantaged.

In a sense it is better that people from disadvantaged background are also involved and competing on an equal footing with the previously advantaged communities. It resonates with the idea that the bourgeoisie's existence improves the chances of the working class expressing their issues on a sounder platform than in the apartheid era. This argument does not take into consideration the possibility of the symbiotic relationship between the bourgeoisie and the owners of capital, which renders the symbolic representation of the disadvantaged tenuous at best or ineffective at worst.

Proponents of this argument also say that the policy contributed significantly in re-asserting the disadvantaged community's self-respect through role modeling. BEE's success stories recreate a sense of self-belief that black people can carry

out their own programmes of life and they can fulfill their intentions within the economy of their abilities. It is what Glaser calls a 'direct redistributive effect'⁹⁷ whereby successful role models with gravitas are helping to extend the middle class by helping aspirant black professionals to become entrepreneurs and to ply their trades as independents.

The counter to this line of argumentation is that while symbols and role models go a long way in igniting in people a desire to go beyond the mundane and execute their life programmes with great determination, there is a limit to symbolism; their success must be within the realm of possibilities. Blade Nzimande has a point when he says, 'BEE ownership must be ownership geared towards developmental goals'⁹⁸. In other words it must give people substance in terms of their programmes of life and realistically temper the patterns of capital accumulation and patterns of intra- and inter-firm relationships.

The sense of belonging that disadvantaged black people might feel in the light of the emergent black business class has a positive impact in raising down-trodden disadvantaged people's self-esteem but does not translate into mass emulation of the successful group. Establishing a sense of self-respect based on the estimation of others is a side benefit that is hard to inculcate except for those whose proximity to power is reasonably close, or for those who have had exceptional chances of harnessing skills and abilities.

While BEE is a catalyst and to a limited extent is creating a small group of people whose confidence has been bolstered by the success of BEE participants, it is still a matter that awaits empirical evidence to prove whether role modeling is as extensive as purported to be in some quarters.

Rawls's principles are constructed to address most of the basic goods that individuals require and it includes the Difference Principles to address to a greater extent the needs of those who are least advantaged. Every participant in the decision process matters; therefore no-one is just an admirer of a process that they do not participate in.

5.3 BEE is succeeding

Some prominent businessmen are adamant that BEE is succeeding in de-racialising the economy. They further argue that not every member of the black community is a potential business leader, and that it is sufficient for government to create an enabling environment that ensures that there are no obstacles that may hinder an individual's programme of life. It is believed without much evidence that the 'the strategic impact of BEE lies in new owners altering the strategies of their newly acquired businesses, typically raising the 'level of biodiversity' in an industry'⁹⁹. Macozoma believes that the centrality of economics in the resistance to domination and exclusion in South Africa should not be ignored when questions are raised on the efficacy of BEE¹⁰⁰.

Thus, even though they accept that Rawls's theory is the most extensive in terms of presenting the fundamental principles needed to govern a well-ordered social structure, they express doubts as to the validity of having a scientific theory of justice that can be used as a standard to evaluate the basic structure of society. They argue that their society is governed by a diverse set of processes that influence interventions such as BEE. So, there can never be a single coherent set of principles that can evaluate BEE with regard to distributive justice.

They argue that the principle of liberty may be paramount in Rawls's thesis, but it assumes a more pluralistic society, and does not account for communities that have a majority of people who are marginalised and mostly poorly educated in appreciating high-level socio-political issues. It is also difficult to factor the realities that, if self-respect is a primary good, abject poverty and marginalisation have a negative effect on this particular good especially for those who are previously disadvantaged.

They posit that the refined assumption that Rawls makes of the people in the original position – their appreciation for liberty is more refined and the assumption's applicability in our communities is debatable. The level of sophistication requires a different set of social circumstances than those in South African. Macozoma ask how people could expect a 'capitalist process to yield a socialist result'¹⁰¹, implying the great inequalities that have resulted in the redistribution process are natural to a capitalist system. Rawls's Difference

Principle allows for inequality as long as it is to the benefit of the least advantaged without giving any parameters to what levels of inequality are acceptable or not, save the fact that the maxi-min calculus requires that the worst possible outcome chosen should be the best possible outcome for the least advantaged. Rawls presents the egalitarian underpins of his difference principle as when he disputes the notion of being advantaged by one's circumstances of birth for which one cannot claim credit.

Some commentators from the black community feel that while the theory might be robust it does not provide an adequate framework to deal with the fundamental issues of property and economic power and freedom that are pertinent in the South African scenario. They also feel that the primacy of the individual in pluralistic society is not perceived in the same way in the black communities, which tend to be communalistic, thus any scheme of arrangement will tend to appraise the group over the individual without protection for the inequalities that develop over time. Therefore, Rawls's principles may not always be compatible to traditional societal norms, which may not predominate daily lives but form the undertone of most of the decisions black people take in terms of ethics and morality.

A counter to the assertion that BEE is succeeding makes an unjustifiable assumption about the role of the bourgeoisie in the new corporate landscape. Given the fact that BEE is politically induced, it would more likely produce a 'parasitic' bourgeoisie than a 'productive black bourgeoisie'¹⁰². Blade Nzimande asserts that our current model of BEE is 'compradorial'¹⁰³ and parasitic:

Its compradorism reflects its reliance on the patronage of established capital, not just foreign, but also in particular, established sectors of domestic capital. This emerging class fraction has, typically, not accumulated its own capital through unleashing of productive processes, but relies on special share deals, affirmative action, BEE quotas, fronting, privatisation and trading on its one real piece of 'capital' (access to power) to establish itself ... It is not involved in primitive accumulation, so much as primitive consumption¹⁰⁴.

According to Moeletsi Mbeki, BEE is an invention of white business elite to make sure that the black political elite is co-opted into the mainstream economy in a controlled fashion. He further asserts that this political elite has developed fully fleshed reparations mentality, which makes them perpetual victims and guardians of the status quo. They must stay as victims to continue benefiting. He believes in the entrepreneurial spirit, which depends on one's confidence that one could carry out one's own programme of life and not depend on the kindness of the controllers of capital. The reparations mindset does not augur well for the development of genuine industries and genuine black owned companies.

Mbeki feels that some of the perceived successful black owned companies are built on individuals who see themselves as 'joining existing enterprises, the process of which is to be facilitated by the distributive state through reparations inspired legislation'¹⁰⁵.

BEE's success still requires empirical evidence. Its impact on the current economic landscape seems minimal at best and the kind of values expected from the previously disadvantaged does not seem to be permeating the established order. The one-sided assumptions being made about the role of the recently empowered in the interplay between political and economic power are gratuitous in the light of the limited influence being exerted by BEE players who are not full principals and certainly not agents. Diversity cannot effectively occur in a situation where individual ingenuity is not easy to exercise because of the dominant culture in established corporates. Feelings of being co-opted are inimical to entrepreneurial creativity and given the large concentration of ownership and capital, black people cannot exert enough influence to start reshaping the mainstream economy.

Rawls's principles of justice are based on a social contract that is established between members of a community on the system of values that will govern their social structure. Similarly, BEE is a social contract among South Africans on how to address past inequalities, and how to establish a new economic order that will ensure stability in a just and equitable manner. Thus, the primacy of liberty and equality is paramount as a guiding principle regardless of the levels of plurality in that particular society. The criticism leveled against Rawls's principles on the

basis of the lack of plurality puts the cart before the horse: a scheme such as that established by BEE that does not have a clear value system to underpin it will relegate the disadvantaged to the choices and decisions taken by those who are advantaged by the 'lottery of life'.

The calculus of Rawls's Difference Principle – with its focus on choices that will ensure that the worst outcome is to the greatest benefit of the least advantaged – creates the balance between the trickle down that is a function of market vagaries and the justice required in the redistribution of primary goods. This mechanism is designed to ameliorate the inequalities that naturally accrue to an unabated capitalistic distribution of primary goods. These principles do not presuppose an already egalitarian society; rather they are fundamental guidelines to establish firm bases of self-respect as primary good for all autonomous individuals who would like to fulfill their own ends, regardless of their set of circumstances. It is therefore ironic to reject principles that are designed to protect the least fortunate for precisely the fact that their self-esteem has been dented by historical subjugation. The communal orientation of traditional African society would benefit from Rawls' fundamental principles, which are geared towards building a consensus based on principles that can be universalised since they protect the individual in whatever context he operates and are guided by the justice as fairness.

While the principle of redress is important as perceived by the previously disadvantaged it is more important to establish guiding principles that underpin interventions such as BEE not only for short term but also for long-term stability.

Seen in the light of Rawls's Theory of Justice, narrowly-defined BEE, which is limited to the conferring of ownership, management and control of South Africa's financial and economic resources to previously disadvantaged individuals, does not measures up against Rawls's theory of distributive justice.

While BEE is a policy crafted in a constitutional democracy with individual rights, there are no guidelines that would ensure equal liberty as well as access to these opportunities. Access is a function of what Rawls calls accidents of history – connection with government gives an individual an unfair advantage as a citizen.

Unequal access to these opportunities belies the constitutional desire for a more pluralistic society. While Rawls requires a social structure where members share the benefits and burdens of achieving their common interests, BEE does not have principles that guide participants to act in a fair and equitable manner. Rawls appraises the value of the individual within the consensus; BEE tends to appraise select groups of individuals.

In BEE, there are no provisions to manage the inequalities that are invariably associated with a capitalist system of allocation yet Rawls's Difference Principle makes the least advantaged the focus of the choices being made – the worst possible outcome of the choices being made should be to the greatest benefit of the least advantaged. In the redistribution of wealth, BEE only considers the poorest of the poor if it helps consummate the deal. The choices being made are not guided by what the least advantaged might desire.

While there is no doubt that BEE is in the distributive justice trajectory, some of the choices made in the implementation of this policy seem to point at a commutative justice orientation. Critics think the ownership and control basis for BEE create bourgeoisies with a reparations mindset who are perpetual dependents. The primacy of the individual as capable of carrying out her programme of life is emphasised in Rawls's principles. Given his strong egalitarian values, the group that is a nonentity from a moral standpoint is emphasised in BEE policy.

In Rawls's principles, every individual counts and individuals can be held morally responsible. In BEE the distribution is allocated along race lines in terms of entitlement – yet the beneficiaries are real individuals. The policy of BEE conflates the individual with the group, which is problematic from an egalitarian point of view.

Rawls suggest that, because of the universal applicability of his principles of justice, they could be used to assess the direction of any social change. These principles are not met by BEE as currently constructed.

Section 6: Conclusion

The argumentation above shows that BEE does not measure up against Rawls's theory of distributive justice. The requisite underlying principles of distributive justice require equality, liberty, equality of opportunity and inequality that is to the greatest advantage of the worst off class.

BEE does not contain the discussion of the rules that will govern the scheme where every member participates on an equitable basis. The moral basis of these stakeholder relationships is a matter for empirical enquiry.

BEE does not have the individual as the focal point of its principles, thus it conflates the group with the individual. Beneficiaries are very few; however, their benefit is derived on a representative scale that reflects population sizes.

The accentuated inequalities that emanate from the implementation of BEE are not geared towards the benefit of the worst off class. Since BEE is politically induced it has spawned out what seems to be 'parasitical bourgeoisies' as opposed to 'productive bourgeoisies' who participate in BEE with no intention of changing the intra- and inter-firm relational patterns. These are bourgeoisies who have treated empowerment as an end in itself, and not as a means to effect a more equitable society.

The equality of opportunity and access to office is limited to those who have historical and current links with the ruling party. While BEE emanates from a constitutional democracy it does not bear the egalitarian characteristics required by Rawls' distributive theory.

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