The Coding of Black Economic Empowerment and Redistribution Policy Failure in Post-Apartheid South Africa

by

Lindokuhle Siyabonga Nkomonde

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Supervisor: Professor Robert Van Niekerk

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DECLARATION

I Lindokuhle Siyabonga Nkomonde declare that this research report entitled ‘Interrogating the effectiveness of the law on redistribution policy in post-apartheid South Africa’ is my own unaided work. I have acknowledged, attributed, and referenced all ideas sourced elsewhere. I am hereby submitting it in partial fulfilment of the requirements of the Doctoral degree (Public Policy) in the University of the Witwatersrand, Johannesburg. I have not submitted this report before for any other degree or examination to any other institution.

Lindokuhle Siyabonga Nkomonde
Signed at Johannesburg on 5 March 2025

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Dedicated to the memory of my friends

Lalie Ngozi

and

Thulani (Shabalala) Zulu

ABSTRACT

This study sought to interrogate and provide a critical analysis of the stated aim of the Broad-Based Black Economic Empowerment (BBBEE) policy (2003) to redress the racialised distribution and resultant economic inequities of the apartheid past by advancing Black ownership of and control over the economy. The study also sought to provide a critical analysis of the contested legal meanings and conceptualisations of redistribution in the BBBEE policy in order to provide insights on why the BBBEE policy has not achieved its redistributive objectives in a democratic South Africa.

At the core of this study has been the assertion that when law – an authoritative policy instrument – is enacted for the specific purpose of being a catalyst for economic transformation, and when redistribution proves ineffective, it is important to enquire if its legal conceptualisations of a deracialised economy through redistribution are consistent with those found in policy. The study, furthermore, sought to critically assess whether the concepts of redistribution adopted in policy and law make clear provision for the deracialisation of the economy in ways that allow for meaningful socio-economic change in the long term, rather than limited reformism that reproduces racialised inequality in the democratic era. In order to arrive at this understanding, the study interrogated and analysed the conceptions of redistribution in the BBBEE policy and their legal codification in the BBBEE Act (Act 53 of 2003) at the formalisation of the policy during the period of 1994 to 2003. Furthermore, the research analysed if the conceptions of redistribution in the Act were consistent with those identified in the policy.

The findings of this study reveal that the BBBEE policy emerged out of a highly contested legal process that started many years before the policy was conceptualised. Ideas or policies regarding matters of redistribution and socio-economic justice were debated and, arguably, settled even before the democratic state of South Africa was declared in 1994. The power contestations that took place during the political negotiations for freedom influenced what economic system would be adopted in the country, what legal system would be put in place, what political institutions would be

in place and what powers they would have, as well as what could or could not be done about the injustices of the past.

Because of these power contestations, the study found that the BBBEE policy of 2003 had conceptual challenges that prevented it from attaining its objective to deracialise the economy in ways that allow for meaningful socio-economic change in the long term. The study also found that the conceptual challenges in the BBBEE policy were transferred to the BBBEE Act and in the process rendered the Act ineffective as an authoritative legal instrument of the BBBEE policy. Whilst the study acknowledges that the Act cannot be singled out as the primary determinant of BBBEE redistribution policy failure, it demonstrates that it was weakened by the concepts of redistribution used in it and could not play its role to provide authority in the regulation, implementation, monitoring, evaluation and enforcement of the BBBEE policy.

Importantly, the study found that the absence of any reference to the necessity of justice in both the BBBEE policy and Act points to a critical flaw in the conceptualisation of the policy and its redistributive intent. The defining of BBBEE outside the imperative of justice, as the study established, demonstrates that the policy was not conceived for redistribution. In the result, the BBBEE policy framework did not place race at the centre of its redistribution intent; it did not introduce measures aimed at empowering the general Black population as opposed to a small Black business class; and failed to give the state the power to intervene in the economy for redistribution in favour of the Black population. In the final analysis, the study found that any amendment made to the BBBEE policy framework to improve its effectiveness that does not correct the conceptual foundations of the BBBEE policy to ground it on justice will not realise meaningful redistribution and the effective participation of Black people in the economy.

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LIST OF ACRONYMS

ANC	African National Congress
AZAPO	Azanian People's Organisation
BBBEE	Broad Based Black Economic Empowerment
BBBEE Act	Broad Based Black Economic Empowerment Act, Act 53 of 2003
BBBEE Commission	Broad Based Black Economic Empowerment Commission
BEECom	Black Economic Empowerment Commission
CEE	Commission for Employment Equity
CGE	Commission for Gender Equality
COSATU	Congress of South African Trade Unions
DBSA	Development Bank of Southern Africa
DME	Department of Minerals and Energy
DTI	Department of Trade & Industry
EED	Economic Empowerment for the Disadvantaged
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Programme
IDC	Industrial Development Cooperation
IMF	International Monetary Fund
JSC	Judicial Service Commission
JSE	Johannesburg Stock Exchange
Khula	Khula Enterprise Finance
MERG	Macro-Economic Research Group

MPRDA	Mineral and Petroleum Resources Development Act
NDP	National Planning Commission
NDP	National Development Policy of Malaysia
Nedlac	National Economic Development and Labour Council
NEF	National Empowerment Fund
NEF Act	National Empowerment Fund Act
NEM	Normative Economic Model
NEP	New Economic Policy of Malaysia
NP	National Party
PAC	Pan Africanist Congress
RDP	Reconstruction and Development Programme
SACP	South African Communist Party
SMME	Small, Medium and Micro Enterprises
SONA	State of the Nation Address

Chapter One
The context of the study

1.1 Introduction

This study is concerned with the relationship between Broad Based Black Economic Empowerment (BBBEE) and the conceptualisations of redistribution in post-apartheid South Africa. The BBBEE policy, acting through the Broad Based Black Economic Empowerment Act, Act 53 of 2003 (BBBEE Act), aims to redress the racialised distribution and resultant economic inequities of the apartheid past by advancing Black ownership of and control over the economy (Southall, 2006). The policy has become the main instrument for economic redistribution in post-apartheid South Africa (Francis and Webster, 2019) and forms part of a collective of policies put in place by the democratic government to drive socioeconomic transformation in areas such as land ownership, public procurement, employment conditions, and skills and training (DTI, 2003). As Vilakazi and Bosiu (2021) note, within the collective of these policies, the BBBEE policy was undoubtedly important for driving racial transformation of the economy, not least because it targeted widespread changes in ownership within existing, largely white-owned businesses. This study sought to interrogate and provide a critical analysis of this aim and the contested legal meanings and conceptualisations of redistribution in the BBBEE policy in order to provide insights on why the BBBEE policy has not achieved its redistributive objectives in a democratic South Africa.

The history of unequal and racialised distribution has resulted in South Africa indicating the highest inequality rate in the world in the democratic era. According to Sulla, Zikhali and Cuevas (2022), South Africa is the most unequal country in the world, ranking first among 164 countries in the World Bank's global poverty database, with a Gini coefficient of 0.6 (Statistics South Africa, 2019b). Although the Gini coefficient is a measure of income, it is indicative of the acute levels of wealth polarisation in the national distribution and the scale of differentiated opportunity in the market or capital driven South African economy. Within the wider theory of justice, opportunity refers to the actual opportunities a person has to improve their life (Sen, 2009).

In absolute terms, and while intra-race inequality has grown at a faster rate in the democratic era, this societal inequality is arguably still driven largely, but not exclusively, by the disproportionate domination of the white population in economic activity (Gumede, 2018). This, it has been argued, is due partly to the tenacity of racialised economic legacies that still condition the distribution of opportunity, resources and wealth in favour of whites and paradoxically protects their privilege through neo-liberal state policies and laws that legitimise a new form of oppressive domination and capital accumulation in the democratic era (Ruiters, 2020). It must be noted, however, that the introduction of policies such as BBBEE, while aimed at correcting the racialised distribution of economic opportunity of the past, has given rise to a Black middle class that also contributes significantly to rising inequality (Mbeki, 2009). Following Southall (2004), the working definition of the middle-class used in the thesis works from the premise that it is typically characterised by salaried government or corporate employment, has no direct ownership of the means of production and is in a subordinate relationship to capital-owning employers. The specificity of the Black middle class is significant because of the historical configuration of South African society and how resources and opportunities were distributed according to race. As Southall (2004) further notes, whites in South Africa are hugely advantaged compared to Blacks, amongst whom Africans (the majority of the population) are relatively disadvantaged compared to the Indian and Coloured minorities. Therefore, understanding how historical racial group disadvantage in South Africa is reproduced is central to attempts to achieve equity in the distribution of resources and opportunities.

Noting the salience of race in appreciating concerns of redistribution in post-apartheid South Africa, there is however no consensus in South Africa on how economic redistribution should be conceptualised. Historically, there have been contestations on the formulation of economic redistribution in the national liberation alliance – consisting of the African National Congress (ANC), South African Communist Party (SACP) and Congress of South African Trade Unions (COSATU) – which adhered to the concept of a national democratic revolution (discussed below). Understanding how these strategic formulations on economic redistribution were articulated in the national liberation alliance provides insights on the extent and limits of the conceptualisation and place of redistribution imperatives in the political strategy of the ANC and its alliance partners.

It has been argued by some scholars that the ANC, through the Freedom Charter – the strategic political framework on the basis of which the national liberation struggle to end apartheid was fought – saw economic redistribution since the mid-1950s as a transfer of economic resources from members of the oppressing white nation into the control of a class of Black capitalists and state functionaries – or petty-bourgeois – mediated through ‘the people’ (Hudson, 1986; Fatton, 1984). Whilst the SACP, which also endorsed the Freedom Charter in 1959, did not see the Freedom Charter as a programme for socialism, it regarded it as a programme for a national democratic revolution and envisaged its redistributive intent as a restoration of land and other national assets to the masses with widespread nationalisation of key industries in order to break the grip of white monopoly capital on the main centres of the country’s economy (SACP, 1962). This did not entail white monopoly capital being replaced by a new class of Black capitalists. Instead, the SACP sees the national democratic revolution as a two part process, beginning with the overthrowing of white domination and the attainment of a multi-class, deracialised democracy, followed by the transformation of power relations and, eventually, the installation of a classless socialist society (Southall, 2006). The SACP’s 1984 constitution described the national democratic revolution as '...the national liberation of the African people in particular, and the black people in general, the destruction of the economic and political power of the racist ruling class, and the establishment of one united state of people's power in which the working class will be the dominant force and which will move uninterruptedly towards social emancipation and the total abolition of exploitation of man by man' (Slovo, 1988). This thinking appears to align with the proposal by Behuria, Buur, and Gray (2017) that changing the economic structure of an economy leads to a change in the distribution of economic power. The idea of a national democratic revolution as put forward by the SACP was later adopted by the ANC at its Morogoro Consultative Conference (1969) as a programme for attaining political control and economic emancipation by destroying the existing social and economic relationships based on white domination. As such, the national democratic revolution became a binding ideology of the tripartite alliance and cemented the alliance and other diverse groups against the enemy of ‘colonialism of a special type’ or apartheid and its exploitative economic legacy (Mosala, Venter and Bain, 2017). South Africa's largest trade union federation and ANC alliance partner, COSATU, has maintained, however, that the national democratic revolution envisaged by the ANC is nothing more than a project to elevate a Black capitalist class as opposed to its own view that meaningful economic redistribution means equal ownership by the workers in the economy (Southall and Tangri, 2006).

Outside the national liberation alliance, the Pan Africanist Congress (PAC) and the Azanian People's Organisation (AZAPO), differed with the ANC on how national redistribution needed to be conceived. In fact, the formation of the PAC in 1959, whose Africanist ideological roots first manifested in the ANC Youth League in the early 1950s, was a show of disapproval of the adoption of the non-racial Freedom Charter by the ANC. The PAC believed that the ANC had, through the Freedom Charter, abandoned a key demand of the liberation struggle – the return of land to Africans – by stating that South Africa 'belongs to all who live in it, black and white' (Pheko, 2012). In general, the PAC rejected the guarantees for minority rights contained in the Freedom Charter, arguing that this would entrench minority domination and frustrate redistribution (O'Malley, 1991). This was captured by Robert Sobukwe in the Inaugural Conference of the PAC when he said, "We guarantee no minority rights... We stand committed to a policy guaranteeing the most equitable distribution of wealth. Socially we aim at the full development of the human personality and a ruthless uprooting and outlawing of all forms or manifestations of the racial myth," (Sobukwe, 1959:5). The PAC, therefore, insisted that white domination and its redistributive system had to be overthrown and replaced by an Africanist Socialist democracy that would promote the educational, cultural and economic advancement of the African people (PAC, 1959). AZAPO was formed along similar ideas in 1978. Among its founding aims was the total abolishment of any form of political oppression, economic exploitation and marginalisation and social degradation of Black people (AZAPO, 2022). The ANC, therefore, sought inclusive nationalism as its approach to redistribution where the economy would be open and shared among all citizens and for each citizen to enjoy the freedom of socio-economic activity as they desired (ANC, 1955). The PAC, on the other hand, wanted to pursue a narrow Africanist approach to redistribution in which land and all national resources would be returned to the African people as their rightful owners (PAC, 1959). From these two approaches emerges an understanding that redistribution could be an exercise in compromise or a settlement seeking exercise, as per the ANC approach, or one that uncompromisingly seeks to correct an injustice by an unconditional return of the land and means of production to those from whom it was unjustly taken away.

The conceptualisation of economic redistribution has continued to evolve in the democratic era as seen from the various policy frameworks introduced by the governing party, the ANC. Upon taking over government in 1994, the ANC instituted the Reconstruction and Development Programme or RDP. First introduced as the ANC's 1994 election manifesto for the first democratic national elections and dubbed a programme for growth through redistribution (Davies, 2021), the genesis of the RDP was in the ANC's 1989 meeting in Harare which embraced the slogan of economic growth through redistribution and resulted in the Harare Declaration (Freund, 2013). The Harare Declaration, according to Freund (2013), "proposed that the state would assume the 'leading role in the reconstruction of the economy in order to facilitate the realisation of the economy' and 'the democratic movement do[es] not recognise and find[s] morally reprehensible, the present government's attempts through privatisation, regulation and other legislative means, to weaken the new state's ability to intervene to restructure the economy,'" (p. 522). The RDP recognised that the country's economy was built on systematically enforced racial division in every sphere of society, marked for example by very clear racial and gender inequalities in ownership, employment and skills. As such, the RDP promoted the ideas of empowerment and affirmative action to address the deliberate marginalisation of Black people, women, and rural communities from economic, political and social power. The expression of the concepts of empowerment and affirmative action in the RDP signalled that more than just equal socio-economic rights was sought for Black people; there was also a need to ensure that economic distribution favoured Black people to redress past imbalances through a deliberate process. Crucially, the RDP called for the direct involvement of the state in the redistribution programme (ANC, 1994).

Global economic compacts such as the Washington Consensus (1989) – which promoted free-market economic policies supported by global financial institutions such as the International Monetary Fund (IMF) and World Bank – as well as the final dissolution of the Soviet Union in 1991 – signalled a shift in global economic policy that consolidated market liberalism as the dominant global order. Mosala, Venter and Bain (2017), aptly described this period as follows:

> "Politically, the world was changing. The fall of the Berlin Wall in 1989, which led to the implosion of the Union of Soviet Socialist Republics (USSR) in 1991, prompted a major shift in geo-politics. The collapse of the USSR gave rise to the term, the 'end of history', as well as references to the triumph of liberal democracy by Fukuyama (1989). In Africa, countries such as Zambia, Mozambique and Tanzania, which had embraced nationalisation and other socialist ideologies, were in economic crisis. Neo-liberal thinking dominated capitalists' rule worldwide. The ANC signed a new General Agreement on Tariffs and Trade (GATT) and joined the World Trade Organization (WTO) in 1995, thereby committing itself to neo-liberal policies in the post-apartheid era. The apartheid government had been late in embracing a market-based policy of deregulation and non-intervention. From the early 1980s onwards, it had sought to enhance the role of the private sector in policymaking, and the ANC, once in power, extended the process of economic liberalisation by adopting macro-economic policies that rapidly led to the containment of fiscal deficit (easing fears of a populist response), single-digit inflation and lower interest rates," (p. 331).

In response to the shift in global economic policy that consolidated market liberalism as the dominant global order, and the need to resuscitate an economy that had been ailing since the 1970s (Habib and Padayachee, 2000), the ANC government decided to adopt the market friendly Growth, Employment and Redistribution Programme (GEAR) strategy. GEAR (Department of Finance, 1996) emphasised that accelerated economic growth, associated with stronger employment creation, was indispensable for the attainment of equitable distribution of income and improved standards of living for all. Employment creation, noted GEAR (Department of Finance, 1996), provided a powerful vehicle for redistribution, supported by government housing, water and sanitation, health, education, welfare and social security services provision. While calling for redistribution, GEAR (Department of Finance, 1996) did not see a direct role for the state in this regard. Instead, GEAR argued for the liberalisation of the economy and for market driven redistribution. As argued by Davies (2021), the ideas of neoliberalism had been heavily campaigned for by the leadership of the ANC in the early 1990s to ensure South Africa's conformity with the Washington Consensus. As Davies (2021) notes, some leaders were taken to the World Bank for 'training' and were invited to conferences and seminars on economic policy addressed by 'international experts' promoting neoliberal views. Freund (2013), also notes that from early 1990 on, the ANC leadership were subjected to a massive campaign on the part of international capitalist forces to move towards policies that would give business much of what it wanted and to fit South Africa into the dominant neoliberal paradigm. In this regard, international tours and influences became an important feature in cementing the thinking in the ANC president (Nelson Mandela) to abandon the idea of nationalisation and instead increasing engagements with investors in fora such as the World Economic Forum in Davos, Switzerland, where powerful economic and political figures assembled annually (Freund, 2013).

GEAR was adopted in 1996 as a macroeconomic policy framework aimed at strengthening economic development, broadening employment, and redistribution of income and socioeconomic opportunities in favour of the poor (Department of Finance, 1996). It represented the gradual ideological departure from the distributional intentions of the RDP by advocating for market-driven redistribution in line with the recommendations of proponents of the Washington Consensus (Bond, 2000, Andreasson, 2006 and Davies, 2021). GEAR (Department of Finance, 1996) advocated for opening the economy to international competition and foreign direct investment, pursuing tighter fiscal policy by reducing government spending (particularly the reduction of the public service wage bill) and the introduction of capital friendly tax reforms – which reduced corporate tax from 50 per cent to 30 per cent in the decade 1991 to 2001 (South African Reserve Bank, 2015), all of which had adverse distributional effects on the Black poor as evidenced by a steady increase in inequality since 1996 (World Bank, 2018). As Davies (2021) notes, white owned monopolies and oligopolies continued to own and control the vast majority of the means of production, with large parts of each economic sector controlled by very few of these firms. GEAR also predicted a surge in private investment in export-oriented manufacturing and the adding of 600 000 jobs in the economy, none of which materialised (Zalk, 2021).

What is evident from this analysis is that economic policy for a better part of the first decade of democracy progressively reflected liberal conceptualisations of economic redistribution that did not effectively address the racialised distribution of the past (Padayachee and Van Niekerk, 2019). This is why the World Bank (2018), for example, noted that race continues to drive inequality of income and opportunity in South Africa.

Despite the implementation of transformative policies and what was regarded by government as sound fiscal management during the first democratic administration, South Africa’s economic growth performance remained disappointing. This poor economic performance was marked by high levels of unemployment and poverty, unequal distribution of income and low levels of Black participation in the economy (Black Economic Empowerment Commission, 2001). These conditions led the government of the ANC to elevate national discourse on BBBEE as a concept first mentioned in the RDP but which found no policy expression in GEAR. BBBEE also developed out of the ANC’s position that the country needed a Black capitalist class to ensure the economic empowerment of Black people and the deracialisation of the ownership of productive property in the country to fight growing inequality (Mbeki, 1999). This was outlined in a Department of Trade & Industry (DTI) strategy document presented to Parliament in 2003 titled ‘South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment’. The strategy laid the foundation for the BBBEE Act (2003). However, Terreblanche (2012) argues that these policies only succeeded to establish a Black elite and promote the interests of local and foreign corporations while neglecting the impoverished Black majority, whereas the promulgation of the BBBEE Act (2003) failed to assist realise the transformation of the economy and reduction of inequality.

At the core of this research, therefore, is the assertion that when law – an authoritative policy instrument – is enacted for the specific purpose of being a catalyst for economic transformation, and when redistribution proves ineffective, it is important to enquire if its legal conceptualisations of a deracialised economy through redistribution are consistent with those found in policy and the redistributive outcomes this produces. It is furthermore necessary to critically assess whether the concepts of redistribution adopted in policy and law make clear provision for the deracialisation of the economy in ways that allow for meaningful socio-economic change in the long term, rather than limited reformism. In order to arrive at this understanding therefore, the following requires interrogation:

- How have the concepts of redistribution been conceived and developed in the BBBEE policy?; and
- Have the concepts of redistribution in the BBBEE policy been applied consistently in the BBBEE Act (Act 53 of 2003)?

Necessarily, these questions lend themselves to a type of historicised inquiry that takes into account the racialised distribution of the pre-democratic era, as well as the power dynamics between different class interests when such policies and laws are promulgated. Such analysis requires a recognition that policy and law making are contested spaces occupied by different interest groups that seek to advance their interests, and that the bargaining that takes place in these spaces is dependent on the bargaining power held by the different groups.

Within the context of a history of social and economic injustice, from a critical theory perspective, a transformative research paradigm was necessary to interrogate these power dynamics and how they find expression in policy and law in a democratic South Africa.

Critical theory, particularly the critical theory of race, provides an insightful interpretative framework in this study as it places race at the centre of discourse analysis, which enables an examination of the specific ways in which racial identities perpetuate inequalities and economic injustice expressed in social systems like policy and law (Modiri, 2012).

Key terms: Black Economic Empowerment; Redistribution; Justice; Inequality; Racialised Distribution; Deracialised Economy.

1.2 Research Conceptualisation

1.2.1 The context of racialised distribution in South Africa

South Africa celebrated thirty years of freedom in 2024, but poverty, inequality and unemployment resulting from the country's history of separate development continue to negatively affect the lives of many people (Tibane, 2018). According to Sulla, Zikhali and Cuevas (2022) writing in the World Bank's report on inequality in Southern Africa, South Africa is the most unequal country in the world, ranking first among 164 countries in the World Bank's global poverty database. South Africa's economic growth, measured by gross domestic product (GDP), has shown a declining trend in recent history. Outside the period between 2004 and 2007, where the country recorded an average growth rate of 5 per cent, the country has struggled to achieve growth rates higher than 2 per cent, leading to a steady increase in unemployment, which reached 35.3 per cent in 2022, and a worsening of inequality and poverty (Statistics South Africa, 2022).

The level of human development in South Africa – at least for the majority of the population, Blacks – was at its worst during apartheid and has not significantly improved in the democratic era, with about 50 per cent of the South African Black population living below the poverty line (Statistics South Africa, 2017). Statistics South Africa (2019c) also notes that white South Africans continue to earn, on average, three times more than Black South Africans.

Twenty years since the enactment of the BBBEE Act (2003), the control of the South African economy remains rigidly racialised in favour of the 7.8 per cent of the population who are white, to the exclusion of the 80.8 per cent who are Black. Data from the Broad Based Black Economic Empowerment Commission (BBBEE Commission) shows that Black ownership in reporting companies across the economy was just 29 per cent in 2019, compared to 25 per cent in 2018 and 32 per cent in 2016. There is not one sector of the economy that has more than 50 per cent Black ownership in large companies. Those companies in historically white-dominated sectors of the South African economy such as finance (25 per cent Black ownership) and agriculture (12 per cent Black ownership) have proven to be particularly resistant to transformation. Construction (48 per cent Black ownership), property (42 per cent Black ownership) and ICT (36 per cent Black ownership) are deemed to be showing "relatively good" progress. Black women remain particularly marginalised, with their average ownership of large entities just 12.1 per cent. The membership of boards for JSE-listed companies also remains racialised with just a 43 per cent Black representation, 20 per cent of whom are Black women. Information from the BBBEE Commission also reveals that whites outnumber Blacks in top management positions with 66.5 per cent, and in senior management positions with 54.4 per cent (Thomas, 2020).

The perpetuation of inequality in South Africa remains a question that is not adequately responded to. One of the central questions facing the country is: why is human development and wellbeing lagging behind for the majority of South Africans (Gumede, 2018)? Maathai (2009) argues that the reason is a lack of justice.

Terreblanche (2012) supports this assertion by arguing that the perpetuation of poverty and wealth represents social injustice where "systemic factors enable a small minority of the population to accumulate power and wealth by exploiting a large part of the population and depriving it of property, labour power and opportunities," (p. 108). In an influential study, Terreblanche (2002), points out that the colonial powers and white colonists achieved this in three ways: by creating political and economic power structures that put them in a privileged and entrenched position in relation to the indigenous peoples; by depriving indigenous people of land, surface water and cattle; and by reducing indigenous people to various forms of unfree and exploitable labour. All of these today continue to be the pillars for Black deprivation, poverty and ever growing inequality, as noted in the World Bank's (2018) assessment of the drivers of inequality in South Africa. The World Bank (2018) observes that the legacy of apartheid in South Africa is enduring as demonstrated by chronic poverty in half of the population, mostly in Black communities. The World Bank (2018) further observes that the consumption patterns in South Africa reveal that the country is one of the most unequal countries in the world, with high unemployment and a labour market characterised by a small number of people with highly paid jobs in the formal economy, and the larger population who occupy low paying jobs in the informal economy. As a consequence, wealth inequality is high and has been growing over time driven by high inequality of opportunity, measured by the influence of race, parents' education, parents' occupation, place of birth, and opportunities influenced by gender (World Bank, 2018).

South Africa exhibits social symptoms which are related directly to the problem of inequality – poor community life, mental health and drug use, poor physical health, poor educational outcomes, teenage births, violence, high rates of imprisonment, lack of social mobility, capital-labour inequality, expenditure cascades, etc. (Wilkinson and Pickett, 2010; Frank, 2013; Collier, 2007; and Cornell and Panfilio, 2010). Between 45.5 and 53.8 per cent of South Africans live in poverty and the country suffers from very low levels of income, high unemployment, as well as poor access to sanitation, water and housing (Matsau, 2017).

1.2.2 The role of legal instruments in public policy

- **Brief governance history of South Africa**

Whilst liberal historians have argued that contestations between political and economic power holders have always been the norm, Marxist analysts would suggest that changing political policies reflect the changing interests of dominant social groups (Southall, 2012). It is generally accepted and has been demonstrated by Wolpe (1972), Bond (2006) and Terreblanche (2012) that successive white minority governments since the colonial era in South Africa have been reliant on repressive political authority exercised through the state to create the exclusionary legal and regulatory framework to enable it to thrive and exercise its racialised power over the indigenous majority.

The racialised power structure operating through colonialism, segregation and apartheid which enabled white domination in South Africa operated to exclude Black South Africans from exercising control over the distribution of economic resources. To give effect to segregation (and subsequent apartheid), government promulgated legislation such as the 1913 Land Act denying the Black indigenous population access to resources and opportunities as a form of 'social engineering', resulting in inequality, poverty, the economic and political exclusion of Black people, while protecting the racialised privilege and accumulation interests of the white minority (Randall, 1972; Lenel, 2002; Unterhalter, 1972). This system was institutionalised through various “native” laws (Cornell and Panfilio, 2010).

Critics of coloniality, such as Ndlovu-Gatsheni (2013) and Mangcu (2014), would suggest that these historical power structures persist even after the attainment of democracy. In order to understand this use of power in a democratic South Africa by the former colonisers to exert influence in the post-colonial era, it is necessary to look into the public institutions born out of democratic era law and their impact on public policy.

- **Public institutions and the law**

The supreme law or constitution of a democratic society commonly establishes the public institutions that make up the state or the public sector. These legislated institutions exist to implement the legal frameworks determined by the law makers, not least of which is the development and implementation of public policy. There is a strong association between public sector institutions and public policy. These institutions are given the authority, through law, to determine, implement, monitor, evaluate and enforce public policy in line with the ideology of those who hold power. Without these institutions, public policy would not be realisable. By creating these institutions, the legal system acts an instrument or enabler of public policy (Dye, 1995).

There are generally three principal institutions in any modern democratic society that are responsible for shaping public policy; namely, the legislature, the executive, and the judiciary (Anderson, 1997). These institutions are commonly found in a political system of representative democracy which is based on a written constitution and laws that guarantee procedures that inform political practices in a democracy (Keane, 2009). The legislature makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law (Davis, 2012).

In the democratic era, the constitution of the Republic of South Africa (Parliament, 1996) sets as its intentions to heal past divisions and establish a society based on democratic values, social justice and fundamental human rights. The constitution confers the legislature with the power to amend the constitution, pass legislation with regard to any matter, as well as assign any of its legislative powers – except the power to amend the constitution – to any legislative body in another sphere of government. The constitution further vests executive authority in the President who in turn exercises executive authority with other members of the Cabinet. South Africa's executive implements national legislation, develops and implements national policy, coordinates the functions of state departments and administrations, and prepares and initiates legislation (Parliament, 1996). Both these arms of the state have a direct role to play in both policy formulation and the writing of the country's law. But they cannot do this autonomously as every piece of law they produce is subject to the constitutional test. The constitutional framework is designed with the intention that public representatives will not be able to pass laws that represent their ideologies, if the proposed laws are inconsistent with the provisions of the constitution. This point is eloquently made by Ramose (2002b), who states the following about South Africa's constitutional order:

> "… the basic supreme law of the country shall be above the law-making power vested in parliament. The laws enacted by parliament shall, in principle, always be subject to their conformity and consistency with the constitution. Parliament would therefore be the prisoner of the constitution whose principles possessed the character of essentiality and immutability," (p. 488).

Whilst the judiciary has no opportunity to participate directly in the formulation of public policy and in the writing of law and legislation, it does indirectly influence it through interpretation of the law and by making pronouncements on matters of policy as it decides cases brought before it. Whilst on paper in many democracies the courts are independent and subject only to national law, there is a view that they are active participants in the political system. Anderson (1997) argues that judges are often thought to be non-political, merely 'following the law', but in fact they are often deeply involved in policy politics. Anderson (1997) further argues that a judge's appointment to the bench normally depends on their political party affiliation and their policy preferences and values and that, once in office, these values and preferences affect their decisions. In South Africa, the Judicial Service Commission (JSC) is responsible for interviewing and recommending judicial officers for appointment by the President of the Republic. The JSC consists of judges and politicians (public representatives from Parliament and a Cabinet minister), among others, who represent the values and ideologies of their constituents. Their participation in the JSC is therefore not objective, but subject to their ideological and political leaning. The hard line stance of the JSC on the need for transformation in the judiciary during interviews for judicial vacancies (Mabuza, 2018a and Mabuza 2018b) has been a clear indication of the Commissioners' values and policy position on the matter. Furthermore, the constitution endows the President of the Republic, a politician, with the sole discretion to appoint judges. This constitutional provision, together with the value-based process undertaken by the JSC, makes judges political appointments.

Once in office, judges promote public policy through their judgments. It is instructive to understand how this works in practice through the illustration of a judgement in the minerals and energy sector and how this might apply to concerns specifically of economic distribution as found in the case of BBBEE, which is the focus of this study. In 2013 the Constitutional Court heard and decided on a matter of Agri South Africa v Minister for Minerals and Energy (Mogoeng, 2013). The essence of the application, brought by Agri South Africa, was that the commencement of the Mineral and Petroleum Resources Development Act (MPRDA) of 2022 – enacted to facilitate government's policy on equitable access to and sustainable development of the nation's mineral and petroleum resources – expropriated the coal rights ceded to Agri South Africa. The appeal was dismissed. The judgment's main thrust was that the objects of the MPRDA to facilitate equitable access to the mining industry, promote sustainable development of South Africa's mineral and petroleum resources and advance the eradication of all forms of discriminatory practises in the mining sector had to be given precedence. By deciding in this manner, the Constitutional Court had affirmed and given impetus to the Executive's policy position on national economic transformation and redistribution.

This demonstrates how the judiciary as a state institution can and does influence public policy discourse and implementation. Whilst the judiciary may not directly initiate the country's policy agenda, it clearly has the ability to give impetus to public policy and/or redirect it through the interpretation of the law.

Within the context of this study, the foregoing discussion demonstrates why legal instruments matter in the implementation of public policy. Public policy is often implemented through legal instruments and these legal instruments must represent the values espoused in policy. The success of public policy, therefore, partly depends on the articulation of key ideas in the legal instrument that support it. This clarity is particularly important when public policy becomes the subject of legal challenges and its conceptual foundations must be interpreted by judges on the basis of the legal instruments that must give effect to public policy objectives.

1.2.3 Redistribution and legal challenges in South Africa

Although public policy is often implemented through legal instruments, there is no linear relationship between government policy and legal enforcement. The South African government has introduced many policy programmes in the post-apartheid era to address the social problems of poverty, unemployment and inequality across the policy spheres of economic development, education, health, and income maintenance. Not all of government's policy programmes are implemented, however. Some are terminated when their legality is challenged.

The Supreme Court of Appeal judgment declaring that the Preferential Procurement Regulations, 2017, were inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and therefore invalid (Zondi, 2020) serves as an example. This order was confirmed by the Constitutional Court on appeal in February 2022 (Madlanga, 2022). This judgement has rendered an important part of BBBEE unrealisable. Rabkin (2018) has also catalogued examples of government policy programmes that have been halted by courts of law resulting in setbacks in their implementation. The loss by the Gauteng Department of Education of the court battle to force Hoërskool Overvaal, an Afrikaans medium school, to admit 55 English-speaking pupils (Child, 2018), and the halting of government's nuclear programme in 2017 – which, among others, aimed to contribute to the country's national programme of socio-economic transformation, growth and development (Department of Minerals and Energy, 2008) – by the Western Cape High Court (Peyper, 2017), are examples of government policy programmes that were terminated after being legally challenged.

Policy failure in such instances could be ascribed to a number of factors. One of them is the misalignment of the law with the policy agenda of government. Another factor – and which is the focus of this research – is potentially poor policy development and preparatory analysis, which leads to the failure to adequately conceptualise the redistributive intentions of public policy. Further yet, policy failure in such instances could be ascribed to ill-conceived ideological frameworks of policymakers that similarly fail to adequately conceptualise redistributive intentions. As a consequence, policies either do not realise their intended goals or are thwarted by legal challenges.

The literature provides many compelling perspectives on the failure of redistribution policy in South Africa, as will be explored later. Many of these perspectives point to a lack of clear policy on redistribution, persistence with 'out of context' neoliberal policies not designed to benefit all South Africans, as well as failure to craft policies that reach far enough to effect the required transformation (Habib and Padayachee, 2000; Gumede, 2018; Tangri and Southall, 2008). Other perspectives hold that the content of policy is well positioned to effect redistribution, and improper policy implementation leads to redistribution policy failure (Netshitenzhe, 2013; Southall, 2006; Terreblanche, 2012). While offering useful insights, these perspectives leave a knowledge gap. This is because they fail to consider, as is interrogated in the context of this study, how the different conceptions of redistribution are defined in public policies aimed at redistribution (and their supporting legal instruments) and the implications such conceptions of redistribution give rise to.

Available evidence (Fudge, 1990; Bilchitz, 2016; Bangani and Vyas-Doorgapersad's, 2020; and Francis and Valodia, 2021) suggests that analysis of redistribution policy failure has largely disregarded the counter-vailing factors and influences (class, race and gender based) in the political system that may frustrate the implementation of redistribution policy. These factors and influences are particularly important when policies become the subject of legal challenges and interpretations in courts of law that wield veto powers. For example, the measure of inequality can be a point of legal contention if there is no agreement on the instrument of measure. Even if there is agreement, for instance, that the Gini Coefficient is the measure to be used, further nuances need to be clarified – will the success of redistribution be measured as the absolute difference between the initial and final Gini Coefficient, or will it be measured as the change in the Gini Coefficient relative to its initial level (Luebker, 2014)? Clarity in such conceptions is important so as to direct policy and its programmes and obviate contestations on interpretation to the extent that they hamper redistributive intentions.

In addressing the stated research problem it is important to ask questions about the varied and contested meanings of redistribution in South Africa and its coding in both BBBEE policy and law. It is important to examine which interests are represented in conceptualisations of redistribution and how this, in turn, is reflected in policy and in law.

1.2.4 Redistribution and Addressing Inequality: Considerations on the BBBEE policy in South Africa

At the beginning of its democratic era in 1994 South Africa transitioned from a system of government that was structurally biased to the white minority into a democratic government that aimed to promote equal opportunity for all and the development of the disadvantaged Black majority. A redistribution of wealth, resources and opportunities was implied through various public policies in order to correct the racialised distribution of the past. This was necessary because the system of apartheid in South Africa was a racially discriminatory distributional regime enforced through public policies designed to protect, promote and privilege the welfare of white people (Seekings and Nattrass, 2005). The racial transformation of the economy, the reversal of economic exclusion and its negative social consequences was also important for the sustainability and stability of the country's political settlement (Vilakazi and Bosiu, 2021). In this regard, note Vilakazi and Bosiu (2021), the sustainability of South Africa's structural economic transformation depended on the ability to ensure that the pattern of growth and diversification of the economy was racially inclusive.

At the core of the BBEEE policy, and public policy in general, are normative claims aimed at improving the quality of life of citizens. As such, public policy has to give effect to normative and empirical goals in order to deracialise the economy in South African society in ways that achieve desired changes and socio-economic progress (Cloete and de Coning, 2011; Gumede, 2018). Piketty (2015) suggests that the crux of public policy must be to address the question of social inequality and redistribution

– this is because the unequal distribution of wealth among individuals in a country reproduces an inegalitarian society which is unable to improve or resolve or address its socio-economic problems and needs.

Redistribution for the attainment of an inclusive political system and economy can take place using a number of instruments. Piketty (2015) distinguishes between two kinds of redistribution – pure and efficient redistribution. The primary tool for pure redistribution is fiscal redistribution. Modern fiscal redistribution uses a variety of taxes (such as income tax and value-added tax), transfers (such as unemployment insurance fund, social grants, and pensions), and expenses paid directly by the government for public goods. Efficient redistribution, on the other hand, aims to go beyond redistributing income but extends further to correct structural biases within the political and economic system that have brought about the inequities and inefficiencies. Such instruments include affirmative action, minimum wage legislation and broad-based economic empowerment (Piketty, 2015). These aim to directly target inequality of opportunity in employment, labour market discrimination and differences in environment that manifest in, among others, low-quality educational facilities, unemployment, violence and drugs for sectors of the population that do not receive developmental support (Bourguignon, 2015). The choice whether to employ pure or efficient redistribution is a policy decision that, more often than not, is implemented through the enactment of laws. In this sense, laws have a distributional effect.

The BBBEE policy is a purported form of efficient redistribution that was introduced to deracialise the South African economy and promote economic equality by attaining more representative management, ownership and control of enterprises and productive assets, among other objectives.

The BBBEE policy and the ideas contained in it when the government introduced the White Paper on BBBEE in 2003 developed over time, through various iterative policy development processes. As indicated in the introduction, these historical, policy influencing framings had an impact on the development and formalisation of the BBBEE policy in the democratic era can be traced back to at least seven main documents. These will be described as they provide a context for the evolution of policy thinking on redistribution in the democratic era.

The first of these is the Reconstruction and Development Programme (ANC, 1994), the development of which was championed by the alliance partners of the ANC, chiefly COSATU and the SACP, in which the concept of Black economic empowerment was first mentioned. The RDP promoted the ideas of empowerment and affirmative action to address the deliberate marginalisation of Black people, women, and rural communities from economic, political and social power. Other ANC documents that had an impact on the development and formalisation of the BBBEE policy were the Economic Transformation resolutions taken at the party's 50th National Conference (ANC, 1997), and the resolutions on BBBEE taken at the party's 51st National Conference (2002). The resolutions of the 50th National Conference called for the establishment of 'new social and economic relations that would empower the Black community in general and African people in particular'. To this end, the Conference urged government to develop a National Empowerment Policy and the National Empowerment Fund (NEF), as well as pursue a 'vigorous affirmative procurement policy'. The 51st National Conference noted the continuing limited participation of Black people in the economy and called for the design and implementation of broad based sector or industry empowerment programmes with clearly defined targets.

The fourth document that had an impact on the development and formalisation of the BBBEE policy was the Growth, Employment and Redistribution strategy (GEAR), introduced by the Department of Finance (1996) as a strategy for rebuilding and restructuring the economy. GEAR recognised the redistribution of income and opportunities in favour of the poor as an important long term goal for the country. GEAR preceded the release of the Black Economic Empowerment Commission's (BEECom) Report in 2001, the fifth document to impact the development and formalisation of the BBBEE policy. The BEECom was established in 1998 by emerging Black capital and some elements of the ANC mainly to investigate obstacles to meaningful participation of Black people in the economy, develop a coherent understanding of the definitions and processes associated with BEE, and to make recommendations on appropriate policies and strategies in this regard (BEECom, 2001 and Ponte, Roberts and van Sittert, 2007). The BEECom's Report highlighted concerns about the trajectory of transformation since the democratic transition, including dissatisfaction with the absence of policy direction, a lack of Black business' voice in the process, the leading role of white businesses in the BEE process, and the prevailing narrow definition of transformation used to pursue BEE at the time (BEECom, 2001). The BEECom Report (2001) therefore defined its approach to Black economic empowerment as an integrated and coherent socio-economic process located within the context of the country's then national transformation programme in the immediate post-apartheid era, namely the RDP. It noted that Black economic empowerment was aimed at redressing imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's financial and economic resources to the majority of its citizens. It also sought to ensure broader and meaningful participation in the economy by Black people to achieve sustainable development and prosperity. In order to achieve this, the BEECom Report (2001) proposed that an Integrated National Black Economic Empowerment Strategy be adopted, which would outline the guidelines, regulations, targets and roles to be undertaken by the public and private sectors over a decade.

This strategy was developed by the Department of Trade and Industry (DTI) with input from the Black Business Council, the Black Business Working group, the Big Business Working Group and the Trade and Industry Chamber of the National Economic Development and Labour Council or Nedlac (Erwin, 2003). It was introduced in 2003 as "South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment", and was proclaimed as an economic transformation strategy that would facilitate the deracialisation and engendering of the country's economy (2003). The then Minister of Trade and Industry, Mr Alec Erwin (2003), noted that the Strategy aimed to achieve both higher levels of Black ownership as well as the reduction of income inequality.

To give effect to the Strategy for Broad-Based Black Economic Empowerment, the BBBEE Act, 2003 (Parliament, 2003), was assented to on 9 January 2004. The stated goal of the Act was to promote the achievement of the constitutional right to equality, 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 (Parliament, 2003). On 27 January 2014 the Broad-Based Black Economic Empowerment Amendment Act, 2013, was assented to in order to amend the BBBEE

Act, 2003. The amendment of the Act was necessitated by a number of challenges in the implementation of BBBEE, key amongst these being fronting or the deliberate circumvention or attempted circumvention of the BBBEE Act (Department of Trade, Industry and Competition, 2021). The Amendment Act (2013) redefined Broad-Based Economic Empowerment to give emphasis to 'viable' economic empowerment for women, workers, youth, people with disabilities and people living in rural areas. The Amendment Act (Parliament, 2013) also introduced regulations for increasing effective economic participation by black owned and managed enterprises, including small, medium and micro enter-prises and co-operatives and enhancing their access to financial and non-financial support. Another important amendment made to the BBBEE Act was the inclusion of a clause that permitted the cancellation by any organ of state of contracts or authorisations awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its BBBEE status (Parliament, 2013).

And yet, in spite of all these measures, data from the BBBEE Commission shows that Black ownership in reporting companies across the economy was just 29 per cent in 2019, compared to 25 per cent in 2018 and 32 per cent in 2016 (Thomas, 2020). Statistics South Africa (2019c) also notes that South Africa is consistently ranked as one of the most unequal countries in the world; and in addition to being extremely high, South African inequality appears to be remarkably persistent, with limited progress recorded in reducing inequality since the democratic transition in 1994.

This context is important to note for two reasons. First, it offers insights into the development of the BBBEE policy over time and the possible role players and power dynamics between such role players that might have influenced the conceptualisation of the policy. Second, the foregoing context is important because it provides a focused framework for answering the research questions. It guides the research process by pointing out key ideas in the redistribution agenda and how these have been transferred to the BBBEE policy. As such, the study will return to these documents in greater detail in the analysis phase to explain the formative stages of the concepts of redistribution in the BBBEE policy and how the government arrived at the chosen conceptual framing in 2003 when the policy was formalised, including how these ideas were transferred into the BBBEE legislation.

1.2.5 Understanding the influence of regulations on redistribution in post-apartheid South Africa

The preceding section has offered insights into the development of the BBBEE policy over time and the possible role players and power dynamics between such role players that might have influenced the conceptualisation of redistribution in the BBBEE policy. This is one side of the discussion in this study. The other side aims to develop an understanding of the influence of regulations on redistribution through BBBEE to contribute to developing a focused framework for answering the research questions. To this end, this section discusses the concept of redistribution in relation to the basic law of the land, the constitution, and how this has given rise to various regulations or legal instruments to promote redistribution, including the BBBEE Act.

It is often taken for granted that the South African constitution recognises the need for redistribution. This assertion is often based on the text found in the preamble to the constitution and the founding provisions of the constitution. The preamble to the constitution states that the supreme law is adopted in order to ‘heal the divisions of the past and establish a society based on democratic values, *social justice* (emphasis added) and fundamental human rights. The constitution also pronounces that the state must take steps towards improving the quality of life of all citizens and free the potential of each person (Parliament, 1996).

Social justice is understood as the pursuit of justice through an equitable distribution of economic, political and social benefits in a society (Chipkin and Meny-Gibert, 2013). The constitution presumably pursues this ideal by stressing four values on which South Africa is founded, one of which is ‘human dignity, *the achievement of equality* (emphasis added) and the advancement of human rights and freedoms’. The inclusion of the need for ‘social justice’ in the preamble to the constitution and the pursuit of ‘human dignity and equality’ in the national founding values, therefore, appears to suggest an acknowledgement of the importance of the redistribution question.

In the Bill of Rights, the constitution further declares that in order 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. The constitution then proceeds to outline the basic principles with regards to the achievement of equality and redistribution in various areas of life. In this instance, the constitution covers, for example, the expropriation of property; access to land on an equitable basis; access to adequate housing; access to health care, food, water and social security; and access to basic and further education.

However, in the main, the pursuit of equality through justice (the equitable distribution of economic, political and social benefits in a society) is dealt with in section 9 of the constitution. Section 9(3) of the constitution sets out the grounds on which the state may not unfairly discriminate directly or indirectly against anyone. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. It has been argued that the exclusion of 'class' or 'socio-economic status' as a ground for discrimination implies that the existing discrimination on the basis of class is fair and this necessitated a constitutional amendment to be corrected (Adhikarie, 2017). However, it has been noted by Adhikarie (2017) that the courts, through numerous decisions, have endorsed that the socio-economic status or class of a person that resulted in past discrimination should be considered in determining whether discrimination on a person is unfair. Furthermore, notes Adhikarie (2017), the mere fact that a ground is not listed in section 9(3) of the constitution does not necessarily mean that it is excluded as a ground for unfair discrimination.

It has also been further argued that discrimination on the basis of socio-economic status or class is dealt with explicitly by legislation enacted in response to section 9 of the constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000) (Adhikarie, 2017). The Act endeavours to facilitate the establishment of a democratic society guided by the principles of equality, fairness, equity, social progress and justice, human dignity and freedom (Parliament, 2000). The Act prohibits discrimination of a person on the basis of socio-economic status and defines socio-economic status as "including a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications" (Parliament, 2000).

However, prohibiting discrimination of a person on the basis of socio-economic status is not the same as guaranteeing their economic participation. South Africa’s unemployment rate of 33.9 per cent (Statistics South Africa, 2022a) attests to this. Economic participation in a free market economy such as South Africa requires economic capital, which comprises physical capital and financial capital. Physical capital refers to long-lasting human-made material assets such as buildings, factories, vehicles, machinery and equipment. Financial capital refers to nominal assets such as equities, shares, securities, bonds, debentures, bank deposits and cash (Dalziel, Saunders, and Saunders, 2018). In other words, a person who wishes to participate in the economy and is not able to do so because of a lack of economic capital, may not invoke the Promotion of Equality and Prevention of Unfair Discrimination Act to argue for their economic inclusion because the free market economy is subject to its own rules, which make economic capital a prerequisite for economic participation. It can be argued, therefore, that policies on employment equity and Black economic empowerment, for example, and their supporting legal instruments, the Employment Equity Act (Act 47 of 2013), and the BBBEE Act, (Act 53 of 2003), were introduced to address the limitations of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 by directly engaging with the economic participation of the economically disadvantaged.

The effectiveness of the BBBEE Act may be judged on the basis with which it achieves its stated objectives to promote economic transformation in order to enable meaningful participation of Black people in the economy, achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises, as well as reverse engendered economic inequality. Put differently, the BBBEE Act was enacted to give effect to the constitutional vision for social justice and the achievement of equality through redistribution. This understanding of the influence of regulations on redistribution offers crucial insights into the meanings ascribed to redistribution in the BBBEE Act and provides a basis on which part of the research questions were answered.

1.2.6 The research problem statement

The available evidence suggests that the BBBEE Act appears to be ineffective in ensuring the successful implementation of the BBBEE policy. The expectation with regards to any policy written into law is that it will be followed and implemented to the letter of the law. It can be ventured further that if all South Africans subscribe to the intent and values of the country's constitution, all those affected and responsible would seek to go beyond merely complying with the letter of the law but align themselves with the spirit of the law as well. Therefore, the expectation when a policy such as the BBBEE policy that has been written into law is put in place is that it will be implemented with consideration of the legal precepts that originally informed its promulgation. However, the evidence in the preceding discussion suggests that this has not been realised.

South Africa's case of high inequality and lack of redistribution is puzzling if considered from the perspective of the mainstream rational choice theory, which postulates that high income inequality will lead to higher redistribution – a hypothesis popularised by Meltzer and Richard in 1981 (Luebker, 2014). This hypothesis, however, has been scrutinised with many scholars (such as Milanovic, 2000; Kenworthy and Pontusson, 2005; de Mello and Tiongson, 2006; Lupu and Pontusson, 2011) questioning whether highly unequal societies really redistribute more. Many of these investigations, as Luebker (2014) notes, conclude that the answer partly depends on how 'redistribution' is defined. There is reason to believe that the lack of redistribution envisaged in the BBBEE policy and BBBEE Act in South Africa continues because a common conceptualisation of redistribution in both policy and law has not been developed, resulting in policy failure. This can be illustrated using the land redistribution policy failure.

A reading of the ANC's Freedom Charter (1955) exposes conflicting ideas of land redistribution, for example. Whilst the document recognises that Black South Africans were 'robbed of their birthright to land' it makes no provision for an unencumbered return of the land. Instead it makes an imprecise reference to the sharing of land 'among those who work it', without being explicit about who is being referred to by the reference 'those who work the land'. Is an individual, for example, considered to be ‘working the land’ by virtue of ownership of the land or by virtue of being a land tiller on behalf of the land owner? The Freedom Charter (ANC, 1955) also states that ‘all shall have the right to land wherever they choose’. However, the negotiated political settlement during the transition from apartheid which gave birth to the South African democracy and constitution instead emphasised individual property rights, thus putting land out of reach for landless native South Africans who could not afford to ‘buy back’ the land they were robbed of. A right without the means to exercise it remains unattainable. Therefore, land redistribution as it has been conceptualised is ambiguous and has had the effect of guaranteeing that whites would continue to own 72 per cent of the total land surface of the country, approriated through the Natives Land Act of 1910 (Department of Rural Development and Land Reform, 2017).

As the NDP (National Planning Commission, 2012) records, inequality and inequities sustained by institutions of historic privilege and deprivation continue to define opportunities. The President of the Republic of South Africa, Cyril Ramaphosa, conceded in his February 2018 state of the Nation Address that more needed to be done to achieve economic redistribution, especially in the areas of land redistribution and employment equity.

The reasons for redistributive policy failure are manifold. Many analysts who have tried to unravel the causes behind these failures have restricted themselves to analytical perspectives that focus on the purely theoretical framework of economic policy process and analysis, albeit enunciating from different perspectives on economic development. In the main, some analysts have approached the issue from the neo-classical economic perspective, thus viewing redistribution at a micro-economic level focusing on individuals, households, companies and the market where they converge. Yet, other analysts have examined redistribution from the development economics perspective, which concerns itself with macro-economic structures and structural transformation processes. Others have investigated redistribution using Neo-Marxist theory, which concerns itself with the political economy from a holistic, society embracing perspective (Martinussen, 1997). Using these three major schools of thought, in the result policies would ultimately be labelled as either inadequate, plain wrong or even non-policies. For instance, Terreblanche (2012), arguing from a development economics perspective, contends that there is no redistribution policy in

South Africa based on the lack of programmatic interventions in this regard. Habib and Padayachee (2000), Gumede (2018) and Tangri and Southall (2008) argue that policy failure in addressing socio-economic challenges in South Africa is a consequence of damaging neoliberal policies that do not take the country's context into consideration and that are not designed to benefit the whole of society. Netshitenzhe (2013), on the other hand from a Neo-Marxist perspective, contends that public policies in South Africa have been inadequate in their failure to absorb more people into economic activity, provide quality education and efficient public services, adopt progressive taxation and appropriate spatial settlement patterns.

Further yet, as scholars have continued to grapple with the problem of redistribution failure, a school of thought emerged that tried to explain why governments often choose to employ socially inefficient forms of redistribution. The concept of inefficient redistribution, relates to redistribution that benefits a select group of people and not society as a whole (Acemoglu and Robinson, 2001). The BBBEE policy and its promised trickledown effect has been argued to be a representation of inefficient redistribution for primarily benefiting a tiny Black elite (Southall, 2006). The policy, it has been argued, has only succeeded to establish a Black elite, promote the interests of local and foreign corporations while neglecting the impoverished Black majority, and has failed to transform the economy for more inclusive participation (Terreblanche, 2012). The validity of these assertions will be subjected to scrutiny in the context of this research study.

It is argued that at the core of inefficient redistribution policies in South Africa since the advent of democracy is the ruling party's preference for non-racialism, which, as argued by Ruiters (2020), perpetuates racial inequality through a non-racial form of the state. The acceptance of the state and its institutions (e.g. a free market economy, a parliamentary governance system, and a legal system based on the Roman Dutch law) by the ANC in 1994 that had been used against Black people for centuries, portrays a governing party that has not stood for transformation of the system (as for example advocated for by Biko (1978)) but merely its partial reform, while accepting the pillars around which the system evolves. In the result, redistribution policy since 1994, it is argued in this thesis, has been informed by reformist and not transformation imperatives, and therefore rendering it inefficient.

An important factor to consider when analysing the use of inefficient redistribution policies is that governments do not make policy choices free of influence. Policy making is a bargaining process in which governments interact with interest groups where neither side is assumed to have all the bargaining power (Drazen and Limâo, 2004). Consequently, when two policies are available to achieve the same goal, the outcome is determined by bargaining (Drazen and Limâo, 2004). Where the outcome of this bargaining process is the adoption of inefficient redistribution policies to the benefit of select interest groups, societal choices for fundamental social change are often circumscribed by a political system that ensures protection against expropriation by a majority. Diermeier, Egorov and Sonin (2016), contend that nations put in place a number of institutions to manage the policy bargaining process – such as the separation of powers between the legislative, executive, and judicial branches of the state, and other constitutional arrangements – which effectively provide some players with veto power to block any redistribution without their consent.

In a constitutional democracy like South Africa, these veto powers are contained in law and exercised through the courts. As such, law becomes an authoritative policy instrument in the political system used to address the contested policy issues in society for the benefit of one interest group or another (Wolpe, 1972 and De Coning, 2006). Admittedly, even if it is poorly conceptualised, law cannot be singled out as the defining cause of public policy failure. In fact, some writers, such as Allott (1981), have argued that laws are not binding and their mere existence does not compel people to conform to them. But this type of argument ignores a critical characteristic of law, its enforceability on the basis of common values as expressed in a nation's constitution. This research takes the view advocated by Wolpe (1972) and De Coning (2006) that in any state, legislation or law is an authoritative policy instrument used to address the perceived policy issues or problems in society. The important factor to note is that the constitution empowers the executive and the legislature with powers to draft policy and enact legislation that can achieve the desired outcomes, whatever those may be.

Therefore, whilst the law cannot be singled out as the primary determinant of redistribution policy failure, it surely plays a significant role given the authority it provides to implement, monitor, evaluate and enforce public policy (Dye, 1995). In the result, its interaction with policy must be reflected upon in order to gain a broader perspective on policy failure. Public policy, after all, is an output of the political system (Dye, 1995; Anderson, 1997; and McConnell, 2010) and its success in South Africa depends on addressing systemic issues that perpetuate the racialised distribution of the past (Terreblanche, 2008). South African law in the current constitutional order has, in principle, been given a transformative role which requires that it cannot be insensitive to the fundamental changes that must take place in order to attain human dignity, achieve equality and the advancement of human rights and freedoms (Mbeki, 2004 and Langa, 2006).

On account of this, one of the questions that arise from the failure of the BBBEE policy is whether there is a common conceptualisation of redistribution in both policy and its supporting legal instrument. The law as an instrument of policy can only reproduce what has been defined in policy. If redistribution is not adequately and clearly conceptualised in BBBEE policy, it will not be adequately and clearly defined in law and this might render the law ineffective. This study, therefore, sought to interrogate how the concepts of redistribution have been conceived, developed and applied in the BBBEE policy framework, and whether this provides insights on why the BBBEE policy aimed at addressing racial inequality has not achieved its intended outcomes in a democratic South Africa.

1.2.7 The research purpose statement

This research interrogated and analysed the conceptions of redistribution in the BBBEE policy and their legal codification in the BBBEE Act (Act 53 of 2003) at the formalisation of the policy during the period of 1999 to 2003. Furthermore, the research analysed if the conceptions of redistribution in the Act are consistent with those identified in the policy.

1.2.8 Research questions

The research questions are as follows:

- How have the concepts of redistribution been conceived and developed in the Broad Based Black Economic Empowerment policy?

  In order to answer this question, it is necessary to answer the following secondary question:

  i. What concepts of redistribution have been adopted in the Broad Based Black Economic Empowerment policy?

- Have the concepts of redistribution in the Broad Based Black Economic Empowerment policy been applied consistently in the Broad Based Black Economic Empowerment Act (Act 53 of 2003)?

  In order to answer this question, it is necessary to answer the following secondary question:

  i. What concepts of redistribution have been adopted in the Broad Based Black Economic Empowerment Act (Act 53 of 2003)?

1.2.9 Delimitations of the research

This research is motivated by an interest in the relationship between public policy, the law and redistributive policy failure in post-apartheid South Africa. However, the research will not investigate the economic and social impact of the BBBEE policy as this is outside the scope of the study. Instead, the research limits itself to the particularity of the conceptualisation of redistribution in the BBBEE policy and legislation. Therefore, whilst the research emerges from an interest in the relationship between public policy, the law and redistributive policy failure, the findings are not claimed to be generalisable to redistributive policies in general in South Africa.

1.2.10 Justification of the research

Socio-economic justice has remained elusive in many African countries, including South Africa, even after the attainment of independence from colonial rule. The first African country to attain colonial independence in 1957, Ghana, has seen slow progress in the improvement of the material conditions of its people since independence – the country ranked 140 out of 189 countries and territories with regards to human development in 2017 (United Nations Development Programme, 2018).

The same can be shown for many other ‘liberated’ (post-independence) African countries. Mhone (2001) in his analysis of unemployment in the African labour force in Southern African economies points out that the sustained unemployment or underemployment of the African labour force continues to be one of the most puzzling issues in economic policy analysis when contrasted with other developing countries who have made the crucial turn towards inclusive growth and development.

It is important to answer such questions in order to deepen our historical understanding of policy failure and the undesirable status quo where poverty and the lack of opportunity that is pervasive in Black communities persist tenaciously. The costs of inequality are explained insightfully by Wilkinson and Pickett (2010) in their seminal study in which they argue that the negative effects of inequality reach everyone in a society, not just the poor. Frank (2013) also reflects on the devastating social pressures produced by inequality that weigh on the less privileged. This study therefore aims to contribute to the available body of knowledge aimed at reversing racialised distribution and socio-economic injustice for the benefit of Black people.

1.2.11 Format of the research

The study first presents a literature review that begins by investigating the historical context of redistribution through BBBEE in South Africa. The literature review further explores the concept of redistribution and how it has developed over time, including its application in different contexts. This was undertaken to determine a reference point for the conceptual foundations of redistribution in answering the first primary question of the study regarding the conceptualisation of redistribution in the BBBEE policy and Act.

The next step in the literature review conducts an appraisal of other studies that have investigated the relationship between redistributive policy and law, with specific reference to policies and laws that target social transformation in order to expose the knowledge gaps that exist in this area of inquiry. In this regard, the literature explores the use of law to achieve social transformation. Furthermore, the literature explores other studies that have been conducted to investigate the relationship between redistribution policies and the laws put in place to support them.

The literature review, finally, introduces the interpretive theory framework that was used to interpret the research findings. The study then presents the research approach, procedure and methods best suited to answering the research questions. Findings on the primary and secondary data are finally be presented, followed by a presentation of findings on the research questions, the theoretical considerations emerging from the findings and concluding remarks.

1.2.12 Conclusion

This chapter has introduced the research problem and outlined what the study intends to accomplish. Further to introducing the research problem, an outline of the BBBEE policy and related concepts of inequality and redistribution has been provided to give context to the focus of the study. Lastly, the chapter has provided a framework on how the study will be undertaken to answer both the primary and secondary research questions.

Chapter Two

Literature Review and Theoretical Framework

2. Literature Review

This literature review will explore the concept of redistribution and how it has developed over the era of the South African liberation struggle, including its application in different contexts. The literature review begins by providing a brief outline on thinking on redistribution in the period preceding the democratic elections of 1994. This exploration of the concept of redistribution is undertaken to determine a reference point for addressing the research questions on the conceptualisation of redistribution in the BBBEE policy and Act specifically.

The literature review will further conduct an appraisal of other academic studies that have investigated the relationship between policy and law, with specific reference to policies and laws that target social transformation, in order to address knowledge gaps that exist in this area of inquiry. In this regard, the literature will explore the use of law to achieve social transformation, particularly the three perspectives which drive the discourse on redistribution in the country; namely, the perspective of white economic domination, the perspective of land deprivation, and the perspective of unfree black labour (Terreblanche, 2002).

The section will conclude by introducing the interpretive theory that will be used to interpret the research findings, based on the findings of the literature review.

2.1 Thinking on redistribution in the lead up to democracy

In the period leading up to democracy in South Africa in 1994 as the transition to a new political and economic dispensation unfolded, thinking on redistribution was influenced by the ideas of structural adjustment and reconstruction or restructuring (Coetzee, 1993). Mosala, Venter and Bain (2017) note that the manner in which transformation would be achieved in terms of the National Democratic Revolution (NDR), as expressed in the Freedom Charter, rested on two divergent views. The first of these, note Mosala, Venter and Bain (2017), was the transposing of political power to economic power in order to drive radical transformation measures such as nationalisation. The second view involved achieving transformation through the adoption of a neo-liberal approach, in which the promotion of macro-economic development and the growth of company earnings would take precedence over radical redistribution (Mosala, Venter and Bain, 2017).

With significant reliance on work done by COSATU's Economic Trends Group, the ANC published a discussion document in 1990 in which it outlined proposals on restructuring the economy. The prevailing idea in these proposals was the pursuit of economic growth through redistribution – an economic principle wherein growth is achieved through redistribution and the proceeds of growth are redistributed to satisfy the basic needs of the population (Terreblanche, 2002). In 1992, the ANC published Ready to Govern, its policy guidelines for a democratic South Africa. The Ready to Govern document included a section on economic policy that focused on redistribution programmes to meet the basic needs of the population, including redistribution of resources for rural development, affirmative action and land redistribution (ANC, 1992). The Ready to Govern document, according to Freund (2013), was greatly influenced by Thabo Mbeki, who was emerging as a figure of the greatest importance and arguably the most important single architect of the 'new South Africa' and committed to intensive racial 'affirmative action' domestically, while accepting the existing economic world order as a given.

The idea of growth through redistribution ultimately became a strong element in the RDP, the ANC's 1994 election manifesto which prioritised the delivery of basic services to the majority of the population (Davies, 2021). The RDP recognised that the country's economy was built on systematically enforced racial division in every sphere of society, marked for example by very clear racial and gender inequalities in ownership, employment and skills. It therefore promoted the ideas of empowerment and affirmative action to address the deliberate marginalisation of Black people, women, and rural communities from economic, political and social power (ANC, 1994). However, the reconstruction or redistribution through growth envisaged in the RDP also implied a change in power relations between those who control or have access to power and the disenfranchised as an important way to bring about societal and economic transformation. It also implied a change in asset-based relations through measures to promote deconcentration or the breaking up of white-owned monopolies in the economy (Coetzee, 1993). According to Terreblanche (2012), these ideas of redistribution emerged out a growing consensus in the early 1990s in certain white and Black circles that the nature of transformation necessary in a democratic South Africa would require the whites, including the white corporate sector, to make financial sacrifices in the long term to address the systemic injustices of white political dominance and racial capitalism.

The National Party (NP) government, which counted the white corporate sector as its key constituent, opposed the idea of redistribution as expressed in Ready to Govern. The NP government did not see redistribution as integrally connected to long-term sustainable economic growth (Morris, 1993). Instead, the NP government favoured structural adjustment – loans made by the World Bank designed to encourage the structural adjustment of an economy by removing “excess” government controls in the economy and promoting market competition as part of the neo-liberal agenda followed by the Bank (United Nations, 2024) – to promote sustainable growth, arguing that redistribution could only be attained through growth. The views of the NP government in this regard were expressed in the Normative Economic Model (NEM) published in March 1993 as its official proposal on an economic framework for a democratic South Africa (Terreblanche, 2002) following the breakdown of Codesa 2 negotiations in 1992. The impetus of the NEM was on accommodating Blacks in a majoritarian democratic system; attaining a high economic growth rate within the framework of an unrestrained free market capitalist system, marked by little to no state intervention; as well as avoiding an aggressive redistribution policy and allowing the fruits of high levels of economic growth to trickle down to the poor (Terreblanche, 2002).

At this stage the ANC had also established the Macro-Economic Research Group (MERG) to formulate appropriate economic stabilisation policies, including monetary and exchange rate policies that would be used to manage macro-economic imbalances in the economy resulting from apartheid’s structural deficiencies. The objective of the ANC in developing the MERG policy framework was to forge a re-distributive econometric model that could be presented by the ANC to rival what the National Party would offer in negotiations (Freund, 2013). In its 1993 report A

Framework for Macroeconomic Policy in South Africa, the MERG opposed the NP's NEM, which it said "favoured the advantaged section of society and [wrongly] assumed that the trickle down effects will distribute the benefits to the disadvantaged," (MERG, 1993:4). Instead, the MERG "favoured a redistributive growth strategy whereby the state would perform a prominent, interventionist role in economic restructuring, with substantially increased expenditure in the social sectors to meet equity imperatives," (Padayachee and Van Niekerk, 2019:201). The criticism of the NEM by the MERG echoed a significant view within the ANC at the time with regards to economic and social restructuring. In line with this thinking, the NEM was viewed as an effort by the NP and the white corporate sector to ensure capitalist corporations would remain in a dominant position against the anticipated new Black political authority, to prevent the democratic government from implementing a mass redistribution programme (Terreblanche, 2012).

However, the economic policy proposals made by the MERG were attacked as unfeasible by the dominant, white-owned mainstream media and discarded by the ANC in late 1993 (Padayachee and Van Niekerk, 2019). The MERG gave way to the RDP 'base document', 1994–1996, which was developed within the Alliance and served as the platform on which the ANC campaigned in the 1994 elections (Heywood, 2021). The RDP, launched on the eve of the first democratic elections in 1994, was seen as a compromise between the idea of growth through structural adjustment as favoured by the NP, and growth through redistribution as preferred by the democratic movement. Padayachee and Van Niekerk (2019) explain this compromise as follows:

> "Mandela saw [the RDP's] contribution to a more just society because it combined the virtues of a centralised economy and the free market. Both the SACP and Cosatu emphasised the importance of the RDP's commitment to state-led development, while [National Party government] Finance Minister Derek Keys was pleased that it represented the best of both worlds – fiscal conservatism and aggressive growth, coupled with social justice. And the document was sufficiently cleansed over various iterations of its 'radical' elements to please local capital," (p. 116).

Although Black economic empowerment as a concept in the democratic movement discourse was first mentioned in the RDP, its intentions has been a subject of debate owing to the ‘de-radicalisation’ of the BBBEE programme. In its early conceptions of Black economic empowerment as expressed in the Freedom Charter, the ANC and the democratic movement envisaged a political system in which the state had substantial centralised control over social and economic policies, thus facilitating the breaking of the power of white-owned corporations and in the process creating the possibility of Black people entering business (Mbeki, 2009).

However, according to Mbeki (2009), the fact that Black economic empowerment has proven elusive is testament to the white private sector’s ability to resist fundemental economic re-distribution. Terreblanche (2012) argues that the local and global white business operating in South Africa have from the outset put in place a strategy to preserve their economic dominance. According to this argument, the white business class created Black economic empowerment as a quid pro quo between the corporate sector and the ANC leadership core that involved creating lucrative opportunities for the emerging ANC elite to join the white capitalist elite and become rich to stop them from adopting socialist policies and making demands for nationalisation and mass redistribution (Mbeki, 2009; Terreblanche, 2012 and du Toit, 2022). This became known as the elite pact or compromise and emphatically excluded the possibility of a comprehensive redistribution policy in the democratic era, contends Terreblanche (2012). According to Zalk (2021), political settlements often reflect ‘elite bargains’ struck between powerful economic and political elites. Various rents and rent-like transfers, such as rents derived from market dominance, natural resources, transfers from the real economy to financial sector actors, conditional industrial policies to promote the acquisition of industrial capabilities, and state licensing and procurement instruments, characterise these elite bargains (Zalk, 2021). Redistribution in this context in South Africa was regarded as reparations for the Black elite (Mbeki, 2009).

The BBBEE policy in the democratic era continues to struggle to define itself as a policy for the benefit of the broad Black population. The policy has been argued to be a representation of inefficient redistribution primarily for benefiting a small Black elite (Southall, 2006). There is also a persevering perception that the policy has only succeeded to promote the interests of local and foreign corporations while neglecting the impoverished Black majority, and has failed to transform the economy for more inclusive participation (Terreblanche, 2012).

The above historical overview draws attention to the political contestations over re-distribution. This is a concept that requires further interrogation, as below.

2.2 Conceptualising redistribution – perspectives from literature

The concepts of inequality and redistribution developed and gained traction in the nineteenth century, particularly arising out of Marxist theorisation which was critical of the perceived unfairness of the power relations between capital and labour, profits and wages, as well as employers and employees (Piketty, 2015). The concept found resistance from proponents of laissez-faire capitalism who argued that redistribution decreased economic efficiency (Okun, 2015). The inequality created by the imbalanced power relations between capital and labour, profits and wages, as well as employers and employees came to be known as the 'marginal productivity theory', which asserts that "those with higher productivities earned higher incomes that reflected their greater contribution to society… [and] competitive markets, working through the laws of supply and demand, determine the value of each individual's contributions" (Stiglitz, 2013:37). According to Thurow (1981), in most industrial countries, marginality has been used to avoid having to decide what is ultimately fair or unfair. The distribution of income and resources continues to be informed by the marginal productivity theory to this day, in a world that follows the capitalist system of production. In line with the marginal productivity theory, therefore, inequality is a function of productivity that would be resolved without state intervention if each member of society increased their productivity. According to Piketty (2015), this view of inequality exerts a profound influence on the way redistribution is conceptualised outside the context of state intervention in market driven economies. In this context, observes Thurow (1981), redistribution must take place at an individual level – a case-by-case fight against discrimination or remedial programmes for individuals – where each individual is given an equal opportunity to achieve economic success.

State led redistribution policy, however, presupposes the centrality of the state in the receiving of resources or wealth and their equitable distribution to society – an idea popularised by Polanyi (1957). It developed from an early conceptualisation of redistribution, referred to as levelling mechanisms, implemented through the formation of a cultural institution to counteract the concentration of wealth by individuals or groups (Earle and Ericson, 1977). These redistributive policies, according to Kohler (2015), are deployed to correct socially unacceptable outcomes through income redistribution whenever markets fail to distribute in a manner considered desirable. Such policies, therefore, stand diametrically to the western tradition of redistribution targeting individuals and not social groups (Thurow, 1981).

Redistribution is therefore informed by the fundamental idea that genuine socio-economic development must translate to advances in the socio-economic lives of the disadvantaged, poor and resource-weak groups in society – evidenced by increased economic participation, and improvements in purchasing power, educational outcomes, health and housing standards, among other outcomes (Martinussen, 1997). As such, any redistributive policy intention must be judged by its effects on economic development and the eradication of poverty. In this sense, as Sen (2009) points out, redistribution is born out of the idea of justice and its success must be measured on the improvements in the quality of life and on the well-being and freedoms enjoyed by human beings.

Redistribution is broadly defined as the use of tax and transfer policies to reduce income inequality (Luebker, 2014). Causa and Hermansen (2018) define redistribution as the relative reduction in market income inequality. It is the modification of a distribution of resources across a population through a political process to even out a skewed statistical distribution by transferring resources from the better off to the less well off (Sznycera, Lopez Seale, Sell, Lim, Porat, Shalvi, Halperin, Cosmides, and Tooby, 2017). Redistribution is used as remedy for economic injustice through socio-economic restructuring (Fraser, 1995).

As has been outlined, redistribution for the attainment of an inclusive political system and economy can take place using a number of instruments. Piketty (2015) distinguishes between two kinds of redistribution – pure and efficient redistribution. The primary tool for pure redistribution is fiscal redistribution. Modern fiscal redistribution uses a variety of taxes (e.g., income tax, value-added tax, etc.), transfers (e.g., unemployment insurance fund, social grants, and pensions), and expenses paid directly by the government for public goods. According to Bourguignon (2018), taxation and income transfers to the poorest segment of society are the most direct way to keep inequality in check and reduce poverty in the short term, particularly when the benefits of growth fail to reach the poor. Income transfers can also be linked to certain conditions – such as up-to-date vaccinations or regular school attendance by children – for improved social outcomes (Bourguignon, 2018).

Efficient redistribution, on the other hand, aims to go beyond redistributing income but extends further to correct failures within the political and economic system that have brought about the inequities and inefficiencies. Such instruments include affirmative action, minimum wage legislation and broad-based economic empowerment (Piketty, 2015), to name a few. These aim to directly target inequality of opportunity in employment, labour market discrimination and differences in environment that manifest in, among others, low-quality educational facilities, unemployment, violence and drugs for those residing in areas that do not support development (Bourguignon, 2015). These interventions improve people's long-term capacity to generate income by providing opportunities for education and training, access to productive credit and health care, for example (Bourguignon, 2018).

As has been explained, opportunity is linked to the idea of capability, a concept of justice that focuses on actual opportunities a person has to improve their life (Sen, 2009). For countries such as South Africa that are emerging from conflict situations and extended periods of human rights violations as well as racial discrimination, redistribution carries an additional purpose to deliver historical justice to victims of past wrongdoing (Ramose, 2002b). This historical justice, argues Fraser (1998), may extend beyond the redistribution of income and opportunities, but may include the need for cultural recognition as redress for cultural injustices. Fraser (1998) refers to this social justice claim as the politics of recognition wherein the goal is a difference-friendly world, where assimilation to dominant cultural norms is no longer the price of equal respect. It is a social theory endeavour with the task to understand the complex relations between class and status, economy and culture, in social contexts that are increasingly transnational and multicultural (Fraser, 1998). For Fraser (1998), therefore, theories of justice should have a perspectival dualism that can accommodate the complex relations between interest and identity, economy and culture, class and status in a contemporary globalised capitalist society. This theory finds resonance with ideas expressed by Thiong'o (2002) about a new tradition of Asian, African and South American countries challenging the convention by Europeans of defining these countries through colour-tinted glasses. Thiong'o (2002) notes that, in the sixties Asia and Africa began to demand and assert their right to define themselves and their relationship to the universe from their own centres in Africa and Asia. In other words, moving the centre of knowledge about what is just from its location in Europe towards a pluralism of centres, themselves being equally legitimate locations of the human imagination (Thiong'o, 2002).

Laplante (2014) also outlines four theories of justice that can find relevance in countries such as South Africa. The first one is reparative justice; corrective justice that occurs in response to an injustice by 'righting a wrong' through compensation in order to bring equality back to the relation. It can also be defined as an act of restoring something to its rightful owner or the act of making good or giving equivalent for any loss, damage or injury (Black's Law Dictionary, 1968). According to Weitekamp (1993), the idea of restorative justice emerged from early human societies that had no rulers or any form of legal system and has existed since humans began forming communities. In these societies reparative justice became the preferred way to resolve conflict because it allowed the disputing parties to resume normal relations expeditiously (Weitekamp, 1993). The restitution process in these societies assisted to "prevent further, more serious conflicts, particularly to avoid a feud; rehabilitate the offender back into society as quickly as possible and to avoid a negative stigma; provide for the victim's needs; restate the values of the society by addressing the needs of both the victim and the offender, thus indicating that the society desired some type of justice for all its members; socialise the members about its norms and values; and provide regulation as well as deterrence for its members," (Nader and Combs-Schilling, 1977:34-35). As such, reparations to the victim and their kin frequently took precedence over action against the offender and was not focused on punishment in the form of retribution or revenge and, in the result, was reformatory in its influence, more deterrent in its tendency and more economic to the community (Weitekamp, 1993).

The second theory of justice is restorative justice, which rests on the basic premise of striving to ‘repair the harm’. The restorative process mends ‘relational harms’ and fosters self-respect, feelings of safety and empowerment (Laplante, 2014). Okimoto, Wenzel and Feather (2009) note that restorative justice is about restoring proportionality to a situation or restoring it to the state it was prior to the transgression, as if no transgression had occurred at all; in other words, to restore equity or equality. In a restorative justice process, the concerned parties are directly involved in the justice process, dealing with the injustice through interaction and mutual understanding – allowing them the opportunity to vent their feelings, present their side of the story, and ideally come to an agreement about the hurt the offense has caused, the offender’s responsibility, and what can be done to restore a sense of justice (Okimoto, Wenzel and Feather, 2009). An important element for proper restorative justice, notes Braithwaite (2002), is a process of deliberation that places emphasis on healing rather than punishing, that is, healing the group as a whole while mending social relationships. As such, posit Okimoto, Wenzel and Feather (2009), restorative justice is the restoration of a sense of justice through renewed value consensus.

Third is civil justice, which refers to a vision of macro-reconciliation that mends the relation between the government and the governed and defined as a full opportunity for all citizens to participate in the life of the commonwealth (Laplante, 2014). Civic justice supports the democracy building aims of transitional justice by responding to the grievances of constituencies marginalised on the basis of race, ethnicity, religion, and gender; including those denied the right to personal security, the right to vote and to participate in democratic political processes, as well as rights to freedom of expression, association, and religion – collectively referred to as civil rights (Laplante, 2014 and Kairys, 2001). According to Kairys (2001), the origins of civil rights can be found in practices of governments or powerful individuals or institutions that gained widespread acceptance throughout the world in the last half of the twentieth century and came to be viewed as oppressive, leading to the development of civil rights as legal protections of individuals or groups from certain forms of oppression. Civic justice views reparations as part of a wider social, political and judicial reform processes, which collectively are directed towards social reconstruction by reinforcing rights and conveying recognition and acknowledgement that government failed to protect and respect the rights of citizens (Laplante, 2014).

The final theory of justice considered here for countries emerging from conflict situations and extended periods of human rights violations is socio-economic justice. Socio-economic justice seeks to remedy historical social and economic inequalities (Laplante, 2014). In the case of South Africa, the South African Human Rights Commission or SAHRC (2018) observes that the right to equality, although not explicitly guaranteeing economic equality, empowers government to implement affirmative action, or special measures, in order to advance persons or groups subject to persistent patterns of discrimination. Socio-economic justice is therefore about the attainment of socio-economic transformation, defined as aiming to achieve substantive socio-economic equality (SAHRC, 2018). Substantive equality aims to achieve equal outcomes by treating people and groups differently – justified where some people are discriminated against on the basis of their identities or characteristics (SAHRC, 2018). Socio-economic justice therefore also entails a redistribution of resources, which means that government must redistribute resources in order to ensure substantive socio-economic equality, which includes substantive equality in economic outcomes (SAHRC, 2018). If the redistribution of resources to ensure substantive socio-economic equality is not pursued, it can negatively impact a country’s economic growth, as noted by the United Nations Development Programme or UNDP (2014):

> “If high levels of inequality constrain growth, and limit its pro-poor impacts, then reducing inequality may be a prior and necessary condition for a sustainable decrease in poverty. Going for growth as a means of addressing poverty in the absence of policies to address inequality or the underlying factors through which inequality is reproduced may yield limited returns. Instead, reducing inequality may be a necessary condition for the kinds of growth required for optimal impacts on poverty. This has important implications for policy, casting into doubt the received wisdom of a trade-off between redistributive policies and growth,” (p. 6)

Of these theories of justice, reparative and restorative justice are arguably the most difficult to attain. Based on their intent to repair harm, it can be argued that they need to be pursued jointly. Reparations are effected through compensation – the act of restoring a thing to its rightful owner, or the act of giving equivalent for any loss, damage or injury suffered (Weitekamp, 1993) – and commonly take place generations after the original harm. Consequently, restoration is seldom to the same group of people and it is most often their descendants. This may result in a lack of appreciation for the reparations and this may render reparative justice ineffective. Restorative justice attempts to prevent the failure of reparative justice by empowering the community that is the recipient of a reparation by providing it with the necessary support to ensure the reparations bring the desired impact and that impact is sustainable. Crucially, restorative justice is about giving those who were wronged the power to hold those who have wronged them accountable for the wrongs committed and remedies thereof. This accountability, however, is often lacking because the power relations that led to the original harm too often remain in place and those against whom harm was committed have no power to demand accountability. This makes true reparative and restorative justice difficult to attain.

Civic justice, on the other hand, is concerned with the attainment of equal basic human rights, and for all people to be treated equally and have access to the same opportunities to advance their lives. The ANC's Freedom Charter (1955) is an example of a programme for civic justice. Unlike reparative and restorative justice, civic justice does not argue beyond the attainment of equal rights for identified specific wrongs to be righted. The end goal for civic justice is the recognition of all sectors of society as equal in order to free them to pursue all the opportunities available in that society. Reparative and restorative justice go beyond this by calling for the redress of past injustices.

Socio-economic justice is also about pursuing redress for past social and economic injustices. It is essentially about the redistribution of wealth and opportunities to those who suffered injustices to improve their lives. Like reparative and restorative justice, socio-economic justice is difficult to attain because those who suffered injustices often lack the power to hold those who denied them socio-economic rights accountable.

Because of these skewed power relations, economic power and opportunity often remain in the hands of those who have always held it. As such, inequalities created through socio-economic injustices tend to reproduce themselves even within the context of civic justice, for example.

Whilst redistribution can emerge from different contexts and can take many forms, its conceptualisation is a complex process that does not follow the same approach and is not always attainable. How a particular redistributive policy conceptualises redistribution, therefore, can only be derived from an understanding of the prevailing context, including existing power relations, values and assumptions upon which the policy was developed.

Within the South African context, and given the failure to attain redistributive justice that informs the thesis of this study, it can be argued that what has been achieved in the democratic era is civic justice. This national civic justice is premised on the human rights enshrined in the country's constitution and the principle of the equality of all persons before the law. While this meant that all South Africans were free to pursue any aspect of socio-economic life, civic justice did not provide the means for the previously oppressed Black population to pursue economic opportunities. The historical oppression of Black people in South Africa was first and foremost about dispossessing economic resources – the land and all the natural resources above and beneath it – from their control. The removal of civic rights was a means to ensure that the expropriated wealth remained in white hands. As such, the struggle for liberation was first and foremost about the return of expropriated land and the wealth to Black people. The democratic project, arguably, did not deliver this justice. Instead, it focused on guaranteeing human rights and equality without correcting the socio-economic wrongs of the past. The implication this understanding has for investigating the contested legal meanings and conceptualisations of redistribution in this study for purposes of uncovering insights on the failure of redistribution in the democratic era, is that any concept of redistribution envisaged in the BBBEE policy and Act has to pass the test of justice by demonstrating how it rights a wrong, repairs harm or remedies historical socio-economic inequalities.

2.3 Methods, data, findings and conclusions of studies evaluating the legalities of redistribution policies

Scholars in the fields of public policy and law have in various ways explored the role of law in social transformation. Within the context of a history of racial discrimination, as is the case in South Africa, some researchers have adopted the critical theory approach (particularly the critical theory of race) to investigate the role of law in social transformation; others have adopted the socio-legal analysis approach, whilst others do not recognise the role of law in social transformation and view social transformation as a function primarily of public policy. As explained by Modiri (2012), critical race theory is premised on two principles. The first one is the centrality of racism, which means that racism is a normalised and ingrained feature of the social order which appears often in nuanced and covert ways. The second principle proposes that white supremacy represents a political, legal, economic and cultural system in which whites maintain overwhelming control and power. Socio-legal studies, on the other hand, refers to the use of social science theory to explain legal phenomena (Ríos-Figueroa, 2012). It is based on an interest in questions about the way law gets separated from material life and its own role in creating the relations of material life (Harrington and Yngvesson, 1991).

Within the context of this study, at least two questions must be answered by the literature with regards to the relationship between redistributive policy and law. The first question relates to what the literature says about the use of law to achieve meaningful social transformation. It is important to explore this question because the rational implicit in this study is that indeed law plays an important role in giving effect to transformational policy. The other question to be answered is on the studies that have been conducted to investigate the legalities of redistribution policy, particularly on BBBEE. This question is necessary to appropriately demonstrate the knowledge gap that exists in the literature with regards to the interrogation of redistribution policy and the role played by law in its implementation. However, further than this, exploring studies that have investigated the legalities of redistribution policy provides important insights on the most appropriate approaches to conducting such an inquiry.

2.3.1 The use of law to achieve social transformation

A number of studies have tried to explore the use of law as a tool for social transformation. In South Africa, for instance, central legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (Act 4 of 2000) – which obliges every cabinet minister and sphere of government to implement measures aimed at achieving equality through the repeal of any law, policy, or practice that perpetuates inequality (Terreblanche, 2002) – has been a subject of study as a tool for social transformation.

Kok (2007 and 2010) conducted a socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (Act 4 of 2000) aimed at establishing its potential effectiveness. He considered to what extent the Act would reach its stated goals and concluded that the Act is unlikely to achieve its stated purpose of effecting large-scale societal change in South Africa. Kok's (2007) approach to the study was "a pragmatic and instrumentalist approach to law" (p. 21) which regards law as autonomous. As such, he argued that "law plays a small and limited role in solving everyday disputes and will usually be of limited assistance in effecting social change" (p. 305). This is contrary to the persuasive arguments presented by scholars such as Dugard (1972), Unterhalter (1972), Lukes (1986), Kilpatrick (2000), De Coning (2006), Terreblanche (2012) and Phillips (2010), who argue variously that law is an authoritative policy instrument used to address the perceived policy issues or problems in society, and that law reflects the dominant ideology in a society. Whilst Kok's (2007) analysis purports to apply a 'reform-minded' approach to the subject matter, he reveals his objective by suggesting that what is in law books represents the 'ideal' state for society. In this sense he elevates law and subordinates ideology and public policy to it. By regarding law as only 'a potential tool for addressing social ills' he arguably alienates the research from the historical reality of the use of law to perpetrate oppression and promote a mode of production that fosters inequality in South Africa. By disregarding the historical context of the use of law to oppress in South Africa, the research discounts the reality of the power contestations through which law is produced, as well as the power structures that sustain colonial relations of exploitation and domination. This point is illuminated by Sibanda (2011) in his assessment of the relationship between constitutionalism – the idea that a government should derive its powers from a written basic law and that its powers should be limited to those set out in the law – and poverty eradication.

In his study, Sibanda (2011) contends that those who have taken the time to study the effectiveness of constitutionalism in South Africa have not placed any importance on the eradication of poverty as the ultimate measure of the constitutional project, which is understood as a catalyst for both political and socio-economic change – in other words, the required redistributive effect of law. However, as Sibanda (2011) points out, constitutionalism is an expression of choices made by those collectively responsible for establishing a particular system of constitutionalism. Put differently, constitutionalism emanates from a battle of ideas that represent diverse interests. Therefore, "when constitutionalism becomes subsumed in the regulation of power relations… then it is power politics that dominates the constitutional terrain rather than the demands of society" and the eradication of poverty (Sibanda, 2011:498). As such, and in direct opposition to Kok's (2007 and 2010) view which regards law as autonomous and of limited assistance in effecting social change, Sibanda (2011) concludes that law does have an important transformative or redistributive role to play, but will not be able to do so as long as it is a product of political contestations dominated by self-interested groups that do not recognise social transformation as an imperative. Fudge (1990) made similar findings in her investigation of the limits to and the possibilities of using law in the struggle for social transformation. Fudge's (1990) study evaluated judicial decisions on matters brought to Canadian courts by the labour and feminists movements in that country and concluded that if law itself is not transformed to fully recognise the rights of all citizens and the material social conditions that ground the struggle for social transformation, it will act as a hindrance to social transformation.

There is a developing school of thought that suggests the constitution of the Republic of South Africa makes provision for what has been termed 'empowerment rights' that facilitate access to socio-economic rights (Heywood, 2021). Linked closely to empowerment rights, according to Heywood (2021), is the right to equality, which appears to envelope all other rights by specifying that '[e]quality includes the full and equal enjoyment of all rights and freedoms' and further directing that the state may take 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. Heywood (2021) suggests that the potential of the equality right has not been fully exploited in fulfilment of economic transformation, noting that some scholars have referred to substantive equality as being 'redistributional' in paying attention to 'what structures people's freedom.'

Mlambo (2021), discussing the role of law in promoting economic parity in South Africa from a jurisprudential perspective, has suggested that South African law, through the country's constitution, particularly the bill of rights, has been sufficiently transformed to bring about social change. All that is required, proposes Mlambo (2021), is for the judiciary to be activists and interpret the law in a way that favours the marginalised. The thesis of Mlambo's (2021) contribution, however, is on the role of the judiciary in advancing or promoting economic parity. In this regard, he proposes a distributional pattern driven by the state, through policy- and law-making, that has a bias for the poor. In other words, the judiciary should adjudicate in a manner that rectifies economic injustice. As Mlambo (2021) argues, "There is no doubt that addressing economic inequalities, joblessness and redistribution is critical to alleviating the plight of the poor [using the bill of rights]."

There are at least two limitations with Mlambo's (2021) proposition. The first one is that the constitution does not recognise economic justice as either a right or a founding value of the Republic of South Africa, where economic justice is defined as encompassing the moral principles which guide a country in designing economic institutions that determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance (Center for Economic Justice and Social Justice, 2022). Whilst the constitution proclaims equality of all persons before the law, it speaks of no right that can be invoked to enforce meaningful participation by Black people in the economy, or to redress economic injustice, particularly economic injustices created by the country's past. This is despite the Constitutional Court (1996) asserting in the final stages of the drafting of the constitution that such rights could, to some extent, be justiciable. Mbeki (1998), while addressing Parliament on reconciliation and nation building in what became known in South Africa as the 'Two Nations' speech, conceded that economic injustices stood in the way of the exercise of human rights. In other words, Mbeki (1998) recognised that the bill of rights could not translate to shared economic prosperity.

Therefore, as Francis and Webster (2019) point out, there is a fundamental question to be answered about the tension between the supposedly liberal South African constitution and its ability to facilitate radical socio-economic transformation. The second limitation with Mlambo's (2021) proposition is that it is premised on non-racialism, which, it has been well argued, obfuscates the real history of the socio-economic injustices perpetrated by whites, including their current privileges (Ruiters, 2020).

2.3.2 Studies evaluating the legalities of redistribution policy in South Africa

The legalities of redistribution policy have been studied widely in South Africa. These studies have focused on three perspectives which, as proposed by Terreblanche (2002), drive the discourse on redistribution in the country; namely, the perspective of white economic domination (which this study focuses on), the perspective of land deprivation, and the perspective of unfree Black labour. This section discusses these perspectives to draw insights on how the concept of redistribution in general has developed and, specifically, how this development has impacted on the conceptualisation of redistribution in the BBBEE policy.

- **Studies exploring land redistribution policy failure**

The historical oppression of Black people in South Africa prioritised the removal of land as a key economic resource from the hands of Black people. As Ramose (2002b) notes, "the quest for justice in the form of restoration of title to territory and sovereignty over it is primarily predicated on the premise that land is the indispensable resource for the sustenance of human life [and that] the right to life is inseparable from the right to land" (pp. 486). The struggle for liberation was, therefore, primarily about the return of dispossessed land and the wealth it possesses to Black people. Land, in this sense, is an important element in the economic empowerment of the Black population. As such, land redistribution in South Africa has historically formed an important part of discussions about redistribution for the attainment of socio-economic justice and the economic empowerment of Black people. It is, therefore, important that in interrogating and analysing the contested legal meanings and conceptualisations of redistribution in BBBEE policy, that the study should reflect on the legalities of land redistribution for insights on why meaningful redistribution has not been achieved.

The legalities around land redistribution continue to receive attention as the discourse on South Africa's land redistribution policy grows. Political economic studies to this effect have focused mainly on the long lasting effects of the Native Land Act of 1913, section 25 of the constitution (1996) that deals with property rights (the 'property clause'), and government's 'willing buyer willing seller' policy on land redistribution. There are two main schools of thought on the effectiveness of section 25 of the constitution in land redistribution. On the one hand is an argument that land redistribution continues to be unattainable in the country because the property clause makes government's policy on land redistribution unworkable. On the other hand, there is an argument that the law and the policy do not stand diametrically opposed to each other and that, if applied correctly, can achieve the desired redistributional results.

One of the notable studies that have been produced on the land question in South Africa was co-edited by Ntsebenza and Hall (2007) under the title 'The Land Question in South Africa – The Challenge of Transformation and Redistribution'. In it, Ntsebenza revisits section 25 of the constitution and assesses its effectiveness in facilitating land redistribution. Ntsebenza (Ntsebenza and Hall, 2007) approaches this analysis by interrogating the alignment of the law (section 25 of the constitution) to government's 'willing buyer willing seller' policy. Through a juxtaposition of the text in both law and policy, or content analysis, the study finds that the 'willing buyer willing seller' policy seems to 'weaken' the expropriation clause of section 25 of the constitution by protecting existing property rights while at the same time making a commitment to redistribute land to the dispossessed majority (Ntsebenza and Hall, 2007). The central conclusion of the study is that the text in the law (section 25 of the constitution) and in the policy effectively create competing rights that cannot be reconciled and this leads to the failure of land redistribution policy.

However, Pityana (2013), in his assessment of the effectiveness of section 25 of the constitution in facilitating land redistribution, opposes the view that the law and policy have a cancelling effect on each other, rendering land redistribution difficult or impossible. Pityana (2013) argues that "section 25 of the constitution seeks to strike a balance between competing interests, historical injustice of dispossession, the need for redress and the importance of respect for property ownership in a post-apartheid mixed market economic dispensation," (p. 50). According to Pityana (2013), therefore, the issue is in the interpretation of the text of the property clause. In other words, the challenges currently facing land redistribution may be created by government's reluctance to use a more radical interpretation of section 25 of the constitution. This kind of radical interpretation, as proposed by Sebola and Tsheola (2014), would ensure that when the property clause is used for land redistribution, the right balance is struck between the need for transformation and the need for economic sustainability, which seems to be a secondary consideration within the current policy framework. However, the idea of economic sustainability is closely linked to the concept of market-based land reform. The critical matter for consideration in this type of approach, as Borras (2003) observes, is whether a transformation in class relations on land is possible if market prices are to be paid for land, given the historical context of the economic exclusion of the majority of Black people in South Africa.

Both the arguments advanced by Ntsebenza and Hall (2007) as well as Pityana (2013) – supported by Sebola and Tsheola (2014) – address broad principles of the law based on doctrines expressed in the country's basic law, the constitution. However, the constitution is only a legal compass and not the final policy implementation instrument. This is the reason the democratic government enacted the Restitution of Land Rights Act of 1994 to reverse the wrongs of the apartheid government's Native Land Act of 1913 which dispossessed Black people of their land. Notwithstanding the inclusion of section 25 in the constitution and the enactment of the Restitution of Land Rights Act, some scholars, such as Lahiff and Li (2012), have found that the legal framework on land reform and redistribution is inadequate. In their critical review of land redistribution in South Africa, Lahiff and Li (2012) observed that section 25 of the constitution, while providing the basis for a potentially far-reaching land reform programme, was short on specifics – particularly on the rights and obligations of various parties in the land reform and redistribution process. Lahiff and Li (2012) also noted that the Restitution of Land

Rights Act had not set out the methods to be used for land reform and redistribution. To this end, Lahiff and Li (2012) recommended the enactment of new legislation that would set out the fundamentals of the land reform programme and clarify the roles – and legitimate expectations – of state agencies and private citizens alike, and create the basis for a more integrated, and participatory, programme of land reform. As such, Lahiff and Li's (2012) critical review of of land redistribution in South Africa did not consider conceptual issues related to land redistribution and only raised process issues that would improve the implementation of the country's land reform programme. Therefore, any analysis of the legalities around land redistribution in South Africa that does not consider the conceptions of land redistribution used in legal instruments that must give effect to the principles expressed in the constitution and policy, is limited.

In fact, this is more so when one considers that there are other layers of influence that affect the implementation of redistribution policy. For instance, Fraser (2011) argues it is important to investigate the role of international law in addressing or perpetuating social injustices. Reh, Héritier, Bressanelli and Koop (2011) also make the point that considering the role of international law in national redistribution is important. Mamabolo and Tsheola (2017), in an analysis of the power asymmetry in the distribution of historical rural land between rural communities and white land owners, touch on this perspective by noting the role of international conventions in hampering land redistribution in South Africa. They cite the United Nations' (2015) Sustainable Development Goals – which South Africa is signatory to – Goal 15 in particular, which requires nations to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably merge forests, combat desertification, halt and reverse land degradation, as well as halt biodiversity loss. In the result, argue Mamabolo and Tsheola (2017), large tracts of land that previously produced crops for food for rural communities were turned into nature reserves to escape the anticipated land reform as part of the protected areas under the United Nations convention.

Such a situation, as described by Mamabolo and Tsheola (2017), is of course unacceptable and flies in the face of national sovereignty and the implementation of a programme to redress the impact of apartheid, which the United Nations itself declared a crime against humanity (United Nations, 1976). Specifically, Article 2 of the United Nations' International Convention on the Suppression and Punishment of the Crime of

Apartheid (1976) declares ‘any legislative measures and other measures [that] prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups’ as a crime against humanity. It is accepted that access to land is essential for social, economic and cultural life. The denial of rural communities of land that previously produced crops for food for them in order to comply with the requirement of the United Nations (2015) to conserve such land, is nothing more than a perpetuation of a crime against the indigenous people. It is also a crime because there is no rule of general international law that United Nations treaties must have effect in domestic law (Saunders, 2020). Having said this, section 231(4) of the South African constitution (Parliament, 1996) provides that self-executing provisions of treaties that have been approved by Parliament also take effect as law unless they are inconsistent with the constitution or a statute. It is argued that, even under this test, the requirements of Goal 15 of the United Nations’ (2015) Sustainable Development Goals must still be considered illegal as they are inconsistent with section 4 of the constitution, which reaffirms the national commitment to land reform and reforms to bring about equitable access to all South Africa’s resources.

The denial of rural communities of land has led to the emergence of the notion of elite capture in land redistribution in South Africa, where pro-poor precepts of land reform have increasingly been abandoned in favour of commercial success (Mtero, Gumede and Ramantsima, 2019). Kepe and Hall (2016) highlighted elite capture in land redistribution in their commissioned report for Parliament’s High Level Panel on the assessment of key legislation and the acceleration of fundamental change. Kepe and Hall (2016) observed that policy changes since the 1990s had changed the design and delivery of land redistribution in several significant ways, including the removal of a means test to target only poor households; the shift away from a primary focus on settlement towards agricultural production in exclusively rural areas; and the introduction of joint ventures with commercial strategic partners, among others. A combination of these factors, noted Kepe and Hall (2016), were impeding the provision of settlement and production support to poor, Black beneficiaries and deradicalising land reform into a narrow programme ripe for elite capture.

Hall and Kepe (2017), have argued that land redistribution in South Africa has been constrained by more than just the constitutional settlement and protection of private property, as well as the market-based land reform approach, but also the policy shift to state land purchase and leasing. From 2011, explain Hall and Kepe (2017), the government has adapted the willing buyer, willing seller approach resulting in the state itself becoming the purchaser of land, acquiring land for redistribution to beneficiaries without transfer of title. According to Hall and Kepe (2017), this new approach to land redistribution has created new problems for land redistribution, the most critical of which is the elite capture of the land redistribution process, which obscures the class agenda and vision for agrarian reform. According to the new approach to land redistribution, found Hall and Kepe (2017), government concludes leases with the strategic partners – namely, agribusiness companies – rather than with the beneficiaries themselves who are rural Black people. In this arrangement, the beneficiaries, therefore, neither own the land nor lease it, but remain workers on state farms, working for strategic partners who are white. Hall and Kepe (2017) conclude as follows:

> "Such cases comprehensively draw into question whether state funds for 'redistribution' are being used to provide (white) agribusinesses with cheap or free access to land in the name of redistributing land to (black) rural people. To the extent to which this is more widespread, it begs the question of *why* this is the case – and the degree to which the phenomenon can be attributed to corruption and collusion by the state officials who sanction such deals, or to attempts by officials to ensure commercial production even at the cost of redistributing land or wealth to the ostensible beneficiaries," (p. 8).

In a study by Mtero, Gumede and Ramantsima (2019), attention was given to the issue of elite capture with a focus on government's Proactive Land Acquisition Strategy (PLAS) introduced in 2006 and operationalised through the State Land Lease and Disposal Policy (SLLDP) in 2013. The study by Mtero, Gumede and Ramantsima (2019) sought to deepen understanding of elite capture and provide a more comprehensive picture of how elite capture unfolds in land reform. Mtero, Gumede and Ramantsima (2019) found that, over time, government policy on land reform has shifted away from a primary focus on settlement towards agricultural production and this had resulted in greater emphasis on business related matters on land reform – such as viable business plans, production targets and profits – to the detriment of social justice and equity imperatives. Kepe and Hall (2018) also found that PLAS was no longer consistent with the project of decolonisation, which was the initial aim of land reform, and had moved the land reform programme away from the ideal of social justice, in this sense betraying the idea of land reform as decolonisation. While the land reform programme had been good on paper, noted Kepe and Hall (2018), it was being poorly implemented.

According to Kepe and Hall (2016), since the advent of PLAS, one of the very few ways that the beneficiaries can receive production support from the state is through the Recapitalisation and Development Programme (RECAP). However, in order to qualify for RECAP support, beneficiaries have to have a business plan, and either a mentor or a strategic partner. The impact of this, observe Mtero, Gumede and Ramantsima (2019), was the skewing of the distribution of resources in land redistribution in favour of those who had resources to make land commercially successful or economically viable, which, in most cases, was not the rural people living and working on the land. Within this context social justice imperatives, such as farm worker welfare and inclusion of historically disadvantaged groups, were relegated to secondary considerations (Mtero, Gumede and Ramantsima, 2019).

The insights to be gained from this analysis of studies on land redistribution for answering this study's stated questions on BBBEE, is that it is important to determine the conceptual basis on which policies and laws to support redistribution are put in place as this determines the impact of these instruments. As has been shown with the land redistribution question in the preceding analysis, conflicting interpretations arise out of ambiguous formulations of key notions in policy and legislation. The analysis also shows that with the evolution of policy over time, original policy conceptions may become misdirected as contestations continue, driven by different interest groups. These contestations extend to the interpretation of the constitutional provisions related to the specific legal instrument, as the preceding discussion has shown. Whille specific legislative pieces are used for primary argumentation in the court of law, the manner in which the subject of the legislation is conceptualised in the constitution can also impact the successful implementation of a law as all legislation must ultimately be consistent with the constitution. Therefore, in endeavouring to answer the research questions on BBBEE, it will be important to continuously reflect on the constitution for a broad understanding of the conceptions of redistribution in the BBBEE policy and BBBEE Act, with due regard, however, that when policies become matters of law, it is the policy instruments, the specific legislation, that form the basis for primary argumentation in courts of law, not the constitution (Ngcobo, 2007). This is more so in the case of the redistribution of economic opportunities (as envisaged in the BBBEE policy and BBBEE Act), which does not feature in the constitution, but may be linked to the constitutional intent to 'heal the divisions of the past' and establish a society based on 'social justice'.

- **Studies exploring labour market redistribution policy failure**

Among the objectives of the BBBEE policy is the attainment of a significant increase in the number of Black people in executive and senior management of enterprises, as well as increased income levels of Black persons and a reduction of income inequalities between and within race groups. With regards to redistribution of opportunity in the labour market, the Commission for Employment Equity (CEE) (2019), has shown that middle class white people in South Africa continue to hold the highest paying jobs in the private sector, nearly twenty years since the enactment of the BBBEE Act. A number of studies have been undertaken to understand why Government's policy on employment equity and the Employment Equity Act have not achieved the desired redistributive effects. These studies on the redistribution of opportunity in the labour market offer important perspectives on the conceptualisation of redistribution. They also provide a basis on which to build a position on whether the codification of redistribution of opportunity is consistent in policy and law. Some notable studies in this regard are discussed below.

In a twenty year assessment of South African Labour Law, Benjamin and Cooper (2016) demonstrate how limitations in labour legislation have slowed progress towards transformation in the workplace. Whilst their study is descriptive in nature, seeking to paint a picture of transformation in the workplace since the advent of democracy and the impact the existence of transformative legislation has had, it importantly highlights the power dynamics and contestations at play between employers / organised business, organised labour, and the government in how legislation is conceived and implemented. The study does this by plotting the history of different legislation under labour law and the protracted and difficult bargaining processes that have taken place over the years, firstly to put the laws in place, and to amend them as weaknesses were identified in implementation. In the result, note Benjamin and Cooper (2016), the extent to which the capacity of labour legislation is able to achieve its goals remains dependent on broader social transformation as employers / organised business continue to resist amendments that promote transformation. This argument supports the assertion by Leibbrandt, Woolard, McEwen and Koep (2010) that until labour laws are interpreted and implemented by all role players in the spirit of transformation, employers will continue operating outside the legal framework – without consequence – in order to avoid aspects of the law they do not agree with. Both studies by Benjamin and Cooper (2016) and Leibbrandt *et al* (2010) pay insufficient attention to answering the critical question of what deficiencies can be identified in the conception of the laws which make them contestable and ineffective. Horwitz and Jain (2011) describe the labour legislative regime as reflecting a ‘carrot and stick’ outcomes compliance rather than a commitment approach. It is for this reason that Leibbrandt *et al* (2010) note that despite well-meaning labour regulations the Black labour force continues to be victims of unemployment and discrimination in the workplace. Structural inequalities such as glass ceilings, power and systems that favour the male gender and accompanying misogynistic cultures and behaviours, impact transformation in the labour market (Horwitz and Jain, 2011). Whilst useful in demonstrating the failure of labour legislation to produce redistributive outcomes, the studies by Benjamin and Cooper (2016) and Leibbrandt *et al* (2010) do not offer an analysis of the construction of labour redistributive concepts in the legislation and how this continues to enable organisations to operate in ways that promote inequity in the workplace, particularly in the private sector. One of the reasons it is important to answer this question is that, it has been shown that the poor performance of the labour market on transformation has been central in the worsening of inequality in the wider society (Leibbrandt *et al*, 2010).

Redistribution of opportunity in employment in the public service has also been investigated, particularly as it relates to gender equity. Studies to this effect have sought to understand the barriers that prevent women from occupying the most senior positions in the public service. Generally, these studies move from the premise that the national policy on gender equity and its implementing instrument, the Employment Equity Act, are sufficient to bring about gender equity in the workplace. For instance, Osituyo (2017) investigated why women are rarely found in senior-level decision-making roles in the public service by asking public servants whether they thought this was linked to women's managerial capabilities or gender stereotypes. Mokoena (2018) has also looked into the barriers that prevent women from occupying the most senior roles in the public service by collating data on gender equity in the public service. In the findings, Mokoena's (2018) largely descriptive study suggests that it will take a very long time for women to gain equality with men in leadership positions in the public service in South Africa, but does not offer a comprehensive analysis of the cause of the problem, except to indicate that Government needs to continue to remove barriers and put much stronger measures to achieve equal representation in its institutions. A number of studies in this regard have taken this limited approach.

Labour market redistribution has also been investigated from the perspective of the failure by employers to mainstream people with disabilities in the work place. Some studies in this regard have focused on the conceptions of disability used in the Employment Equity Act and the impact of these conceptions in facilitating the mainstreaming of people with disability in the work place. In a study, Ngwena (2007) noted that extrinsic disabling factors were integral to a meaningful interpretation of disability. Ngwena (2007) delved into the social construction of disability and argued that both the medical and social models are essential tools for understanding and shaping the construction of disability. Where the legislative objective is to prevent discrimination, observed Ngwena (2007), a construction of disability that fails to transcend the medical model risks not only frustrating, but also distorting, in a fundamental manner, the rational for anti-discrimination law as a tool for combating systemic disadvantage arising from stigma, prejudice, stereotypes or indifferent attitudes.

Mswela (2018) has also placed focus on the conceptions of disability used in the Employment Equity Act from the perspective of albinism, to understand whether albinism is classified as a disability, as well as to understand the construction of disability under the Employment Equity Act in order to shed light on whether people with albinism qualify for the protection afforded to people with disabilities in the work place. Mswela (2018) found that the South African definition of disability, as set out in the Employment Equity Act, was narrow and insufficiently inclusive. Mswela (2018) called for a broader approach to viewing disability, which includes both a social and a human rights perspective or a socio-political perspective, which places emphasis on human dignity, respect and the right to equality. Mswela (2018) noted that the Employment Equity Act definition of disability needed to be reviewed with the view to identifying the unique disadvantages and negative stereotyping suffered by people with albinism as a result of the narrow definition of disability used in the Employment Equity Act. Furthermore, Mswela (2018) argued that the disadvantages and negative stereotyping suffered by people with albinism as a result of the narrow definition of disability used in the Employment Equity Act should be recognised as unlawful conduct against people with disabilities as defined by legislation. These studies on the mainstreaming of people with disabilities in the work place and the conceptualisation of definitions in the Employment Equity Act, demonstrate the importance of adequately defining key terms in legislation in order to achieve the desired redistributive outcomes. As both these studies have demonstrated, a narrow or distorted conception of disability can have significant impact on the implementation of the legislation and place limits on what it can achieve.

There are also studies that have investigated labour market redistribution from the gender perspective. South Africa's Commission for Gender Equality (CGE) has investigated the extent to which public sector institutions in South Africa are making progress on gender main-streaming and transformation (Mohlakoana-Motopi, Ngobeni, Bazola, and Chauke, 2014). The study looked at areas such as organisational leadership and gender profile, gender mainstreaming policies, organisational cultures and systems, women's involvement in decision-making, and gender budgeting. Whilst the study noted inconsistent progress on gender main-streaming and transformation in the public service, it highlighted that security cluster departments were the worst performers in this regard. As with other similar studies on the matter, the CGE noted poor leadership and a lack of leadership training as a cause for the failure of gender main-streaming and transformation and did not venture further to interrogate any other underlying issues, such as the impact of key concepts as they relate to gender and the distribution of opportunity, that possibly render the policy on gender equity and the Employment Equity Act ineffective.

One of the most comprehensive studies examining the factors that hamper the implementation of gender equality within the South African public service was conducted by Bangani and Vyas-Doorgapersad (2020). Titled 'The implementation of gender equality within the South African Public Service (1994–2019)' the descriptive study gave an in-depth account of gender inequalities in the public service. In noting the poor implementation of the Employment Equity Act in the course of advancing gender equity in the public service, Bangani and Vyas-Doorgapersad (2020) suggest that, while equity targets (carrot and stick approach) are a good way to promote gender equity, it was necessary to move beyond targets and adopt a more far reaching approach that transforms gender relations in the public service – and the country in general – as part of the entrenchment of democracy. This recommendation is particularly interesting because it speaks to how gender equity is conceived and approached. Arguably, once a problem is identified with the manner in which gender equity is conceived in the workplace, this must be followed by an analysis of whether the legal instruments put in place to achieve this equity align to this ideal in terms of their codification of gender equity. Bangani and Vyas-Doorgapersad's (2020) investigation therefore falls short in this regard. As such, the aim of the current research is to build on such studies to construct a position on the importance of the consistent codification of redistribution of opportunity in policy and law.

- **Studies exploring BBBEE policy failure**

The effectiveness of the BBBEE policy has also been explored from a number of perspectives, including its impact on business and economic performance, particularly because of its positioning as an economic transformation strategy that would facilitate the deracialisation and engendering of the country's economy (Department of Trade and Industry, 2003).

Acemoglu, Gelb and Robinson (2007) provided an analysis of BBBEE focusing on its impact on firm behaviour and performance and economic growth. Acemoglu, Gelb and Robinson (2007) tried to identify the specific problems the BBBEE policy was conceived to solve and further determine whether there existed other instruments which could have been used to achieve the same aim. In this sense, their study delved into the conceptual foundations of BBBEE in relation to facilitating improved business performance and economic growth. Acemoglu, Gelb and Robinson (2007) found that the BBBEE policy was unlikely to be optimal from the perspective of growth and could not be a self-sustaining programme. Acemoglu, Gelb and Robinson (2007) suggested a review of the conceptual framing of the BBBEE policy as a transitory intervention – aimed at breaking up the initial conditions inherited from apartheid and pushing South Africa towards higher levels of productivity, equality and social welfare – rather than a permanent programme. The reason for this, argue Acemoglu, Gelb and Robinson (2007), is that the policy is not clear what happens in the future after the various targets have been met. This proposal suggests that Acemoglu, Gelb and Robinson's (2007) study, called for an approach to the BBBEE policy geared towards justice for the previously disadvantaged Black majority that would break up the initial conditions inherited from apartheid and putting in place measures that would ensure those conditions do not rematerialise. The study by Acemoglu, Gelb and Robinson (2007), therefore, offers some direction with regards to exploring the conceptualisation of redistribution in the BBBEE policy, and redistribution policies in general – for the attainment of justice, as per the interest of the current study.

Krüger (2011) also investigated the impact of the BBBEE policy on business performance. Krüger's (2011) study took the form of a survey interviewing five hundred managers – employed in small enterprises and micro-enterprises, medium enterprises and large multinational companies – on their perceptions and thoughts regarding the impact of the BBBEE policy on various areas of business performance. The study by Krüger (2011) was motivated by the enactment of the BBBEE Act and the roll out of the Codes of Good Practice for BBBEE in various business sectors and the fact that "little research has actually been done on the more 'practical issues' related to [BBBEE] compliance, such as the potential impact it may have on the various dimensions of business performance" (Krüger, 2011: 213). The study by Krüger (2011) found that the perceptions of respondents in the study – a large majority (70%) of whom would stand to benefit from BBBEE practices and similarly viewed themselves as being qualifying previously disadvantaged individuals – indicated that the impact of the BBBEE policy on South African businesses on various business dimensions were mainly negative. Krüger (2011) therefore proposed a reimagining or reconceptualisation of the redistributive or transformative intent targeted through the BBBEE policy for a programme that would receive greater support from managers of companies in South Africa and therefore have more credibility. Whilst the study by Krüger (2011) goes into great detail unpacking the measures government had put in place to implement the BBBEE policy framework, it offered no substantive discussion of the rationale or the necessity of BBBEE as an instrument for the pursuit of socio-economic justice to ground its analysis. Because of this, the study takes a limited stance in its interrogation of issues around the BBBEE policy and business performance. The evidence of this limited approach is revealed in the study's results, which suggest that unless the implementation of BBBEE is reconsidered, the programme would suffer a credibility crisis and would not receive adequate support from managers of companies. Krüger's (2011) study therefore offered no contribution on how to improve the implementation of the BBBEE policy to give it credibility and garner support for it from managers, nor does it offer any alternatives on how the BBBEE aim to redress the racialised distribution and resultant economic inequities of the apartheid past by advancing Black ownership of and control over the economy could be achieved.

Kleynhans and Kruger (2014), in their study of the effect of BBBEE on profit and competitiveness of firms in South Africa, observed that the implementation of BBBEE within companies had a positive effect on profitability, turnover and investment. Unlike Krüger's (2011) survey based study, Kleynhans and Kruger's (2014) study was a quantitative study undertaken to find empirical evidence supporting the relationship between high BBBEE scores, profitability and competitiveness. The significance of Kleynhans and Kruger's (2014) study for the current research is in its grounding of its investigation on the conceptualisation of the BBBEE policy as an instrument 'to reach new levels of wealth, profitability, competitiveness, equality, and social welfare for all'. To this end, the study by Kleynhans and Kruger (2014) investigated the conceptual foundations of the BBBEE policy and how these were formulated to achieve profitability and competitiveness in transformed businesses or businesses that embrace the implementation of empowerment initiatives. These empowerment initiative in the long run were expected to redress the racialised distribution and resultant economic inequities of the apartheid past by advancing Black ownership of and control over the economy (Southall, 2006). Kleynhans and Kruger (2014) observed in their findings that when the enablers of the BBBEE policy – such as the implementation of the BBBEE generic scorecard – were applied, economic growth was inevitable because companies could, for example, enjoy the benefits of high BBBEE scores, which increases their chances of accessing government contracts. Kleynhans and Kruger (2014) note that long-term effects, such as sustained profitability and an increase in investments, are possible if the BBBEE policy is applied with consistency. The insights provided by the study therefore suggest that a correlation exists between the framing of aspects or conceptualisations of economic empowerment as outlined in the BBBEE policy and the outcomes as they relate to the policy's objectives. The findings of Kleynhans and Kruger's (2014) study confirm that there is a need for a deeper interrogation and analysis of the conceptions of redistribution in the BBBEE policy and their legal codification in the BBBEE Act to determine the consistency of their application and the impact thereof on policy outcomes.

There have also been studies evaluating the relationship of BBBEE and the law. The Competition Act of 1998 was one of the early legal instruments introduced in the democratic era to promote equity and advance Black economic empowerment. The stated aim of the Competition Act was to provide all South Africans equal opportunity to participate fairly in the national economy, as well as promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (Parliament, 1998a). However, it has been argued that the Act did not pay attention to the salient issues for the reversal of white economic domination and redistribution. As Hirsch (2005) notes, "The [Competition Act], when it was finalised, acknowledged the objective of wealth redistribution, but did not build in instruments to enable competition law to be a primary tool of redistribution," (p. 201). Goga and Mondliwa (2021) also observe that the Competition Act has had muted impacts, particularly for dealing with abuse of dominance by large incumbent firms. In part, note Goga and Mondliwa (2021), the lack of impetus of the Competition Act has been due to its ineffective design – as also noted by Hirsch (2005) – which was an outcome of negotiations between big business, the government, and labour formations. In the result, Mncube and Ratshisusu (2021) in a study on competition policy and Black empowerment, note that the Competition Act has not succeeded in transforming ownership in the economy by reversing white economic domination and facilitating redistribution.

Shava (2016) makes similar observations about BBBEE and its inability to effect economic transformation through redistribution, and argues that the practice of fronting has a constraining effect on the BBBEE policy's redistributive objectives. "The impact of fronting created doubts [and] lack of trust among citizens on whether [the policy's mandate] of rectifying the socio-economic injustices [can be achieved]," observes Shava (2016). Shava (2016) concludes by noting that the BBBEE policy faces a number of obstacles – including corruption, fraud, mismanagement, poor accountability, lack of monitoring and evaluation, difficulties in registering companies under BBBEE – that hinder the capacity of the policy to become an economic imperative aimed at redressing past imbalances. These observations point to a need for further investigation of the intent of redistributive law and the coding of the key concept of redistribution found in it.

The relationship between Government's policy on BBBEE and its supporting BBBEE Act, has also been studied widely. In this regard, researchers have focused their studies on the economic inclusion enabled by the BBBEE policy and BBBEE Act, as well as how the BBBEE policy and legal framework have affected business practices on matters such as mergers and acquisitions as well as the appointment of directors.

The country's redistributive economic policy programme as imagined before the advent of democracy underwent numerous ideological vicissitudes as a result of the balance of economic and political power, at both the global level (notably the fall of the Soviet Union in 1991) and local level (the Codesa negotiations and the need to resuscitate an economy that had been ailing since the 1970s with the assistance of foreign investment). The original BBBEE policy created expectation for the attainment of social justice and transformation when it was introduced during the early years of democracy. However, the policy soon attracted criticism as the perception grew that it only benefitted the elite and politically well-connected, failed to contribute to reducing the constantly widening gap between the rich and the poor and provided only an impression of change (Uppal, 2014, Herman, 2017 and Tangri and Southall, 2008). Others opposed the policy for different reasons, labelling it reverse discrimination and an impediment to economic growth (Uppal, 2014). The diametrical views on the policy led to debates about its necessity between those in favour of positive discrimination and those who viewed it as unjust discrimination or inefficient. The policy was later reformulated in an attempt to reposition it for broader reach within the Black community and attempting to redress historical inequalities (Herman, 2017).

Adversaries of the policy and some scholars are still advocating for it to be discontinued and a new formulation of the policy to be reintroduced. Krüger (2016) proposes a discontinuation of BBBEE because it has not brought about economic growth and social development, and advocates instead that economic redistribution be left to market forces. The think tank South African Institute for Race Relations (IRR) has also put forward a proposal to reconceptualise economic empowerment by introducing a general policy of economic empowerment for the disadvantaged (EED) (Roodt, 2018). In essence, EED seeks to abandon the redistributive objectives of the BBBEE policy, including its legal framework, and replace them with what is termed 'equal opportunity for all' – a neo-liberal conception that, in fact, seeks to perpetuate racial inequality through a non-racial policy that removes attention on the need for socio-economic justice and redistribution for the Black majority and, instead, promotes entrepreneurship, the market and rapid economic growth (key elements of the Washington Consensus) as key policy thrusts for empowerment. Bilchitz (2016) argues that these controversies around Black economic empowerment, and socio-economic rights in general, reveal important questions about the coding of socio-economic rights in the constitution and how they make the ground fertile for contestations on economic policy and models for development. This thinking is supported by Francis and Valodia (2021), who call for a more conceptual investigation of BBBEE and how its current formulation has been shaped by legislation and policy.

Ponte, Roberts and Van Sittert (2007) undertook this kind of conceptual investigation of BBBEE by examining it through the lens of a developmental state, focusing on the relationship between BBBEE and economic policy in South Africa. The study by Ponte, Roberts and Van Sittert (2007) noted that BBBEE was applied in the context of neoliberal economic policy, as captured in the GEAR framework, and other general constraints – such as mobility of capital and investment as well as risk rating – and that the focus on the market-friendly and non-interventionist principles promoted in the

GEAR framework left little room for manoeuvre in terms of redistribution through BBBEE. Furthermore, Ponte, Roberts and Van Sittert's (2007) study argued that the ANC government failed to adequately conceptualise BBBEE to deal with the existing corporate structure and the control of the 'commanding heights' of the economy. The study also pointed to a disconnect between BBBEE and the economic policy, which resulted in the managerialisation of BBBEE or the treatment of BBBEE as a separate, technical entity to be managed according to the principles of corporate social responsibility and compliance management. This managerilisation of BBBEE, argued Ponte, Roberts and Van Sittert (2007), diverted attention away from the desired substantive goal to change the racial ownership of the economy through redistribution. In the end, Ponte, Roberts and Van Sittert (2007), argue for 'a major shift' in conceptions of the BBBEE policy from a managerial process to a more substantive policy proposal that will enable the delivery of meaningful empowerment.

The prevailing studies conducted on the BBBEE policy and its legal framework have therefore been stuck on the contested perspectives of its formulation – either rejecting or defending its necessity – but largely failing to interrogate whether the redistributive conceptual basis of the policy and its supporting legal instrument actually assist to achieve the substantive goals of transformation, redress, reconciliation and social justice as outlined in the constitution.

As Tangri and Southall (2008) note, the ANC favoured the creation of a high profile group of wealthy Black businessmen, referred to as a 'patriotic bourgeoisie', who would be used to strengthen the relationship between government and business as well as be part of the process to deracialise the economy. But has the concept of the patriotic bourgeoisie delivered diversity in the South African economy?

Ijasan (2018) made an attempt to move research on BBBEE in this direction by evaluating the BBBEE Act as a diversity initiative that should move beyond managing diversity to fostering diversity. This research found that the Act displays only potential for fostering diversity and recommended that the implementation process of BBBEE be reviewed to attend to the salient issues of diversity. Cawe and Mabasa (2020) also cited implementation challenges with BBBEE. In one of the recent evaluative studies on BBBEE, Cawe and Mabasa (2020) offer recommendations on 'refining' the BBBEE policy to close the gap between the intended goals of the policy and implementation. Implicit in Cawe and Mabasa's (2020) argument is the notion that the conceptual basis for BBBEE does not require scrutiny; instead, there needs to be an assessment of the strategies put in place to implement the policy. To this end, they propose that the features of contemporary capitalism that influence the policy's substance and form ought to be taken into consideration. One of the key proposals they make in this regard relates to identifying new sectors to 'unlock opportunities for empowerment' and achieve national socioeconomic objectives.

Vilakazi and Bosiu (2021) have also conducted an assessment of the strategies put in place to implement the BBBEE policy. In their study, Vilakazi and Bosiu (2021) analysed the challenges with the approach taken with BBBEE, and provided insights into its inability to address specific barriers to entry and the deracialisation of the economy. One of the areas Vilakazi and Bosiu (2021) analysed was legal compliance with BBBEE. Vilakazi and Bosiu (2021) observed that the non-compulsory nature of the Codes of Good Practice and the lack of legal penalties on firms for failing to comply with the Codes, acted as an obstacle to BBBEE. "Even after the first BEE legislation was enacted," observed Vilakazi and Bosiu (2021:95), "many companies, particularly those not reliant on government contracts or licences, have failed to meet BEE requirements for various reasons, including the lack of an economic incentive to do so." Another area Vilakazi and Bosiu (2021) analysed pertained to the financing of BBBEE deals, noting that the model of equity acquisitions by Black business and groups had failed because many of those acquisitions were based on loans that left real economic control and returns in the hands of the established corporations.

Vilakazi and Bosiu (2021) also looked into the allocation of BBBEE points and its impact on successful transformation. Vilakazi and Bosiu (2021) noted that it was disingenuous to allow large companies to gain BBBEE points for spending on corporate social investment schemes. Vilakazi and Bosiu (2021) observed that, while such initiatives may have been helpful to society in general terms, gaining BBBEE points from them gave white businesses latitude to claim empowerment status even when forgoing the inclusion of Black businesses or individuals into their value chains and management structures, which was at the core of BBBEE. In the end, observed Vilakazi and Bosiu (2021), the BBBEE policy framework has failed to impact the economy at structural level. These and other challenges with the implementation of BBBEE pointed to a greater difficulty of government's inability to intervene decisively in the transformation of the economy. As Vilakazi and Bosiu (2021) explain, the BBBEE policy agenda required a high level of government intervention to be successful; however, it was implemented within an economic policy context that was fundamentally neoliberal and market-oriented, and thus not giving much space for government to intervene decisively. These issues were exacerbated by the fact that government had no discernible strategy to deal with the legacy of entrenched economic concentration, the power of large firms, high barriers to entry, and the challenge of developing new Black industrialists and firms (Vilakazi and Bosiu, 2021).

Vilakazi and Bosiu's (2021) research therefore was concerned more with the structuring of BBBEE interventions and the impact of government's broader economic policy on the implementation of BBBEE. As with other literature reviewed in this section – such as Mncube and Ratshisusu (2021), Ijasan (2018), Cawe and Mabasa (2020) – it did not adequately engage with the conceptions of economic redistribution found in BBBEE policy framework and their impact on the implementation of the BBBEE policy.

- **Insights gained from studies on redistribution policy failure in relation to BBBEE policy**

The question of achieving transformation, redress, reconciliation and distributive justice through BBBEE therefore remains important because it concerns the interpretation of socio-economic rights as, in some sense, it identifies some of the tensions in capturing the internal goals of these rights in policy and in law (Bilchitz, 2016). As Williams (2011) proposes, laws can have skewed distributional effects and this is not accidental or coincidental, but rather a deliberate formulation directing how opportunity and resources are distributed. This thinking receives support from a seminal study by Pistor (2019), which explains the legal code of capital or how legal coding transforms assets of insignificant value into assets that create capital and generate wealth for its holder. Legal devices such as contract law, property rights, collateral law, trust, corporate, and bankruptcy law, notes Pistor (2019), are the modules from which capital is coded:

> “They bestow important attributes on assets and thereby privilege its holder: *Priority*, which ranks competing claims to the same assets; *durability*, which extends priority claims in time; *universality*, which extends them in space; and *convertibility*, which operates as an insurance device that allows holders to convert their private credit claims into state money on demand and thereby protect their nominal value, for only legal tender can be a true store of value… Once an asset has been legally coded, it is fit for generating wealth for its holder,” (Pistor, 2019: 3).

This process of legal coding, argues Williams (2011), is a political process that infuses the politics of race, gender, and class to structure law in societies around the world to work to keep people in poverty rather than improve their welfare, whilst protecting the key elements of neoliberal globalisation such as investor rights, trade freedoms and low corporate taxation (Caroll and Sapinski, 2010).

This study argues that the skewed power relations between the ruling party since 1994 and the owners of capital, the former colonisers, resulted in redistribution policy – whether economic redistribution, land redistribution or redistribution of opportunity in the labour market – in the democratic era being stillborn because the greater bargaining power of capital influenced these policies to sustain racialised economic legacies that still condition the distribution of opportunity, resources and wealth in favour of whites and paradoxically protects their privilege through neo-liberal state policies and laws that legitimise a new form of oppressive domination and capital accumulation in the democratic era (Ruiters, 2020).

The contestations that exist in the meaning of key provisions in redistribution policy are an indication that there are fault lines in the conceptual foundations of these policies. It is also the suggestion of this study that the fault lines in the conceptual foundations of policy are transferred to the legal instruments that are meant to ensure the implementation of policy, also rendering them ineffective.

This study, therefore, aims to examine the conceptual basis of redistribution in the BBBEE policy and how this finds expression in the BBBEE Act, if at all. This inquiry is important to undertake because unless the BBBEE policy (and any policy with a redistributive intent) is interrogated on the conceptual basis which underpins its redistributive provisions, any amendments to the policy and legal instrument face the risk of being partial and therefore unlikely to be able to substantively revise the policy framework in ways that realise substantive as opposed to symbolic transformation. In addressing the stated research problem, it is important therefore to ask questions about the sanctity of law within the current constitutional order. It is important to examine which values the law represents and who gains from it and the application of critical theory arguably provides significant insights in this regard.

2.4 Introduction to critical theory and its key components

Critical theory evolved from Marxism in the early nineteenth century, which until then had concerned itself with perfecting a historical understanding of class struggle in order to develop a systematic method to counter and end capitalist classism (Thompson, 2017). Early critical theorists saw orthodox Marxism as being restricted by a critical weakness in its failure to accurately link theory to the lived experiences of the working class. Critical theory, therefore, emerged out of the need to reformulate the class struggle away from dogmatic orthodox Marxism to direct it towards an approach grounded on the lived experiences of communities, thus interlinking theory and society (Bronner, 2004).

Thompson (2017) proposes that understanding critical theory must begin with an appreciation of the concept of ‘critique’, which is defined as an act of judgment or resistance. It is also defined as a specific way of relating to the world or a means to relate what is perceived in everyday life with a deeper, more rational knowledge (Thompson, 2017). Critical theory, therefore, asserts that everyday life should not be alienated from the endeavour of knowledge and how truth is understood; it invites us to ask one fundamental question: who gains from this version of truth? (Higgs and Smith, 2002). It aims to facilitate transformation by exposing the social conditions under which a society’s knowledge about itself is articulated (Thompson, 2017). In this sense, as Dryzek (2006) points out, critical theory endeavours to bring enlightenment to those suffering at the hands of power in the interests of action on their part to escape suffering. Put differently, critical theory is about expanding the sphere of human emancipation through reasoned, rational consciousness and activity (Bronner, 2004).

This insight informed the political activism of Steve Biko – one of South Africa's pioneering critical theorists in the liberation movement. Biko (1978) stressed the need for Black South Africans to formulate their own thinking, unmediated by the ideas emanating from a dominant group who sought to retain the racialised socio-economic relations imposed by the apartheid system against the Black population. He advocated for an emancipatory programme that would completely transform socio-economic relations and which could only be realised in an atmosphere where people are convinced of the truth inherent in the consciousness of themselves as Black people.

Critical theory, therefore, not only seeks to develop an understanding of how society is structured, but it seeks also to practically transform it in favour of those unfairly disadvantaged (Thompson, 2017). According to critical theory, transformation occurs through what is termed 'theory-in-practice', a process of critical reflection through which we discover the hidden assumptions that maintain existing power relations (Higgs and Smith, 2002).

2.5 Attributes / variables in critical theory studies key to the conceptualisation of redistribution

According to Higgs and Smith (2002), critical theory presupposes power relationships within a society, which dominate the production of all forms of knowledge, including knowledge about justice. As has been earlier discussed, public policy is an output of the political system and it cannot be studied apart from the political environment in which it occurs, which both limits and directs what policy can achieve (Dye, 1995; Anderson, 1997; and McConnell, 2010). As such, public policy aimed at redistributive justice is conditioned significantly by the political environment within which those policy interventions are located. Goga and Mondliwa (2021) observe that the evolution and performance of economies are impacted by how institutions are influenced by powerful groups, both formally and informally, and that if powerful groups are not satisfied with the distribution of resources through the current institutional structure, they will seek ways to change the structure by shaping agendas, policy, and laws. So, at their core, policy making and law making are imperfect bargaining processes where some parties wield more bargaining power than others and are able to use this power to achieve the policy and legal outcomes that best meet their interests. As Goga and Mondliwa (2021) note, understanding how economic development happens in a particular context requires an analysis of both a country's formal institutions and of how powerful interests shape these institutions and agendas in order to influence outcomes. The attribute of critical theory that presupposes power relations therefore gives the theory relevance when interrogating the conceptions of redistribution adopted in redistributive policy and law because it lends itself to exposing the structure of the power relationships in policy and law making.

Of course, critical theory is not the only theory able to offer a framework for understanding how justice can find expression (or not) in policy and law. Redistribution policy is a quest for justice made necessary by socio-economic inequalities that exist within a society and that develop over time. Rawls' (1971) insightful theory of justice also finds relevance in such a setting as it seeks to recreate a society at the beginning of time, in its attempt to unravel socio-economic inequalities or reset society to the original social contract. The basic question behind Rawls' theory is: what would be considered just and fair today if society were to be reimagined as a place of equals ruled only by rationality and social cooperation among equals for mutual advantage? In this sense, justice and fairness have nothing to do with feelings of kindness or guilt, or even bargaining power. Instead, justice and fairness must emerge from a rational process in order to ensure 'that no one is disadvantaged … by the outcome of natural chance or the contingency of social circumstances', (Rawls, 1971). Rawls' theory therefore assists in formulating an idea for a just society to aspire to where distributive justice is about putting in place political, social, legal and economic systems that make equitable distribution possible among free and equal people. Freeman (in Martin and Reidy, 2006), however, cautions that Rawls's account of distributive justice is 'ideal typical' in the first instance and not easily applied to a world with injustices as we experience it. Habermas (1996) also points out that, whilst Rawls' theory can probably appeal to the fact that constitutional democracies have flourished in societies in which certain political traditions and ideas of fairness are widely shared, it still ignores the problem of how legal institutions can realise such ideals in contexts shaped by powerful interests and where societal pluralisation and polarisation have fragmented shared identities and eroded the means for consensus.

In countries with a history of conflict and oppression, such as South Africa, Rawls' theory finds limited application, for its idea of distributive justice is based on the freedom and equality of all persons. As Southall (2019) points out, before 1994, white conquest and colonialism buttressed the domination of a white minority and continuously reproduced poverty and powerlessness among a Black majority for centuries, thus making South Africa was one the most highly polarised countries in the world. The enduring historic inequalities along the lines of race, space, class, and wealth, cause South Africa to remain deeply divided even in the democratic era (Southall, 2019). Questions still remain, therefore, about the legitimacy of the country's economic, political and legal systems in attaining distributive justice in the face of high levels of poverty and unemployment among Black people.

Critical theory, therefore, allows scholars to occupy the space overlooked by Rawls' theory in relation to finding distributive justice in in-egalitarian societies, particularly the problem of how policy and law making institutions can realise distributive justice in contexts shaped by powerful interests. Critical theory offers the opportunity to reflect on the power relationships through which policy and law are produced and uncover the hidden assumptions that inform the coding of redistribution in policy and law and that may render them ineffective (Higgs and Smith, 2002).

2.6 Critical theory frameworks for interpreting empirical results on the conceptualisation of redistribution

Since the consolidation of critical theory in the aftermath of the Bolshevik Revolution of 1917 there has been an evolution of ideas that have informed the development of different frameworks in critical analysis (Thompson, 2017).

One of these frameworks involves a critical analysis of the language used in policy to analyse the construction of meaning through language, and uncover the symbolic activity that takes place in policy development (Moran, Rein and Goodin, 2006). The basis for this 'linguistic turn' is that language is never a neutral medium and is replete with meanings present in particular settings that condition policy problem definition, the coding of key concepts and the selection of preferred solutions (Moran, Rein and Goodin, 2006).

Another one of these frameworks is argumentation (Fischer and Forester, 1993), which examines policies and evaluates their arguments as constructed by policy analysts, not only for their truth or falsity but also for their partiality, their selective framing, their elegance or crudeness of presentation, their political timeliness, their symbolic significance, and more. Therefore, “the argumentative turn in policy analysis and planning leads us to study critically the production of analysts’ claims – not to take them as ‘truth’, and not to take every claim to be as valid as any other” (Fischer and Forester, 1993:3).

Yanow (2015) also introduces a critical theory framework called interpretive policy analysis, which focuses on meaning – both its expression and its communication. Interpretive policy analysis considers the perspective of those affected by policies in addition to the perspective of policy makers and implementers in deriving policy meaning. It shifts attention from the search for (and belief in the promise of finding) one correct policy formulation to engage, instead, the possible multiplicities of problem definition resulting from different interpretive communities’ experiences and perceptions (Yanow, 2015).

Lastly, we turn to the critical theory of race, linked closely to the broader concept of race theory. Philosophers and social science scholars have expended considerable effort exploring the influence of race in humanity’s social reality and many agree that racial identities have social effects. The ascription of racial identities, Appiah (2002) asserts, is an ascription of social class. For example, Harris (1995) argues that the set of assumptions, privileges, and benefits that accompany the status of being white are so embedded that whites have come to rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Critical race theory promotes an ethical commitment to social justice by exposing race based power structures as undemocratic, inequitable, and unjust, until they are eradicated (Furner, 2007). Modiri (2012) maintains that many scholars have overlooked the ways in which racial identities and hierarchies have been woven into social systems like law, labour, social power, knowledge and ideology in South Africa and proposes that critical race theory is well positioned to address this oversight by developing a post-apartheid critical race theory that puts ‘race’ back on the agenda by situating it within legal, political and social discourses. Critical race theory therefore seeks to examine the ways in which racial identities perpetuate relations of domination, oppression and injustice (Modiri 2012). The goal of the theorists and activists who engage with critical race theory is to eradicate racial injustice, first by making plain its institutional nature, and second by specifying and undertaking the radical action that is required to replace racist institutions with antiracist alternatives (Furner, 2007).

Any of these critical theory frameworks can be used to interpret empirical results on the conceptualisation of redistribution in the BBBEE policy and legislation. As has been discussed, critical theory is about facilitating transformation by exposing the social conditions under which a society’s knowledge about itself is articulated through systems such as public policy and law for purposes of enlightenment and ending prejudice. For countries such as South Africa that are emerging from conflict situations and extended periods of human rights violations, redistribution carries an additional purpose to deliver justice to victims of past wrongdoing. The ideas of redistribution and transformation implied in the BBBEE policy, as well as their effectiveness, therefore make critical theory a relevant framework for interpreting empirical results on the conceptualisation of redistribution in the policy.

Central to this study is an inquiry on how the concepts of redistribution have been conceived and developed in both the BBBEE policy and BBBEE Act (2003), and whether there is consistent application of these concepts in the policy and Act. At the core of the BBBEE policy is the attainment of meaningful and equitable participation of Black people in the national economy in order to redress the inequities resulting from the apartheid past. The BBBEE policy, therefore, has symbolic significance for both the government (which is largely Black) and the private sector (which is largely white) to be seen to be addressing the inequities of the past.

The BBBEE policy is also about racial identity. It is about elevating the Black population to a level where they can participate meaningfully and equitably in the economy in relation to white people. Intrinsic in this objective is the acknowledgment that, historically, Black and white people occupied different classes in society and that these classes were ascribed to them on the basis of their race. Put differently, these classes were ascribed through racism.

Necessarily, therefore, this inquiry into the conceptualisation of redistribution in the BBBEE policy has to be premised on the centrality of racism. It is accepted in South Africa that racism did not end in 1994 and that, instead, new ways have been found to express it. As such, from the perspective of white people, policy and law have evolved since the decades leading up to the democratic dispensation from brazen instruments to keep Black people oppressed, to being seen as a powerful machine for the maintenance of white privilege (Coaker, 1972). In this new setting, as argued by Modiri (2012), racism is a normalised and ingrained feature of the social order which appears often in nuanced and covert ways in a political, legal, economic and cultural system in which whites maintain overwhelming control and power.

What also aids the maintenance of white privilege and contributes to inefficient redistribution in the democratic South Africa is the inclusion of non-racialism as one of the founding values of the country’s constitutional democracy guiding social and economic relations in the new dispensation. As this study has argued, non-racialism perpetuates racial inequality as it incorrectly assumes a level playing field in the pursuance of socio-economic opportunities by the different races and classes. In the end, non-racialism discounts the nuanced and covert ways in a political, legal, economic and cultural system through which whites maintain economic control and power. Consequently, redistribution policy since 1994 has been informed by reform and not transformation, and therefore rendering it inefficient.

It is for these reasons that critical theory, particularly the critical theory of race, provides an insightful interpretative framework in this study as it places race at the centre of discourse analysis, which enables an examination of the specific ways in which racial identities perpetuate inequalities and economic injustice expressed in the BBBEE policy and legislation.

2.7 Interrogating the conceptualisations of redistribution in the BBBEE policy and BBBEE Act – a conceptual framework

This section began by giving the context within which inequalities in South Africa have developed and made redistribution necessary. It has been shown that the hope for a better life for Black South Africans that came with the transition from apartheid to democracy was not realised as the overwhelming majority of Black South Africans continue paradoxically to live in material conditions not dissimilar to those under apartheid, where race continues to be a key driver of the country’s high inequality (ranking first among 164 countries in the World Bank’s global poverty database) of opportunity, largely because of its influence on the education and labour market pathways to better outcomes (Sulla, Zikhali and Cuevas, 2022). By reflecting on the works of Wolpe (1972), Terreblanche (2012), Bond (2016), Collier (2007), Stiglitz (2017), Piketty (2017), it has been shown that successive governments during the colonial and apartheid eras in South Africa have been able to use political power to promote their interests and subjugate the Black population through repressive legislation, and dispossessing them of property (such as with the 1913 Native Land Act) and opportunity for meaningful participation in economic activity.

Law, as Stiglitz (2013) and Terreblanche (2002) demonstrate, has been one of the most potent weapons in the hands of the colonisers, not only to maintain repressive control over the Black population, but also to create the necessary environment to arrogate to themselves national resources and create private wealth for themselves. That thirty years since the advent of democracy, white South Africans continue to own about three quarters of the basic means of production – land – (Department of Rural Development and Land Reform, 2017) and have incomes three times more than Black South Africans (Statistics South Africa, 2019c), attests to the embeddedness of systematic inequality, particularly found in law, that keeps the majority of Black South Africans impoverished.

This exploitation of local resources by small groups of elites using the capitalist mode of production is not only a South African phenomenon, but a global one that has led to the development of political ideologies in its opposition. Through these ideologies, as Piketty (2015) and Stiglitz (2013) point out, emerged ideas about how to conceptualise the injustices of inequality and the correspondent need for redistribution. Governments since the late modern period up to the current epoch have sought ways to reverse inequalities through the pursuit of justice aimed at improving the socio-economic lives of the disadvantaged, poor and resource weak groups in society. Because the concept of justice evolves under different circumstances in each country (Laplante, 2014), it therefore follows that the course of redistribution or how it is conceptualised must be defined by context.

As has also been shown, redistribution in South Africa has been pursued mainly through the enactment of law to support the democratic government's policies for economic empowerment, land redistribution and freeing Black labour. Whilst some scholars have argued that law is a blunt instrument for social transformation, the consensus is that law – as it was under apartheid – is a useful and essential tool for reengineering society for justice. However, when law enacted for the specific purpose of being a catalyst for transformation and redistribution appears to have no effect, then it is important to enquire if there is a common conceptualisation of redistribution in both policy and law. In other words, there needs to be an interrogation of whether the purposive conceptualisation of the law is indeed fit for purpose. In order to arrive at this understanding therefore, it must be enquired: How have the concepts of redistribution been conceived and developed in the BBBEE policy; and have the concepts of redistribution adopted in policy been applied consistently in the supporting legal instrument?

Necessarily, these questions lend themselves to a type of enquiry that takes into account the power struggles that take place representing different class interests when such policies and laws are put in place. A number of studies have been undertaken evaluating the legalities of redistribution in South Africa. Many have been conducted from interpretivist and epistemological paradigms. This approach was used by Kok (2007 and 2010), Ntsebenza and Hall (2007) and Sebola and Tsheola (2014) in investigating the transformative effects of law and the challenges surrounding land redistribution. Benjamin and Cooper (2016), Leibbrandt *et al* (2010), Bangani and Vyas-Doorgapersad's (2020) and others have also adopted this approach in their analysis of the failure of redistribution of opportunity in the labour market.

With regards to evaluative studies on BBBEE, the works of Ijasan (2018), Uppal (2014), Herman (2017), Tangri and Southall (2008), Krüger (2016), Roodt (2018), Bilchitz (2016), Francis and Valodia (2021), Cawe and Mabasa (2020) as well as Vilakazi and Bosiu (2021) have been noted. Whilst some of these studies offer valuable insights on the failure of redistribution policies, their scope of enquiry does not extend beyond the analysis of the limitations identified by the researchers pertaining to the framing of the policies. The studies do not go further to interrogate the contested concepts of redistribution used in the policies and related legal instruments and their contribution to policy failure. Such analysis requires a recognition that policy and law making are contested spaces occupied by different interest groups that seek to advance their interests, and that the bargaining that takes place in these spaces is dependent on the bargaining power held by the different groups. It also requires a recognition of the continuing effects of neo-colonialism in the post-independence and democratic era of many African countries and the need to consider the continuing effects of non-colonialism on development and redistribution imperatives. Within the context of a history of social and economic injustice, a transformative or emancipatory research paradigm is necessary to unpack these power dynamics and how they find expression in policy and law. As has been discussed in section 2.3, scholars such as Sibanda (2011), Modiri (2012), Mamabolo and Tsheola (2017), Bilchitz (2016), Williams (2011) and Pistor (2019) have moved us closer to understanding the power dynamics that play out in the construction of concepts used in policies for transformation by applying critical theory analysis, which at its core concerns itself with transforming society in favour of the unfairly disadvantaged by being critical of the status quo. This study therefore builds on this knowledge and examines which values are represented by the concepts of redistribution in the BBBEE policy and BBBEE Act through the application of critical theory and critical race theory in particular.

Because critical race theory is about understanding how institutionalised racial disadvantage and systemic racial inequality emerge or how political, legal, social, and economic systems produce outcomes that favour one race over another (Masiga, 2022), it offers important insights for a study such as this one that is concerned with the failure of a public policy to produce redistributive outcomes for a race group on account of past injustices. Critical race theory moves from the premise that racism is normalised and it is therefore difficult to recognise and cure in social systems such as public policy and law (Delgado and Stefancic, 2001). This is especially true in countries such as South Africa where non-racialism, as a formal conception of equality as captured in the constitution, is used as a premise for public policy and law making in different areas of endeavour.

This study is concerned with a critical analysis of the contested legal meanings and conceptualisations of redistribution in the BBBEE policy for the benefit of Black people, in order to provide insights on why the BBBEE policy, acting through the BBBEE Act, has not achieved its redistributive objectives in a democratic South Africa. In conducting this analysis, critical race theory offers the opportunity to analyse the text of the policy for concepts that reproduce skewed economic relations to the disadvantage of Black people.

As such, critical race theory creates the platform to pose race-related questions in the analysis of the conceptualisations of redistribution used in the BBBEE policy and Act with the aim to understand whether such conceptualisations offer any benefits for the intended beneficiaries of the policy. Scholars such Williams (2011) and Pistor (2019) have argued that public policies and laws can be designed to have skewed distributional effects, directing, in the way key concepts are defined in such authoritative documents, how opportunity and resources are distributed for the benefit of a population group over another in a political process that relies on the politics of race (Caroll and Sapinski, 2010).

Critical race theory also provides the opportunity to investigate how racism engraved in public policies and laws advances the interests of white elites and those who benefit from white elites, particularly the Black political elite that is responsible for policy and law making, and the emergent Black capitalist class. Delgado and Stefancic (2001) define this phenomenon as “interest convergence”. In such a situation, the Black political elite and the emergent Black capitalist class have little incentive to eradicate the advantage of the white elites in the economy out of self-interest. This tenet of the critical race theory, therefore, directs that in analysing the coding of redistribution in the BBBEE policy and Act, the self-interests of the Black political elite – and the new

Black capitalist class that emerges from the political elite – be closely considered to determine its influence on the BBBEE framework.

In conclusion, it should be noted that the reality of the historical racialised distribution in South Africa is not in question in this study. Neither is the reality that economic participation in the democratic era continues to favour the white population. Therefore, race is profoundly entrenched within the framework of South African society in the manner it shapes the politics, policies and laws that define opportunity and privilege in the country.

The subject matter of this study, the BBBEE policy, and the research questions that have been set out broadly relate to racialised economic distribution and a just redistribution of economic resources and opportunity to Black South Africans. As Parker and Lynn (2002) argue, one of the main goals of critical race theory is to address race and class inequities in a society by foregrounding race in all aspects of the research process and offering transformative solutions to racial and class inequities in societal and institutional structures such as policy and law. In this regard, critical race theory finds relevance in this study as an interpretive framework. Furthermore, it has to be noted that critical race theory as a discourse generated by Black legal scholars devotes itself to uncovering the often hidden subtext of race, racial deprivation and racial privilege in a society (Parker and Lynn, 2002). This attribute of critical race theory is particularly important for this study as it assists to interrogate how the concepts of redistribution have been conceived, developed and applied in the BBBEE policy framework, and whether this provides insights on why the BBBEE policy aimed at addressing racial inequality has not achieved its intended outcomes in a democratic South Africa.

By analysing the conceptualisation of redistribution in the BBBEE policy through critical race theory the research is able to examine the construction of meaning through language and uncover meanings in the policy that informed the codification of redistribution at the time the policy was put in place.

Chapter Three

Research Approach, Procedure and Methods

3.1 Research approach

This study is concerned with whether there is a common conceptualisation of redistribution in both the BBBEE policy and its supporting legal instrument, the BBBEE Act. The study is premised on the understanding that law as an instrument of policy can only reproduce what has been defined in policy. If redistribution is not adequately and clearly conceptualised in BBBEE policy, it will not be adequately and clearly defined in law and this might render the law ineffective. This study therefore interrogated how the concepts of redistribution have been conceived, developed and applied in the BBBEE policy framework, and whether this provides insights on why the BBBEE policy aimed at addressing racial inequality has not achieved its intended outcomes in a democratic South Africa.

This research took the form of qualitative research approach. As per Nieuwenhuis and Smit cited in Wagner, Kawulich and Garner (2012), qualitative research is suitable where one seeks to discover new insights into a topic, as was the case with this study. As this research was concerned with the relationship between the BBBEE policy and the conceptualisation of redistribution in this policy and its supporting legal instrument, it lent itself to a methodology that allows for an interpretive analysis of the existing policy and supporting legal instrument.

The research is approached from an interpretivist or constructivist paradigm using critical theory to analyse the meanings of the concepts of redistribution in the policy on BBBEE and its legal instrument. The interpretivist or constructivist paradigm can be traced back to the philosophy of phenomenology as introduced by Edmund Husserl, understood as the careful description of experiences in the manner in which they are experienced by the subject (Moran, 2013). Phenomenology concerns itself with one key question: ‘What is happening?’ (Higgs and Smith, 2002). The interpretivist or constructivist paradigm also emerged from the philosophy of hermeneutics, described as the deliberate and systematic methodology of interpretation (Dilthey, 2010). Interpretivism assists to bring forth the particular meanings attached to current concepts of redistribution within the historical setting of the disadvantaged Black population. This is important because the research moves from the basis that the social structures of policy and law develop within the context of race, gender and social class (Ravitch and Riggan, 2012).

Furthermore, and as this study has argued, public policy and law in the post-colonial era have been used as a powerful tool by those who hold economic power to maintain white privilege, often by means of nuanced and covert methods. It is argued that because of this influence by the white owners of capital, redistribution policy and law often do not reflect the lived experiences of the Black population they are supposed to assist. As such, in order to uncover the key ideas behind the conceptualisation of redistribution in the BBBEE policy and BBBEE Act, a deliberate and systematic methodology of interpretation was required to assist in bringing forth the particular meanings attached to the concepts of redistribution in the BBBEE policy and BBBEE Act when it was first formulated. An interpretivist or constructivist paradigm also assisted in constructing a theoretical perspective on the consistency, or lack thereof, of the concepts for redistribution used in the BBBEE policy and Act and whether this contributed to the policy not achieving its intended outcomes.

3.2 Research design

The idea of Black economic empowerment as a programme for redistribution since the advent of democracy evolved over a number of years. This evolution can be traced back to a number of key policy documents from both the governing party, the ANC, and government. Redistribution as a concept also developed over various iterations as captured in policy documents before it found expression in government's 2003 strategy on BBBEE and the BBBEE Act.

The research therefore began with a literature review of the idea of redistribution and the different concepts of redistribution, particularly efficient redistribution, and the policy interventions available to policy makers for effecting redistribution. Discourse analysis was carried out to understand how the known concepts of redistribution have been applied to the BBBEE policy. Further discourse analysis of the BBBEE Act that supports the BBBEE policy was undertaken to interrogate the consistency with which the concepts of redistribution identified in the policy have been captured in the Act.

In-depth interviews were undertaken with policy-makers who took part in processes and conversations to develop the BBBEE policy to further develop the understanding of the conceptions and codifications of redistribution that informed the policy. The following policy-makers were interviewed (in alphabetical order):

- Mr. Alec Erwin (Former Minister of Trade and Industry, 1996-2008);
- Dr. Alistair Ruiters (Former Director-General of the DTI, 2000-2005 and NEF Chairperson, 2002-2005);
- Ms. Andrea Brown (BEECom Researcher and former Director: BBBEE Unit in the DTI, 2001-2003);
- Mr. Duma Gqubule (BEECom Researcher);
- Prof. Itumeleng Mosala (Supervising Commissioner of the BEECom)
- Mr. Lionel October (Former Deputy Director-General: Enterprise Industry Development Division responsible for the drafting of the 2003 BBBEE Strategy);
- Mr. Mbono Fihla (pseudonym) (worked in an economic advisory capacity in the Ministry of the DTI from 1999 to 2001; also worked in the Policy Coordination and Advisory Services in The Presidency between 2001 and 2003);
- Dr. Pali Lehohla (Former Head of Statistics South Africa, 2000-2017).
- Prof. Pundy Pillay (Head of the Policy Unit in The Presidency, 1998-2000); and
- Dr. Rob Davies (Former member of the ANC's Economic Policy Committee; Chairperson of the Trade & Industry Portfolio Committee, 1996-2004).

3.3 Research procedure and methods

3.3.1 Research data collection

As has been previously discussed, the history of the development of the idea of redistribution and Black economic empowerment in South Africa dates back to the ANC's adoption of the Freedom Charter in 1955 and the subsequent formation of the PAC in 1959 following opposition to the ANC's conceptualisation of redistribution in the Freedom Charter and reference in particular to the non-racial clause on land ownership (Sobukwe, 1959). This study was confined to the period in which the process to formalise BBBEE as a government policy took place, that is 1994 to 2003.

To this end, historical economic policy documents emerging from this period were consulted for context and to develop a narrative of how government's concepts of redistribution evolved leading up to the launch of BBBEE. Similarly, the ruling party's historical economic policy documents were reviewed.

Semi-structured interviews were used to conduct in-depth interviews with former policy-makers who were involved in the process and conversations on the development of the BBBEE policy – as listed in section 3.2 above – who provided insights on the prevailing thinking when redistribution was conceptualised in the BBBEE policy as a policy for economic justice.

The research instrument used for the semi-structured interviews is shown below. It provides questions that guided the engagement with the respondents. However, where it became necessary, further questions were put to the respondents to clarify responses or explore any further themes that arose during the interviews.

Research instrument

1. What was the primary purpose of the Broad-Based Black Economic Empowerment policy at conception?
2. What failures within the political and economic system that brought about the inequalities and inefficiencies in distribution were targeted by the Broad-Based Black Economic Empowerment policy?
3. The Broad-Based Black Economic Empowerment policy makes reference to meaningful economic participation by historically disadvantaged persons. What can be understood of the phrase 'meaningful economic participation'?
4. What specific outcomes were targeted by the Broad-Based Black Economic Empowerment policy with regards to reversing racialised distribution and promoting advancements in the socio-economic lives of the disadvantaged, poor and resource-weak groups in society?
5. What assumptions informed the redistributive aims of the Broad-Based Black Economic Empowerment policy?
6. At inception, was the Broad-Based Black Economic Empowerment policy seen as a social contract between South Africa's social partners?

	If yes, was this the reason the Broad-Based Black Economic Empowerment Act (2003) was not endowed with the basic power of any law, enforceability?
7.	The Broad-Based Black Economic Empowerment Strategy makes reference to the 'transfer of ownership and control [of the economy] to Black people. What can be understood of the concept to 'transfer'?
8.	Were there any redistributive limitations that were foreseen and accepted in the conceptualisation of the Broad-Based Black Economic Empowerment policy?
9.	What was the primary purpose of the Broad-Based Black Economic Empowerment Act (Act 53 of 2003) at conception?
10.	What identified possible legal failures in the implementation of the Broad-Based Black Economic Empowerment policy was the Broad-Based Black Economic Empowerment Act (Act 53 of 2003) intended to provide safeguards against?

3.3.2 Research data processing and analysis

In line with the interpretivist or constructivist approach of the research, discourse analysis was used to process and analyse collected data. Discourse analysis was used to derive meaning from text by addressing issues of syntax (Wagner *et al*, 2012).

While there are various strands within the turn to discourse in policy studies, most draw, to some extent, on Michel Foucault's work, where the term discourse is used to make apparent the connection between knowledge practices and power relations (Bacchi 2009; Goodwin 2011).

According to Bacchi (1999), policy discourse involves starting from the assumption that all actions, objects and practices are socially meaningful and that the interpretation of meanings is shaped by the social and political struggles in specific socio-historical contexts. In the result, policy discourses are practices that have effects which include the constitution of subjects and subjectivities.

In relation to this research, it provides the opportunity to examine historical changes in the BBBEE discourse; as well as identify the power dynamics inherent in the discourse and how they impact the conceptualisation of redistribution in the policy and Act.

3.3.3 Research ethical considerations

Informed consent was obtained verbally and in written form from interview participants ahead of the start of each interview. Further verbal and written consent was sought with each respondent to audio record the interview.

Lastly, where applicable, formal permission was obtained from the former employers of the research participants to interview them regarding their work during their tenure. Written permission was obtained from The Presidency and the Department of Trade, Industry & Competition.

3.3.4 Research reliability and validity measures applied

The strength of this research with regards to trustworthiness was assured by meticulous record keeping of interview engagements captured in writing and in audio recordings. This makes it easy for anyone to access research records for purposes of confirming the findings. Further, when capturing findings, the respondents' own words were used as much as possible for transparency and clarity.

3.3.5 Research limitations

This study's contribution to the understanding of the social reality around redistribution as a policy intervention that aims to create a more equitable society is focused only on the consistency with which the concepts of redistribution in the BBBEE policy and BBBEE Act are applied, and the contribution thereof to the overall effectiveness of the BBBEE policy. It does not consider extra-legal factors that may have contributed to the failure of the BBBEE policy. However, with an improved understanding of this aspect of social reality, knowledge will be contributed to making improvements in formulating policies that are free of ambiguity, and therefore less likely to draw contestations.

Chapter Four

How have the concepts of redistribution been conceived and developed in the BBBEE policy? – The Findings

4.1 Introduction

At the core of this study has been the assertion that when law – an authoritative policy instrument – is enacted for the specific purpose of being a catalyst for reversing racial economic inequality, and when redistribution proves ineffective, it is important to enquire if its legal conceptualisations of a deracialised economy through redistribution are consistent with those found in policy. The study has furthermore sought to critically assess whether the concepts of redistribution adopted in policy and law make clear provision for the deracialisation of the economy in ways that allow for meaningful socio-economic change in the long term, rather than limited reformism that reproduces racialised inequality in the democratic era.

In order to arrive at this understanding, the study interrogated and analysed the conceptions of redistribution in the BBBEE policy and their legal codification in the BBBEE Act (Act 53 of 2003) at the formalisation of the policy during the period of 1994 to 2003.

This chapter presents the research findings from in-depth interviews with policy-makers who were involved in the process of developing the BBBEE policy to develop the understanding of the conceptions and codifications of redistribution that informed the policy. Furthermore, findings from key policy documents that informed the BBBEE policy are presented to provide insights on how the conceptualisation of redistribution in the BBBEE policy has evolved over time.

To recap, the study has established that redistribution for the attainment of an inclusive political system and economy can be distinguished into pure and efficient redistribution. The primary tool for pure redistribution is fiscal redistribution, that is, the use of transfers and expenses paid directly by the government for public goods.

Efficient redistribution, on the other hand, aims to go beyond redistributing income but extends further to correct failures within the political and economic system that have brought about the inequities and inefficiencies. Such instruments include affirmative action, minimum wage legislation and broad-based economic empowerment (Piketty, 2015), to name a few. These instruments aim to directly target inequality of opportunity (Bourguignon, 2015). The BBBEE policy, which this study is concerned with, is a form of efficient redistribution, it has been argued. The policy has been the main instrument for economic redistribution in post-apartheid South Africa (Francis and Webster, 2019).

4.2 Findings on the concepts of redistribution in the BBBEE policy

There are a number of policy documents from the post-apartheid governing party, the African National Congress (ANC), and the government from which emerged ideas on redistribution through the Black Economic Empowerment policy before 2003. The documents that formed the focus were:

- The RDP (1994);
- GEAR (1996);
- The ANC's 50th Conference Resolutions on Economic Transformation (1997);
- BEECom Report (2001);
- The ANC's 51st Conference Resolutions on Economic Transformation and Black Economic Empowerment (2002); and
- South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (2003).

4.2.1 The RDP, BBBEE and redistribution

When the ANC took political power in 1994 it laid out its policy programme for a post-apartheid South Africa in the RDP White Paper. The ANC (1994) described the RDP as 'an integrated, coherent socio-economic policy framework' that sought to mobilise all people and the country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future.

The RDP White Paper advocated for integrating growth, development, reconstruction and redistribution into a unified programme. As Davies (personal communication, October 13, 2021) notes, this was in response to a notion by established white business that pursuing economic growth and redistribution simultaneously created a contradiction. According to Davies (personal communication, October 13, 2021), when the ANC engaged established white business about redistribution leading up to 1994, white business was adamant that they would only support redistribution of future economic gains and not what was in the economy at the time. Davies said (personal communication, October 13, 2021):

> “When we started interacting with white business they had the view that, yes you can redistribute, but you can only redistribute the fruits of future growth. You cannot redistribute existing assets or wealth. So, you needed to have growth driving redistribution. That was the kind of tension [that existed]. The RDP [was therefore making the point that] there was no contradiction and you could have [growth and redistribution] together,” (R. Davies, personal communication, October 13, 2021).

The ANC, through the RDP, therefore aimed to grow the economy through redistribution by pursuing an infrastructural programme that would provide access to modern and effective services like electricity, water, telecommunications, transport, health, education and training for all South Africans, particularly the disadvantaged Black population (RDP, 1994). The redistribution envisaged in this context was about using the national balance sheet to roll out life improving interventions for the Black population. Hirsch (2005), explains this objective as follows:

> “In the Reconstruction and Development Programme (RDP)… the ANC addressed [the economic growth versus redistribution] conundrum by positing a virtuous circle: infrastructure development aimed largely at providing access for the poor would also contribute

> to economic growth through opening up the domestic market and increasing the efficiency of the economy. In turn, this would allow further improvements in the lives of the voters," (p. 2).

The RDP recognised that South Africa's income distribution was racially distorted and that there were very clear racial and gender inequalities in the ownership of the economy, employment and skills. For example, state expenditure on education in 1993 did not favour Black people as state expenditure per learner was R1 659 for Black learners, R2 902 for Coloured learners, R3 702 for Indian learners and R4 372 for white learners (Nkabinde, 1997). In the result, the 1994 October Household Survey of South Africa showed that Black people received less education and were therefore less able to compete with other races for jobs in the formal economy (Hirschowitz and Orkin, 1997). This was the reason, according to Erwin (personal communication, June 28, 2021), the ANC placed great focus on affirmative action during the negotiations for the new dispensation in the country during the early 1990s. Erwin (personal communication, June 28, 2021) explains as follows:

> "We were all aware of the fact that market forces by themselves would not correct [the inequalities created by the past]. The previous situation was unusual… this was not just the ordinary forces of capitalist markets. This was a very specific and one of the most concentrated and focused discriminatory regimes the world had ever seen; where ownership was not only prevented, but people's assets were actually taken away from them. Considerable wealth had been destroyed in the apartheid period [and] we were conscious of that," (A. Erwin, personal communication, June 28, 2021).

This statement by Erwin (2021) demonstrates that government at the time recognised it needed to intervene in the economy to redistribute in a manner the market forces could not, in order to deracialise the economy and return to Black people the assets and opportunities that had been taken away from them. Consequently, a central objective of the RDP was to deracialise business ownership and control completely, through focused policies of Black economic empowerment that would change the demographic structure of the economy. The RDP (ANC, 1994) captured this objective as follows:

> "[Black economic empowerment] policies must aim to make it easier for black people to gain access to capital for business development. The democratic government must ensure that no discrimination occurs in financial institutions. State and parastatal institutions will also provide capital for the attainment of black economic empowerment objectives. The democratic government must also introduce tendering-out procedures which facilitate black economic empowerment. Special emphasis must also be placed on training, upgrading and real participation in ownership," (p. 94).

Based on the above, at least five Black economic empowerment interventions targeted by the RDP can be identified, namely, equitable access to productive capital; access to development finance from the public sector; preferential procurement through the tender system in government; the promotion of Black ownership of productive assets; and skills development.

Small businesses, particularly Black owned small businesses, have historically grappled with the challenge of a lack of funding or access to capital. Access to bank credit has mostly been limited to enterprises with acceptable credit histories and sufficient collateral, most of which are white owned. Black owned small businesses in South Africa could not effectively compete in the market and required government support to help them grow and, in turn, contribute to improved national economic growth and the alleviation of poverty and unemployment (Booyens, 2011). The RDP's focus on Black economic empowerment therefore sought to address these barriers to entry by Black entrepreneurs. Ideas in this regard were captured in the 1995 White Paper on National Strategy for the Development and Promotion of Small Business in South Africa (Department of Trade and Industry, 1995). It stated:

> "Since the elections of April 1994 the issues of economic empowerment and growth have been placed high on the agenda of the Government of National Unity of South Africa. With millions of

> South Africans unemployed and underemployed, the government has no option but to give its full attention to the fundamental task of job creation, and generating sustainable and equitable growth... The stimulation of SMMEs must be seen as part of an integrated strategy to take this economy onto a higher road – one in which our economy is diversified, productivity is enhanced, investment is stimulated and entrepreneurship flourishes… Experience has shown that in the past black people have been able to make far greater progress in the micro- and small-enterprise segments of the economy than in medium-sized and larger enterprises. Thus, the SMME sector has – all its impediments notwithstanding – proven to be a highly significant vehicle for black economic empowerment," (p. 3-9).

This thinking played a key role in the development of ideas around Black economic empowerment, as well as the establishment of government structures and institutions to support small businesses, particularly from the previously disadvantaged Black population, including the enactment of the National Small Business Act 102 of 1996 aimed at providing guidelines for organs of state in promoting small business. The enactment of the National Small Business Act ultimately led to the formation of public sector small business support institutions such as the Small Enterprise Development Agency – which promotes entrepreneurship and the growth of SMMEs (Seda, 2023) – and the Small Enterprise Finance Agency – which provides financial products and services to qualifying SMMEs and cooperatives (Sefa, 2023). These interventions were in line with the concept of efficient redistribution through which governments try to correct failures within the political and economic system that have brought about inequities and inefficiencies (Piketty, 2015).

4.2.2 GEAR, BBBEE and redistribution

The Growth, Employment and Redistribution macro-economic strategy (GEAR) was introduced by the democratic government in 1996 and was claimed to be an integrated economic strategy for rebuilding and restructuring the economy as part of efforts to implement the RDP in all its facets. It was claimed by the government that the strategy sought to build a competitive fast-growing economy in which there would be sufficient jobs for everyone; pursue a redistribution of income and opportunities in favour of the poor; attain a society in which sound health, education and other services are available to all; and create an environment in which homes are secure and places of work are productive (Department of Finance, 1996).

GEAR emphasised the need to grow the economy at rates higher than the prevailing rate of 3 per cent at the time. Government envisaged that increased growth would contribute to improving job creation and thereby positively impact income and wealth redistribution. The Department of Finance (1996) expanded on this aim as follows:

> "Accelerated economic growth associated with stronger employment creation is the key to continued progress towards an equitable distribution of income and improved standards of living for all. Employment creation provides a powerful vehicle for redistribution, supported by government housing, water supply and sanitation, health, education, welfare and social security services," (p. 22).

GEAR was therefore conditioning redistribution on economic growth and did not take the approach outlined in the RDP that growth and redistribution could take place simultaneously. Nonetheless, GEAR outlined a number of interventions for redistribution. These included, among others, public sector reforms to restructure public assets (privatisation of state owned companies), a reprioritisation of budgets for improved service delivery, and infrastructure spending. Notably, the interventions for redistribution targeted through GEAR were state-driven interventions using the resources available within government.

GEAR also sought to introduce employment and training policies to enhance the growth potential of industry, extend job opportunities to the unemployed, and thereby contribute, in the long run, to the redistribution of income (Department of Finance, 1996). Government noted in GEAR that progressive education was critical in ensuring long-run economic performance and income redistribution. As such, GEAR outlined that government would pursue continuous improvements in the quality of public schooling for the poor and greater equity in the graduation of students from secondary schooling to tertiary education (Department of Finance, 1996).

Redistribution in GEAR was also discussed in the context of the land reform programme, which has its basis on the constitutional requirements that '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' (section 25(5) of the constitution, 1996), and that 'a person or community whose tenure of land is illegally 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 (section 25(6) of the constitution, 1996). According to the Department of Finance (1996), combining asset redistribution with enhancement of tenure was viewed as important for improving the long-term prospects for employment and income generation in the rural economy. Through GEAR, it was noted, government would pursue the rapid release of land and introduce a settlement grant. It was envisaged that, over time, agricultural development associated with land reform would play a key role in improving the distribution of income and economic activity (Department of Finance, 1996).

GEAR did not directly discuss Black Economic Empowerment and how redistribution through Black Economic Empowerment would be attained. Instead, GEAR made reference to the pursuit of the National Strategy for the Development and Promotion of Small Business in South Africa (DTI, 1995). The Strategy (DTI, 1995) noted that small, medium and micro-enterprises (SMMEs) represented an important vehicle to address the challenges of job creation, economic growth and equity in the country. In this regard, the Strategy (DTI, 1995) identified the SMME sector as 'a highly significant vehicle for Black economic empowerment'.

Some of the key interventions targeted by the Strategy (DTI, 1995) for Black economic empowerment in the SMME sector included encouraging the big business sector to do more business with the SMME sector through incentives, procurement quotas and voluntary commitments; simplifying the public sector tender procurement process to make it easier for SMMEs to compete for government contracts; adjusting public procurement practices to facilitate the allocation of a proportion of contracts to Black owned enterprises. The Strategy also sought to introduce finance interventions for Black entrepreneurs. To this end, government committed to capitalising public sector SMME-focused financing institutions and encouraging the acceptance of alternative collateral from rural and women entrepreneurs in lieu of access to credit.

GEAR (Department of Finance, 1996) also introduced various programmes and institutions to give effect to the National Strategy for the Development and Promotion of Small Business in South Africa. These included the establishment of the Small Business Centre attached to the DTI, the establishment of the Ntsika Enterprise Promotion Agency to provide non-financial assistance to SMMEs, as well as the formation of Khula Enterprise Finance Limited and Khula Credit Guarantee Limited for wholesale loans and loan guarantees, respectively.

GEAR was defined as a strategy for rebuilding and restructuring the economy, in keeping with the goals set out in the RDP. Based on this claim, it could be inferred that GEAR targeted Black Economic Empowerment on the basis outlined in the RDP and sought to deracialise business ownership and control, as well as change the demographic structure of the economy through Black Economic Empowerment.

Davies (2021) has argued that GEAR shaped government economic policies at least until the early 2000s and the closure of the RDP office was seen as the outcome of this. “Although it was said that the RDP continued to remain ‘in force’, in practice it was GEAR that became the flagship programme,” says Davies (2021). However, according to Erwin (personal communication, June 28, 2021), GEAR was introduced only to the extent that it was necessary to bring about stability in the macro-economy of the country on a short-term basis; not to replace the broad-based long-term redistributive objectives of the RDP. Erwin (personal communication, June 28, 2021) explains as follows:

> “The RDP was a broad-based approach covering the whole economy, which influenced a number of areas in the economy. A specific office [for the implementation of the RDP] was formed for various practical reasons in government, but it was closed down for various practical reasons. But that did not mean the RDP was

stopped. GEAR was a specific programme dealing with macro-economic balance. It never replaced the RDP at all. So, what began to happen for us when we took over power [in 1994] is that we realised that the macro-economic situation in South Africa was extremely precarious. When we went abroad to try and raise finance, we were quite clearly told that we are ‘not clear on how you are going manage your macro-economy… what is your broad approach? Do you believe that deficit financing will help you? What kind of foreign exchange policy do you have? What is your approach to monetary policy?’ So we decided then to tighten up on those specifics, none of which was contained in the RDP. In the RDP we used a broad concept of macro-balance, which already points one away from deficit financing and those kind of activities… [Therefore] GEAR was a form of macro-balance. It did not replace the RDP at all… it was a short-term programme designed to stabilise [the macro-economy],” (A. Erwin, personal communication, June 28, 2021).

Gelb (2007), who formed part of the technical team that drafted the GEAR programme for government, lends support to Erwin’s (personal communication, June 28, 2021) view that GEAR placed the macroeconomic dimension at the centre of policy. According to Gelb (2007), GEAR was introduced by government to “achieve policy ‘credibility’ by persuading … investors that it would not in fact reverse its policy stance once they had committed to investing in South Africa,” (p. 4). These included the interest rate policy adopted from 1990 to counter inflation, trade liberalisation, fiscal stringency – including deficit targets – implemented from 1994, financial liberalisation policies, and re-integrating South Africa’s capital markets with those of the global economy.

Davies (personal communication, October 13, 2021) says this response to the concerns of the international community and investors through GEAR was termed a ‘confidence trick’ by the Department of Finance. “… it was based on as assumption that foreign investors would ‘like’ the macro policy reforms and respond by pumping in significantly increased amounts of [foreign direct investment] – sufficient to achieve the growth and jobs targets. None of this, in fact, materialised," explains Davies (2021). Gelb (2007) conceded that, in this sense, GEAR reflected a naïve understanding of credibility insofar as it aimed to achieve rising investment flows in the short-term.

According to Davies (personal communication, October 13, 2021) the redistributive objectives of the RDP were abandoned when GEAR was introduced:

> "The first year or so of the 1994 government, we did see [redistributive gains through the RDP]. But it was chopped off quite quickly by the demands of neo-liberalism, the pressures of the markets and the pressures that came with the changes taking place in the world economy at the time. And so, any kind of drastic step was seen to be potentially something that was going to be met with huge amounts of disruption. GEAR, therefore, moved away from any of the radical ideas of redistribution contained in the RDP in favour of the dominant ethos in the world economy, especially the respect for property rights. We ended up settling for the norms of the neo-liberal world economy [with regards to redistribution and growth] to a very large extent," argues Davies (personal communication, October 13, 2021).

4.2.3 The ANC's 50th Conference Resolutions on Economic Transformation, BBBEE and redistribution

The ANC (1997) recognised that the ownership of productive assets, or lack of it, was one of the key determining factors of the quality of life in South Africa. In keeping with this, the ANC (1997) maintained that the transformation of the South African economy to empower Black people, especially Africans, had to be prioritised. To this end, the ANC (1997) resolved to focus on ensuring that new social and economic relations that empower Black people in general and African people in particular, were established.

Part of this strategy involved putting in place a National Empowerment Policy positioned to transform the ownership of the economy and workplace relations to reverse apartheid era trends. More specifically, the ANC (1997) as the governing party committed itself to implementing a “vigorous affirmative procurement policy” (p. 11) that would ensure public sector institutions awarded tenders to Black people. Furthermore, the governing party resolved to establish the NEF through government to transition Black people from the informal to the formal sector, particularly manufacturing.

Similarly to the stated redistributive thrust proposed in GEAR, these key interventions for redistribution put forward in the ANC’s 50th Conference were state-driven interventions that would utilise resources available within government.

Following these resolutions, the National Empowerment Fund Act (Parliament, 1998b) was assented to on 11 December 1998, with the aim to promote and facilitate ownership of income generating assets by historically disadvantaged persons. A key impetus of the Act was the establishment of the NEF Trust for “redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons” (Parliament, 1998b:3). With regards to Black Economic Empowerment, the Act (Parliament, 1998b) stated that the NEF would provide historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares or interest in state Owned Commercial Enterprises being restructured or in private business enterprises. The Act (Parliament, 1998b) also mandated the NEF to promote and support business ventures pioneered and run by historically disadvantaged persons.

Davies (personal communication, October 13, 2021) noted as follows of the redistributed intent of the NEF: “The redistributive intent of the NEF existed only on paper, and not in reality, because the NEF did not have the capacity to redistribute income generating assets when it was established,” (R. Davies, personal communication, October 13, 2021). According to Davies (personal communication, October 13, 2021), funds such as the NEF struggle to immediately implement their mandate to distribute funds and resources to identified groups because their resources are initially committed to setting up the organisation. “First of all, you develop an institution, employ people and deal with a whole lot of overheads. And then you often invest the money you receive from government and only distribute the returns,” explains Davies (personal communication, October 13, 2021), arguing that the funding model of the NEF worked against its mandate by not resourcing it for redistribution.

October (personal communication, August 10, 2021) supports Davies' (personal communication, October 13, 2021) assertion and suggests that because the NEF's funding model was poor, it limited the organisation to small scale projects with no significant redistributive outcomes. October (personal communication, August 10, 2021) argues that the democratic government failed to position the NEF for redistribution as the Afrikaners had successfully done with the Industrial Development Cooperation (IDC) after taking over government from the British.

> "The Afrikaner people were poor [before taking over the South African government from the British in 1948]. However, within one generation of taking over they managed to create an Afrikaner business class and empowered their whole population. They created substantial institutions to drive that, [particularly] the IDC. The IDC created Sasol, First National Bank, Iscor, the Land Bank, Volkskas Bank, Sanlam and many others. All these institutions were established to empower the Afrikaner. Therefore, empowerment is about creating institutions. If the democratic government wanted to empower the majority of the population at the same scale the IDC did for the Afrikaners, a substantial institution had to be created to serve that purpose," explains October (personal communication, August 10, 2021).

According to this thinking, therefore, there was no real redistributive intent behind the establishment of the NEF. In fact, Ruiters (personal communication, February 17, 2022) suggests that the NEF was 'stillborn' and produced no redistributive outcomes for the first two years of its existence. The greatest challenge in the NEF becoming a truly redistributive organisation, according to Ruiters (personal communication, February 17, 2022), was that it was not capitalised for the mandate it was given on paper. National Treasury was pursuing macro-economic stability and wanted to maintain a budget surplus at all costs. Because of this, National Treasury was averse to creating new line items in the national budget. As such, the NEF could not be operationalised (Ruiters, personal communication, February 17, 2022). Eventually, recalls Ruiters (personal communication, February 17, 2022), “when government downsized its stake in MTN and Telkom in the early 2000s, the proceeds from these sales were used to capitalise the NEF and create a capital pool it could use to lend to empowerment businesses.”

4.2.4 BEECom Report, BBBEE and redistribution

The establishment of the BEECom in 1998 emerged out of then Deputy President Thabo Mbeki’s engagement with the Black Business Council inviting the Council to put forward proposals on a structured process for Black Economic Empowerment in South Africa. Erwin (personal communication, June 28, 2021) explains:

> “There were early moves in the early 1990s by some of the big business companies to bring Black partners into their businesses. In the negotiations for the constitution, the key area of focus was on affirmative action. As you know, our constitution is very strong on both individual and social rights. So, we had to craft the affirmative action clauses fairly carefully so they would sit comfortably with the overall thrust of our constitution, which is equality of opportunity and rights… Those first few years from 1995 through to 1999, we decided to watch and see what would happen [with regards to redistribution]. But it became clear that the movement into ownership by Black aspirant capital owners was going to be very, very slow… Deputy President Mbeki then addressed the Black Business Council and invited them to put forward proposals as to how best to manage this process,” (A. Erwin, personal communication, June 28, 2021).

Informed by the widespread recognition among ruling, political, and business elites that Black inclusion needed to be achieved as part of the settlement reached leading up to and after the democratic transition in 1994, these initiatives took place in a policy vacuum with regards to Black economic empowerment (Vilakazi and Bosiu, 2021). Through the invitation of Deputy President Mbeki, therefore, “the Black Business

Council then appointed what became the ‘Ramaphosa Commission’ [BEECom]… They then presented a report to myself as the Minister of Trade & Industry [in 2001]. We then set up a policy making process, which resulted in the BBBEE Act,” says Erwin (personal communication, June 28, 2021) briefly explaining the context within which the BEECom was established and operated. Mbeki himself described the role of the BEECom as one “to answer the question – how do we promote the formation of a black bourgeoisie which will itself be committed and contribute to black economic empowerment?” (Mbeki, 1999).

Expressing its support for the establishment of the BEECom, the Black Management Forum (BMF) argued that the notion of true empowerment as defined by Black people did not exist, nor did a common definition or benchmark which served as a minimum requirement. The BMF thought it had become necessary for the state to intervene in curbing empowerment deals that were falling far short of recognising the true aspirations of the marginalised Black majority all in the name of Black Economic Empowerment (BEECom, 2001).

The Black Business Council therefore gave the BEECom the mandate to develop a clear and coherent vision and strategy, as well as to construct a clear and unambiguous definition for Black economic empowerment. Linked to this, the BEECom was mandated to report on ways in which the management skills of Black people could be developed; examine ways in which Black business could ensure that its business conduct and ethics remained credible at all times; and come up with practical ways in which small business could be developed. Furthermore, the BEECom was expected to find a way to integrate the empowerment project into the transformation of South African society and determine the role of Black business in the transformation process. The BEECom was further expected to address the engendered state of the economy by identifying the role of Black women in the empowerment process. Lastly, the BEECom was required to explore ways in which Black business could speak with a united voice on issues which directly affected them (BEECom, 2001).

The specific matters the BEECom sought to investigate included “an inquiry into the structure and functions of the regulatory and legislative environment aimed at facilitating black economic empowerment within the context of our national economic transformation," (BEECom, 2001). It also sought to investigate the nature, forms and outcomes of Black economic empowerment in both the public and private sectors, whilst also exploring the nature and form of economic empowerment initiatives on business transactions. The Commission was also interested in ascertaining whether empowerment initiatives reached the lives of ordinary disadvantaged citizens and the impact these initiatives were having on their lives. Finally, the BEECom intended to develop benchmarks and criteria on meaningful and sustainable empowerment initiatives, whilst also putting in place monitoring and assessment mechanisms of empowerment initiatives and transactions (BEECom, 2001).

Davies (personal communication, October 13, 2021) states that this process to define and clarify Black Economic Empowerment was necessary because Black Economic Empowerment after 1994 was not a 'refined' policy, but rather a broad policy thrust – a general idea that there needed to be change in the demographic structure of the economy as it related to ownership and management of businesses to make it more reflective of the South African population. Ruiters (personal communication, February 17, 2022) notes that throughout the 1990s, the ANC had no policy on Black Economic Empowerment and how it could be implemented to pursue redistribution:

> "If you look at the ANC policy resolutions from the 1980s up to about 2000, you will note that, quite frankly, they are pretty silent on BEE and instruments the ANC could put in place to try and address the issue of redistribution and including Black people in the economy. Nothing was specific on BEE, it was always implied with every policy that we were trying to transform an economy where Black people became major participants, if not in the economy, in every other aspect of transformation that we envisaged in South Africa. So, no one specifically said, 'we need to have a BEE section' [in the policy documents]. It was implied. Every policy document sought to address the injustices of the past," (A. Ruiters, personal communication, February 17, 2022).

According to Ruiters (personal communication, February 17, 2022), and in support of Davies' (personal communication, October 13, 2021) assertion that Black Economic Empowerment only existed as a broad policy intention, the transformation of the economy was implied in the broad statement and mantra of the time to 'redress injustices of the past', but never dealt with explicitly. According to Davies (personal communication, October 13, 2021), therefore, the BEECom attempted to fill this policy void in response to early empowerment initiatives. Davies (personal communication, October 13, 2021) explains:

> "Some parts of white capital got a sense that [Black Economic Empowerment] was the way of the future… They decided that they had better find some partners and vehicles to place them into business. And then for many years you had no way of assessing the actual content of BEE; there was no way of assessing one [empowerment deal] versus another or having any kind of a common framework [to assess BEE]. The Ramaphosa Commission came into this context [to contribute to developing a clear and coherent vision and strategy for Black Economic Empowerment]," (R. Davies, personal communication, October 13, 2021).

The BEECom, therefore, in a way was meant to provide a critique of the first phase of Black Economic Empowerment which had already been taking place since the early 1990s (I. Mosala, personal communication, October 25, 2021). However, before the BEECom could offer a critique of early Black Economic Empowerment, it needed to have a working definition of it. According to Gqubule (personal communication, June 15 and July 1, 2021), the BEECom grappled with two variations of the definition of Black Economic Empowerment when it started its work in 1998. The first formulation, notes Gqubule (personal communication, June 15 and July 1, 2021), was the RDP conceptualisation of Black Economic Empowerment, which went as follows:

> "The domination of business activities by white business and the exclusion of Black people and women from the mainstream of economic activity are causes for great concern for the reconstruction and development process. A central objective of the

> RDP is to deracialise business ownership and control completely, through focused policies of Black economic empowerment. These policies must aim to make it easier for Black people to gain access to capital for business development. The democratic government must ensure that no discrimination occurs in financial institutions. State and parastatal institutions will also provide capital for the attainment of Black economic empowerment objectives. The democratic government must also introduce tendering-out procedures which facilitate Black economic empowerment. Special emphasis must also be placed on training, upgrading and real participation in ownership," (ANC, 1994).

Southall (2006) proposes that this conceptualisation of Black Economic Empowerment had its roots in the 1955 Freedom Charter that had committed the ANC to nationalising the 'commanding heights' of the economy. Specifically, the Freedom Charter (ANC, 1955) aspired that "the national wealth of our country, the heritage of 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."

Gqubule (personal communication, June 15 and July 1, 2021) states that this was a maximalist approach to Black Economic Empowerment as advanced by Edigheji (1999), who explained it thus:

> "[The maximalist approach to Black Economic Empowerment] emphasises a comprehensive restructuring of institutions and society, which would effectively alter power relations in the political and economic spheres, rather than the replacement of white individuals with Black ones. The approach entails the generation and redistribution of resources to the vast majority of the people, ranging from skills and educational training to land redistribution. Additionally, the maximalists stress the overall democratisation and transformation of institutions and organisational culture, rather than the mere inclusion of a few individuals from the previously

disadvantaged communities in the ownership and management structures of the economy," (p. 9-10).

The second approach to Black Economic Empowerment that Gqubule (personal communication, June 15 and July 1, 2021) states the BEECom grappled with was a minimalist method, which Edigheji (1999) broadly defined as emphasising a proportional representation of previously marginalised groups of people in the public and private sectors. Edigheji (1999) elaborates as follows:

> "The minimalist approach does not seek 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 other. Rather, it seeks to alter the racial composition of privileges and exploitations, that is, to create **a new circuit of racial capital accumulation**. In its narrow sense, the minimalist approach defines BEE in terms of development of black-owned businesses or creation of a black business class," (p. 5).

Tangri and Southall (2008) note the minimalist approach was favoured by the ANC, which lobbied for the creation of a high profile group of wealthy Black businessmen, referred to as a 'patriotic bourgeoisie', who would be used to strengthen the relationship between government and business as well as be part of the process to deracialise the economy. This position was clarified by Mbeki (1999) addressing the BMF on Black Economic Empowerment when he argued for the creation of a wealthy Black business class. Mbeki (1999) prevailed on the BMF as follows:

> "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 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," (p. 3).

Gqubule (personal communication, June 15 and July 1, 2021) states that the minimalist approach to Black Economic Empowerment was the one favoured by the BEECom. Mosala (personal communication, October 25, 2021) agrees with Gqubule. According to Mosala (personal communication, October 25, 2021) the basic idea adopted by the BEECom on redistribution and Black Economic Empowerment was that there was no fundamental questioning of the economy, except the configurations of relations within the economy, the reproduction of the apartheid ideology in the workplace, and the discrimination of Black professionals. "It was the racialisation of the corporate [sector] that was the problem. [Black] people were fighting for management positions [and] for equality between Black and white managers," states Mosala (personal communication, October 25, 2021). On redistribution, Mosala (personal communication, October 25, 2021) maintains that the BEECom was concerned about the ownership of businesses, in line with the example of empowerment share deals set in the early 1990s. As a result, argues Mosala (personal communication, October 25, 2021), the BEECom focused its thinking on the transfer of businesses from whites to Black business people or the acquiring of significant shares of these businesses on behalf of Black business people. Mosala (personal communication, October 25, 2021) elaborates as follows:

> "Very little economic thinking and theory underpinned ideas about Black Economic Empowerment [in the BEECom]. There were just businesses that [the Black business class] wanted or wanted to be part of. What that meant for the [transformation of relations in the] economy was not being discussed or thought through. People accepted the economy as it [was] and said we want to be part of the mainstream economy… The Commissioners believed that the current situation [was] a distortion of the market forces [and] therefore [their] job [was] to clean up the market forces and they will do the job [to distribute fairly]," (I. Mosala, personal communication, October 25, 2021).

As such, explains Mosala (personal communication, October 25, 2021), not much consideration was given to changing the configuration of the economy or how apartheid was essential to the structure of the economy. In fact, Mosala (personal communication, October 25, 2021) reveals that, in writing the first draft of the BEECom Report he had made a proposal to define Black Economic Empowerment as an economic strategy for transforming the relations in the economy. This proposal was rejected by the BEECom, Mosala (personal communication, October 25, 2021) states. Therefore, the kind ownership the BEECom discussed was about inserting Black people in the existing ownership structures, and not geared towards the transformation of the economy from an apartheid subsystem designed to accommodate and support only whites (I. Mosala, personal communication, October 25, 2021). Mosala (personal communication, October 25, 2021) noted:

> "What the owners of industries did was to open the door into their businesses for certain Black people, predominantly chosen by themselves. So, there was already [a focus on share] ownership without it being an agenda item. [White businesses] were saying 'we are going to open up the doors for highly qualified, highly professional Blacks, even if they were not in business or corporate professionals [because] they needed them for their credentials, so to speak. So, for that reason, ownership [of shares] was particularly a big item on the agenda [of the Commission]," (I. Mosala, personal communication, October 25, 2021).

Gqubule (personal communication, June 15 and July 1, 2021) emphasises this point by pointing to the inadequacies of the funding model for share transfers:

> "We were so caught up in the private sector model [in the BEECom] that we failed to see things could be different… We tinkered at the edges of the private sector model and did not really fundamentally change it. [Had it been done appropriately], it would have required cheaper access to finance from the government side, and also real transfer of shares without debt," expands Gqubule (personal communication, June 15 and July 1, 2021).

The BEECom (2001) ultimately settled for what it termed 'a broad definition' of Black Economic Empowerment and outlined it as follows:

> "It is an integrated and coherent socio-economic process. It is located within the context of the country's national transformation programme, namely the RDP. It is aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's financial and economic resources to the majority of its citizens. It seeks to ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity," (p. 2).

Brown (personal communication, May 13, 2022) states that, through this definition of BBBEE, the BEECom wanted to advance the important idea that the effective participation of Black people in the economy was necessary for economic development. As such, the BEECom was also arguing for BBBEE to be an economic development strategy:

> "It was not about BEE deals and how we could improve them. [There was recognition that] the economy won't transform without growth, but an empowerment strategy must be essential to that growth strategy… Among all the commissioners and the researchers, the thinking was that BEE must be a transformation strategy, which assists in bringing Black people into the economy in every way and promotes growth," (A. Brown, personal communication, May 13, 2022).

The BEECom's definition was also broad in defining what needed to be redistributed to Black people through BBBEE, namely, the ownership, management and control of South Africa's financial and economic resources. The economic development strategy envisaged by the BEECom, therefore, aimed to intervene in various areas of socio-economic activity, including access to the means of production (particularly land and capital), access to quality education, and small business development (particularly for Black people). Brown notes: “This broad approach to BBBEE by the BEECom was the beginning of a significant tension in the conceptualisation of BBBEE as government argued for a narrower definition that would not encroach on areas where government already had policies in place,” (A. Brown, personal communication, May 13, 2022).

The operative phrase in the BEECom’s definition of BBBEE is the reference to ‘redressing the imbalances of the past by seeking to substantially and equitably *transfer and confer* (emphasis added) the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens’. According to Gqubule (personal communication, June 15 and July 1, 2021), the *transfer* envisaged by the BEECom related largely to increasing the equity held by Black people in all sectors of the economy, particularly by increasing the number of shares held by Black people in companies listed in the Johannesburg Stock Exchange (JSE). The BEECom (2001) proposed ‘Black equity participation in each sector of the economy should be increased to at least 25%’ and that ‘Black people should hold at least 25% of the shares of companies listed on the JSE’. The BEECom (2001) also proposed that ‘at least 30% of productive land should be in Black hands’. According to Brown (personal communication, May 13, 2022), it was the view of the BEECom that these interventions or instruments were necessary to encourage companies to implement meaningful empowerment and not superficial empowerment as witnessed in the first phase of BBBEE in the 1990s. As Zalk (2021) observes, by the end of the 1990s, many ‘first generation’ BEE deals collapsed in the wake of the 1997/8 Asian financial crisis, and a brief period that saw Black ownership on the JSE rise and peak at around 7 per cent was rapidly reversed.

Gqubule (personal communication, June 15 and July 1, 2021) refers to the transfers envisaged by the BBECom as market-based transfers using corporate finance principles. The BEECom (2001) made proposals on Black Economic Empowerment transactions to give effect to these transfers. These included ‘appropriate pricing, preferably at a discount to market value’ and ‘creative financing structures’. However, according to Mosala (personal communication, October 25, 2021), the aim to *transfer and confer* the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens was included in the BEECom Report as a compromise between those arguing for market-based transfers, interceded by market forces, and those arguing for a radical approach to redistribution, akin to repossession. “[The term] ‘confer’ meant that the government would have to find ways and resources for creating capital for Black people to enable them to [establish and operate businesses] by themselves. It was the state’s role in the redistribution process,” clarifies Mosala (personal communication, October 25, 2021).

The BEECom also made recommendations on financing BBBEE. According to Mosala (personal communication, October 25, 2021), the BEECom considered two approaches in this regard. The first one would see the establishment of a BBBEE state entity located in The Presidency and accountable to Parliament that would drive the BBBEE agenda throughout government, particularly the financing of the programme. Furthermore, state development finance institutions would be reformed to prioritise BBBEE, reveals Mosala (personal communication, October 25, 2021). The second approach considered by the BBECom related to creating a government BBBEE fund to finance the BBBEE programme, partly by accessing resources in SASRIA – a state-owned short-term insurer created in response to riots and civil unrest during apartheid, when insurance companies balked at paying compensation to ordinary businesses damaged by the protesting public (Sasria, 2022) – notes Mosala (personal communication, October 25, 2021). The envisaged BBBEE fund would also be financed through a proposed general tax. This second approach was rejected by the BEECom and was not included in its final report in 2001. There was agreement within the BEECom on the first approach, but only as it concerned reforming state development finance institutions for a focus on BBBEE. The proposal for a BBBEE state entity located in The Presidency was rejected, notes Mosala (personal communication, October 25, 2021). The BEECom proposal, therefore, availed no new money for the financing of BBBEE.

Brown (personal communication, May 13, 2022) adds that one of the BEECom’s (2001) key recommendations on financing BBBEE was the use of prescribed assets. In this regard, the BEECom (2001) called for the financial sector, particularly life and retirement companies, to divert a minimum of ten per cent of its total assets towards reproductive investment in areas of national priority over an adjustment period of five to seven years. According to Brown (personal communication, May 13, 2022) this proposal was meant to stimulate the economy whilst also acting as a form of economic reparations.

The BEECom's proposals, therefore, represented one of the earliest attempts in the BBBEE policy development process to move beyond the use of state-led interventions to redistribute and establish a role for private sector-led interventions to redistribute. As Mathebula and Odeku (2023) observe, overall, the BEECom concluded that the democratic government monumentally failed to provide the necessary or sufficient institutional and financial assistance for long-term black empowerment, as well as having targeted the people based on racial considerations. To this end, the BBECom recommended the establishment of regulatory bodies that would discharge the BEE duties, such as a procurement agency and public development finance organisations, to centralise and focus policy action and procedures.

4.2.5 The ANC's 51st Conference Resolutions, BBBEE and redistribution

Following its 51st Conference in 2002, the ANC (2002) set itself an objective to attain 'more equitable ownership of productive assets as well as access to skills and infrastructure in order to empower Africans in particular, black people in general, women, youth and the poor'. It sought to achieve this through the Black Economic Empowerment programme.

Although the Black Economic Empowerment policy was not formalised at this time, the ANC expressed discontent about the manner in which empowerment initiatives were taking place. The ANC (2002) noted as follows:

> "Little progress has been made in achieving greater operational participation and control in the economy by black people, and we have instead seen the rise in so-called 'fronting'. This limited participation of black people in the economy limits our ability to expand the productive base, sustain economic development, eradicate poverty and contribute to a better life for all," (p. 31).

This expression of discontent appears to be in line with the BEECom's (2001) negative assessment of the 1990s Black Economic Empowerment initiatives. The BEECom (2001) lamented the limited inclusion of Black people in economic activities, as well as the lack of growth of the Black middle and business classes since the beginning of democracy. As a result, the BEECom (2001) argued for the promotion of opportunities to increase the level of participation of Black people in the ownership, management and control of the economy, through Black Economic Empowerment. Davies (personal communication, October 13, 2021) notes that Black Economic Empowerment initiatives in the early 1990s in practice were only a mechanism for Black business people to acquire shares in companies at discounted rates using debt, but did not translate to the requisite influence in the policies and management of these companies:

> "If one wants to talk about the ownership and control of the economy, it's not limited to shares; it's not measured only by participation in the JSE. It also has got to do with control of powers of economic ownership; the powers of running companies. And I think that too little of that was taken into account. What was passing as BEE was fronting of one sort or another. By and large, all the deals had that element in them. Sometimes it was explicitly there, that the shares that are granted to BEE recipients do not have full voting rights, the right of representation on the board, and things like that. So, the actual control of the company remained in the hands of the existing owners. Very seldom did you find that any Black person who was recruited to the management or the board was going through a process of understanding the core business or taking on a leadership role in the core business," (R. Davies, personal communication, October 13, 2021).

This contributed to the discontent with the early Black Economic Empowerment initiatives and probably led to the inclusion of the reference to 'operational participation and control in the economy by Black people' in the ANC's resolutions on Black Economic Empowerment in its 51st Conference.

However, according to Ruiters (personal communication, February 17, 2022) the discontent noted in the ANC's 51st Conference Resolutions was also as a result of a demand by Black business people within the ANC for a more radical and focused approach to Black Economic Empowerment. Ruiters (personal communication, February 17, 2022) notes that in the lead up to the ANC's 51st Conference there was a group of business people, led by Patrice Motsepe and Moss Ngoasheng, who started to lobby and insist that ANC economic policy documents should begin to make specific reference to Black Economic Empowerment. Ruiters (personal communication, February 17, 2022) elaborates as follows:

> "They wanted Black Economic Empowerment statements to be made. They wanted specific instruments [for Black Economic Empowerment]. They wanted [sector] regulations to have specific provisions allocating resources to Black businesses. For the first time, the notion of Black business was being discussed in a very strident way; in a very confident way," (A. Ruiters, personal communication, February 17, 2022).

Subsequently, the ANC (2002) committed itself to working with the emergent Black capitalist class to ensure joint commitment and practical action to attain increased investment, job creation, employment equity, and poverty alleviation. Furthermore, the ANC (2002) resolved to promote the design and implementation of broad based sector or industry empowerment programmes with clearly defined targets, based on agreements between stakeholders; as well as enhance the effective use of government's instruments such as licensing, procurement, state asset restructuring and provision of finance, to target Black Economic Empowerment.

The indicators of success for these programmes, noted the ANC (2002), would be "overall equity in incomes, wealth, increasing levels of black participation – including black women and youth – in the ownership, the extent to which there is operational participation and control of the economy and the extent to which there has been transfer and possession of skills and a retention of assets by the BEE beneficiaries," (p. 31).

4.2.6 South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment

Several themes emerged through the use of discourse analysis in exploring the development of the Strategy for Broad-Based Black Economic Empowerment (the BBBEE policy), the power dynamics inherent in the discourse and how these impacted the conceptualisation of redistribution in the BBBEE policy. These themes are discussed below.

4.2.6.1 The framing of BBBEE

Government's formal policy on BBBEE was first announced by former President Mbeki during his 2003 State of the Nation Address (SONA). Mbeki (2003) noted that the imperative to transform the economy to bring about 'effective and significant' Black economic empowerment had become pressing. Mbeki (2003) continued:

> "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… The government will lay greatest stress on black economic empowerment that is associated with growth, development and enterprise development and not merely redistribution of existing wealth. We will work in partnership with the private sector and will further ensure that government actions are coordinated and monitored," (p. 14-15).

Mbeki (2003) further indicated that the government had 'prepared a detailed set of proposals' on BBBEE that the Minister of Trade and Industry would outline. The then Minister for Trade and Industry, Alec Erwin, appeared before Parliament a little over a month after Mbeki's (2003) SONA to shed light on government's BBBEE policy. Announcing the adoption by Cabinet of the BBBEE policy on 19 March 2003, Erwin (2003) noted that government intended for the policy to result in higher levels of Black business ownership and the reduction in income inequalities. The desired outcome, in

Erwin's view (2003), was the deracialisation of the economy through effective Black participation in the economy.

These ideas as communicated by Mbeki (2003) and Erwin (2003) were dealt with in greater detail in the policy document published by the Department of Trade and Industry titled "South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment". Erwin (personal communication, June 28, 2021), Fihla (personal communication, July 14, 2021), October (personal communication, August 10, 2021), Lehohla (personal communication, September 12, 2021), Davies (personal communication, October 13, 2021) and Ruiters (personal communication, February 17, 2022) all note that South Africa's approach to BBBEE was largely influenced by the policies implemented by Malaysia to address economic inequalities. Given its significance, the Malaysia experience is briefly discussed below for insights into the conceptual influences of BBBEE in South Africa.

4.2.6.2 Conceptual influence on South Africa: Malaysia and Economic redress

The ANC policy thinkers on BBBEE drew on selective international experiences of de-racialising economic re-dress – in particular Malaysia – which is worth reflecting upon as it provides insights on how the model of economic re-dress was considered from comparative international experiences.

Following the declaration of its independence in 1957, Malaysia experienced deteriorating socioeconomic conditions in the 1960s underscored by ethnic tensions. The cause of the ethnic tensions was the belief by many ethnic Malays, the bumiputera, that ethnic Chinese had economic hegemony in the country which caused the underdevelopment of the bumiputera. These tensions came to a head in 1969 as ethnic conflict broke out. The conflict proved to be a critical juncture in Malaysian economic policy as it was after the conflict that the government of the time introduced the New Economic Policy (NEP) as one of several efforts to achieve national unity through redistributive policies in view of the socioeconomic inequality inherited from the colonial period and consolidated in the post-independence years. The NEP had two objectives, namely to "eradicate poverty" regardless of race and to "restructure society" to eliminate the identification of race with economic function by creating, expanding and consolidating the Malay capitalist and middle classes. This included explicit targets for poverty reduction and bumiputera wealth ownership, specifically. With regards to poverty reduction, the NEP sought to reduce poverty from 49 per cent in Peninsular Malaysia in 1970 to 16 per cent in 1990. On wealth redistribution, the NEP's main restructuring target was to raise the bumiputera share of corporate stock ownership from 1.5 per cent in 1969 to 30 per cent in 1990. The NEP was replaced by the National Development Policy (NDP) in 1991, which was also viewed as prioritising the deracialisation of the Malaysian economy (Jomo, 2004).

South Africa, therefore, looked to Malaysia for lessons on implementing BBBEE because of perceived similarities in the historical contexts of the two countries and the shared objective to deracialise their national economies. One of the main points of difference in Malaysia's NEP / NDP and South Africa's BBBEE policy was in the setting of targets. Whilst the NEP / NDP targeted a specific reduction in poverty and specific increase in stock ownership by the bumiputera, South Africa's policy was largely non-specific, except in sectors where companies required government licences to operate. Another main point of difference in the Malaysian and South African approaches was that in Malaysia, target setting on the transfer of stock ownership was done by the government, whilst in South Africa it was left to businesses in their respective sectors to decide on through charters, except in sectors where companies required government licences to operate.

South Africa's BBBEE policy, as the Malaysians had done in the context of their country specific experience, called for 'significant increases in the numbers of Black people that manage, own and control the country's economy' and 'significant decreases in income inequalities'. Ownership and control of the economy by Black people was to be achieved by means of 'ownership of enterprises and assets through shares and other instruments that provide the holder thereof with voting rights and economic benefits such as dividends or interest payments' (DTI, 2003). Control of an enterprise, on the other hand, meant the right or the ability to direct or otherwise control the majority of the votes attaching to the shareholder's issued shares; the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors of that shareholder; and the right to control the management of that shareholder (DTI, 2003:30).

Overall, beyond placing a focus on areas where government had control, the BBBEE policy was used to try and put broad political pressure on the private sector to also get involved in BBBEE (A. Erwin, personal communication, June 28, 2021). “In the private sector, it would have been much, much too complicated to attempt to put legal provisions in. Those that have tried elsewhere, have really led to major economic collapse… This was an intervention that was not seen as the be-all and end-all of the attempt to bring about economic redress. It was merely a specific target on the public sector and trying to induce the private sector [to implement BBBEE],” explains Erwin (personal communication, June 28, 2021).

4.2.6.3 BBBEE and Black economic ownership and control

The BBBEE policy (DTI, 2003) proposed that the increase in the ownership and control of enterprises by Black people would be achieved in three ways. First, by increasing Black ownership and control in existing enterprises. Second, by increasing Black ownership and control in new enterprises. Third, by increasing the number of new Black enterprises, Black-empowered enterprises and Black-engendered enterprises. The universal term used in the BBBEE policy by the DTI (2003) in this regard, was the transfer of ownership, management and control of the economy to Black people.

According to Erwin (personal communication, June 28, 2021), the transfer of ownership, management and control of the economy to Black people meant the movement from one person to another of an instrument of ownership or an asset. Erwin (personal communication, June 28, 2021) elaborates as follows:

> “The mechanisms to transfer [ownership, management and control of the economy] can be very varied. It was not suggested that it would be a buyer and seller arrangement. We used the word [transfer] broadly. But transfer means that there must be a distinct movement from one location to another. You could not specify how [this movement would take place] because we left it to the market forces, and that was quite key. Given the experience we had with earlier phases of Black Economic Empowerment, we could see that

> there were a wide range of possibilities how white owners could incorporate Black ownership. So, we did not want to prescribe that [because] it would have been probably restrictive to the process. Ownership [transfer to Black people] was meant to give rise to the opportunity to accumulate capital over time, accepting that the economy would remain a capitalist economy," (A. Erwin, personal communication, June 28, 2021).

In essence, this meant that the policy objective to transfer the ownership, management and control of the economy or redistribute the economy was made known to the owners of the economy who were largely white, and Black people who were excluded from economic activity, but left to the free market to intercede. In other words, white capital owners and resource weak Black people would be seen as equal market participants, and the market rules of fair value, demand and supply, and zero government interference, for example, would apply. The intention to leave the transfer of the economy to market forces, however, seemed to be in contradiction to government's rational for introducing the BBBEE policy originally, that "market forces by themselves would not correct the previous situation" (A. Erwin, personal communication, June 28, 2021) of the exclusion of Black people from meaningful economic activity.

Davies (personal communication, October 13, 2021) argues in turn that government's lack of involvement in the redistribution process contributed to the failure of the policy to take effect. "The demands of neoliberalism; the pressures that came from the big change that was happening in the world economy; the big pressure [of the markets] that was put on the new government; thwarted any kind of drastic step towards radical redistribution," suggests Davies (personal communication, October 13, 2021).

Brown (personal communication, May 13, 2022) also notes that there was 'absolute fear' in government at the time of doing anything that would harm investor or market confidence. Davies (2021) explains that the government at the time was extremely sensitive to market sentiment and was lobbied extensively to conform to neoliberal economics as advocated for in the Washington Consensus. As such, government was expected to deregulate, denationalise state assets and step aside from the economic arena, leaving it to the control of market forces (Davies, 2021). Part of this neoliberal approach, according to Davies (personal communication, October 13, 2021), was about preventing the redistribution of the assets in the economy at the time as a form of redress for past economic injustices. Davies (personal communication, October 13, 2021) elaborates as follows:

> "The earliest ANC policy formulations were essentially about redistribution and pursuing growth through redistribution. And then when we started interacting with white business, they had a different view. Theirs was that 'yes, you can redistribute, but you can only redistribute the fruits of future growth; you cannot redistribute existing assets or wealth, so you needed to have growth driving redistribution'," says Davies (personal communication, October 13, 2021) explaining some the issues that affected the conceptualisation of redistribution in the BBBEE policy.

October (personal communication, August 10, 2021) supports Davies' (personal communication, October 13, 2021) assertion that there was a strong view from white business that growth should drive redistribution. Because of the dominance of the Washington Consensus paradigm at the time of the development of the BBBEE policy, explains October (personal communication, August 10, 2021), there was a complete focus on macroeconomic stability, reducing the fiscal deficit, inflation targeting, gaining the confidence of foreign investors and growing the economy within the context of the GEAR programme.

> "In that sense, [government] was very explicit that there should be no redistribution… There was a [dominant] view [within government] rejecting the concept of redistribution; that all we must do is focus on stabilising our finances, dealing with our macroeconomic problems [and] gaining the support of the Western world [to] bring investment into the country's economy. So, BBBEE came in as a bit of an irritation and a nuisance [because] the dominant view [within government] was that BBBEE is not necessary and that [the participation of Black people in the economy] would naturally

> emerge through growth," (L. October, personal communication, August 10, 2021).

As a consequence, says October (personal communication, August 10, 2021), government introduced the BBBEE policy not as a programme for redistribution because it did not want to be seen to be diverging from the Washington Consensus paradigm. Davies (personal communication, October 13, 2021) aligns with this view by October, arguing that there was a reluctance in government to embrace non-orthodox policies and to impose BBBEE as it had been conceptualised in earlier ANC policy documents such as the RDP. Davies (personal communication, October 13, 2021) noted: "There was a reluctance to embrace non-orthodox policies of one sort or another… there was a reluctance to try and impose [BEE on the private sector]. It was more of a reward methodology that was developed." The view that orthodox means could be used to achieve unorthodox ends was dominant in government (R. Davies, personal communication, October 13, 2021).

Mosala (personal communication, October 25, 2021) says this approach essentially accommodated BBBEE within the status quo of the prevalent class and capitalist relations with no intention to truly transform the economy.

Because government could not redistribute existing assets or wealth, it placed the focus of the BBBEE policy on elements such as human resource development, employment equity, enterprise development, and preferential procurement; all geared towards future redistribution in line with the demand of white business that only the fruits of future growth could be redistributed (R. Davies, personal communication, October 13, 2021). "And so, [BBBEE] was argued for in terms of a programme that would benefit the empowerers as well as the empowerees… it was more of a reward methodology that was developed and it ended up being around [preferential] procurement, and that has been the weakness of the BBBEE policy," argues Davies (personal communication, October 13, 2021).

According to Erwin (personal communication, June 28, 2021), the positioning of the BBBEE policy in this manner was so that the focus of the policy could be on areas where government had control. As such, the BBBEE policy was an inward looking policy for government rather than an outward looking programme to get dominant economic players to participate. Ruiters (personal communication, February 17, 2022) summed up this framing of BBBEE by government as follows:

> “What we recognised at the time was that the process of capital accumulation in South Africa was unjust; that specific laws were put in place to deny Black people the opportunity to accumulate wealth, and that we needed to put in place remedies [or] instruments that ensure capital accumulation in the future does not follow the same pattern of the past. But to the extent that there had to be a transfer of wealth from white people to Black people, that was never really addressed,” (A. Ruiters, personal communication, February 17, 2022).

4.2.6.4 Financing BBBEE for effective redistribution

Insights on government’s approach to BBBEE when the policy was first formalised can also be drawn from the way the financing of BBBEE was structured. Debates in this regard began in the BEECom.

When government launched the BBBEE policy, it introduced financing proposals that sought to reform state development finance institutions to give them a BBBEE bias. These were introduced by the Minister of Finance, Trevor Manuel, in the 2003 Budget Speech in which he noted the central role to be played by Black economic empowerment in sustaining South Africa's growth trajectory and improving the distribution of income and opportunities. “Alongside sectoral initiatives to deepen participation in the ownership and management of South African companies and implementation of the preferential procurement policy framework, Government proposes to set aside R10 billion over the next five years to support the funding of new ventures and business expansions that meet agreed empowerment criteria,” announced the Finance Minister (2003), adding that this would in part be financed from the extraordinary proceeds of exchange control measures.

Over and above setting aside R10 billion over five years to support the BBBEE process and re-purposing grants and incentives from the DTI to maximise BBBEE impact, the government made adjustments to the mandates of state owned Khula Enterprise Finance (Khula) and the Industrial Development Corporation of South Africa (IDC). A lending facility was created within Khula to help establish small- and medium-sized enterprises, and the IDC was required to consider a BBBEE component when financing public sector led projects (DTI, 2003). The IDC, according to the DTI (2003), would play a catalytic role in the recovery of the economy through the transfer of ownership, management and control of the economy to Black people. Davies (personal communication, October 13, 2021) argues that this objective did not materialise because the adjustment to the IDC mandate was not supported by a serious resource commitment by government to fund the BBBEE programme and the operational model of the Corporation was not adjusted away from operating like a bank towards operating like a development finance institution. Davies (personal communication, October 13, 2021) explains as follows:

> "All our development finance institutions have had an expectation that they would operate in the same way as commercial banks. They would have a quantum of capital which needs to be redeemed at some sort of a premium. They then would be risk-averse in the same ways private financial institutions had been. The IDC, for example, had not had any public money since the 1940s and its equivalent in Brazil gets a regular infusion of government money, which allows it to operate on a much larger scale than the IDC does in South Africa. So, [the IDC] was expected to act differently from the commercial banks and yet at the same time it was expected to maintain its balance sheet," (R. Davies, personal communication, October 13, 2021).

These constraints on the IDC's developmental mandate essentially meant that the IDC had no role in the advancement of BBBEE, argues October (personal communication, August 10, 2021).

However, the most notable development in the financing of BBBEE was the review of the mandate of the NEF. According to Ruiters (personal communication, February 17, 2022), the mandate review of the NEF was partly necessitated by its failure since its establishment in 1998 to implement any tangible programmes to help Black business. In fact, only in 2004, about six years after its formation, did the NEF put in place a business plan that would guide its operations. The NEF Board chairperson at the time, Alistair Ruiters (NEF, 2004), noted that the development of the business plan was a "significant achievement following a challenging period for both the NEF's board and its staff", further noting that he was "pleased to report that the NEF's foundation has been laid upon a solid business plan" (p. 2). As such, with the adoption of the BBBEE policy, the NEF would roll out "four main product areas: accreditation and advisory services to improve standards and information for BEE; the 'generator' venture capital fund for small firms; the 'accelerator' venture capital fund for medium firms; and the 'transformer' fund, which is designed to invest in BEE enterprises that seek a listing on the JSE," (Hirsch, 2005:227). Through these product areas, the NEF was able to finalise its first transaction in the 2003/2004 financial year, which Ruiters (NEF, 2004) described as follows:

> "The first transaction to be finalised post the NEF's launch provides a useful example of the NEF's mandate and Black business working together. The transaction included the following noteworthy aspects: a start-up media business which was unlikely to have received funding from financial institutions or venture capital funds; young Black entrepreneurs who have committed themselves wholeheartedly to the business and who have assumed significant personal risk; and the involvement of mature Black entrepreneurs who are not only providing a material portion of the start-up capital but who are also providing mentorship," (p. 2).

With this first transaction under the new business plan, the NEF had made the long-awaited start to delivering on its mandate.

Another contributing factor to the failure of the NEF in its early years, according to Ruiters (personal communication, February 17, 2022), was under-resourcing of the organisation. The NEF had been operating on a once-off allocation of R174 million it received during the 1998/1999 financial year when it was established (Department of Finance, 2002), most of which went to administrative costs. This left the NEF uncapitalised for BBBEE. Ruiters (personal communication, February 17, 2022) notes that when they approached National Treasury as the DTI for allocations to capitalise the NEF so it could fulfil its BBBEE mandate, these requests were denied as the DTI Budget Vote was already receiving large allocations for its other developmental financing institutions such as the IDC and Khula. There were also other provincial developmental financing institutions, such as Ithala Development Finance Corporation (KwaZulu Natal) and the Eastern Cape Development Corporation, competing for resources, highlights Ruiters (personal communication, February 17, 2022). The key reason, however, given by the National Treasury for declining the request to capitalise the NEF, notes Ruiters (personal communication, February 17, 2022), was that the National Treasury wanted to maintain a budget surplus. This was in line with government's position, as stated in the BBBEE policy document (DTI, 2003), that the financing of BBBEE should take place within the framework of maintaining macroeconomic balance as per the GEAR strategy that was in place at the time. In his 2003 Budget Speech, Trevor Manuel noted that since the democratic government took political office, it had put in place a period of consolidation, which saw a moderation of expenditure, steadily improving revenue performance and a marked reduction in the budget deficit. Manuel (2003) further noted that sound public finance management, a sustainable deficit relative to GDP and prudent limits on foreign borrowing remained key elements in protecting the public finances against external risks. This meant that BBBEE could not be financed "by taking on excessive debt or large scale deficit financing or by assuming excessive sovereign contingent liability," (DTI, 2003:24). Davies (personal communication, October 13, 2021) also notes that the National Treasury vehemently resisted calls for earmarked taxes to capitalise programmes for BBBEE such as the NEF.

However, in 2003 the government committed to re-capitalising the NEF with a further R2 billion (Hirsch, 2005) using proceeds gained from the privatisation programme. According to this arrangement, the NEF was allocated shareholdings in State Owned Commercial Enterprises, namely, MTN Group (1.5%), Telkom (5%), SAA (5%), Uthingo (5%), Airports Company South Africa (10%), Connex Travel (10%), Viamax

(10%), SAFCOL (10%), Syncat (10%), Transwerk Perway (10%) and Sentech (10%). The R2 billion capital commitment would be accessed over time on the basis of a draw down schedule in line with investment capital requirements – R35 million of capital for investment purposes and R14,6 million for operating expenses for the financial year ending 31 March 2005 (NEF, 2004). This injection contributed to the capitalisation of the NEF in the hope that the Fund would begin to build its balance sheet and recapitalise itself going forward (A. Ruiters, personal communication, February 17, 2022). Essentially, the NEF, like the IDC before it, was being forced into financialisation and operating like a private finance enterprise just to keep its doors open, despite being given a mandate for transformation. This negated the basis for the establishment of the NEF to redress economic inequality that resulted from past unfair discrimination against Black people as declared in its founding Act, the National Empowerment Fund Act (Parliament, 1998b).

4.2.6.5 The political settlement, BBBEE and redistribution

Thinking on redistribution in the BBBEE policy was also influenced by the negotiated political compromises of the transition to democracy. The negotiation process was influenced by the outcome of the Mont Fleur Scenarios (Kahane, 1992) process in which the negotiating parties, among whom were the some of the biggest players in South African capitalism (Freund, 2013), agreed to pursue a scenario where a decisive political settlement is reached, followed by the adoption of sound social and economic policies that observed macro-economic constraints.

The Mont Fleur Scenarios process – named after the venue in the mountains outside Stellenbosch where the discussions took place – was a private sector initiative funded by Nedcor and Old Mutual and took place between 1991 and 1992 (Segal, 2007) to begin a debate on South Africa’s future economic policy. The Mont Fleur Scenarios process was organised in 1991 as a conference on South Africa’s economic future by Pieter le Roux, a development economist and director of the Institute for Social Development at the University of the Western Cape (UWC), who had been approached by the Friedrich-Ebert-Stiftung (FES) to organise the conference (Segal, 2007). The FES is a non-profit German foundation funded by the Government of the Federal Republic of Germany, founded in 1925. Named after Germany's first democratically elected President, Friedrich Ebert, it works to advance both socio-political and economic development in the spirit of social democracy, through civic education, research, and international cooperation (Friedrich-Ebert-Stiftung, 2023).

The process at Mont Fleur, brought together a broad mix of South Africa's political, business and civil society leaders. They came from the left and right, the opposition and the government – among them Dorothy Boesak, Rob Davies, Derek Keys, Pieter le Roux, Johann Liebenberg, Saki Macozoma, Mosebyane Maltsi, Trevor Manuel, Vincent Maphai, Tito Mboweni, Jayendra Naidoo, Brian O'Connell, Viviene Taylor, Sue van der Merwe and Cristo Wiese (Mont Fleur, 2023). According to Segal (2007), le Roux's express purpose was to seek to influence the economic thinking of the country's future leadership. Le Roux succeeded in this regard as some participants – such as Trevor Manual and Tito Mboweni – have acknowledged that their thinking on economic issues has been influenced by the outcomes of the Mont Fleur Scenarios process and thus informing the framing of the ruling party's economic policy position during the Codesa negotiations and subsequently in government in the development of macro-economic policies such as the GEAR (Segal, 2007).

As such, according to Davies (2021), the negotiated settlement was intended to constrain economic policy decisions of the ANC government when it eventually took over government. Fihla (personal communication, July 14, 2021), agreed. "The negotiated political settlement imposed limitations [on the economic policy that could be implemented by government]. The fact that we were now a constitutional democracy [meant that the] constitution would not allow certain things. These are complexities of our political settlement… and we had limited options," (M. Fihla, personal communication, July 14, 2021). Fihla (personal communication, July 14, 2021) says this was probably one of the reasons government rejected the concept of 'conferring' (granting) the ownership, management and control of South Africa's financial and economic resources to the majority of its citizens as proposed by the BEECom (2001). Instead, the BBBEE policy opted for the idea of 'transferring' the ownership, management and control of the economy because the mechanisms to this end could be varied (A. Erwin, personal communication, June 28, 2021). This was viewed as a more acceptable formulation of redistribution through BBBEE within the context of a constitutional democracy and for managing political sensitivities, suggests Fihla (personal communication, July 14, 2021).

However, according to October (personal communication, August 10, 2021), there were also economic reasons that justified the ‘watering down’ of the redistributive intent of the BBBEE policy in line with the principle agreed upon in the negotiated settlement that South Africa would be run as a free market economy. “[Black business] wanted government to force a 25% [Black] ownership transfer in every company [in line with the BBECom proposals]. But when [the proposals of the BEECom] came to government, it tried to water it down… [National] Treasury took an absolutely hard line position against any [BBBEE measure] that was interventionist. That is why it was watered down completely,” says October (personal communication, August 10, 2021) explaining the conflict created by the proposed radical approach to redistribution and the need to ensure the principle of the market economy of zero government intervention in the economy was maintained in line with the negotiated settlement.

Brown (personal communication, May 13, 2022) offers another reason why the redistributive intent to transfer and confer the ownership of the economy to Black people outlined by the BEECom (2001) was narrowed down in the BBBEE policy. “Government was concerned that the approach to BBBEE taken by the BEECom was too broad and that the policy needed to be given a narrower focus. By opting to pursue only a transfer of the ownership of the economy, and not the transfer and confer of the ownership of the economy as had been recommended by the BEECom, government was placing a limitation on the mechanisms that could be used for BBBEE,” proposes Brown (personal communication, May 13, 2022). This narrower focus would be in line with government’s preferred approach to BBBEE of creating a patriotic bourgeoisie or elite Black business class because the envisaged transfers would be market based and thus accessible only to those who could raise the substantial capital required for such transactions.

Pillay (personal communication, July 6 and 19, 2021) also argues that the negotiated political settlement had an adverse effect in the manner redistribution was ultimately conceptualised in the BBBEE policy. Pillay (personal communication, July 6 and 19, 2021) postulates that negotiated settlements tend to be about lowest denominator politics or the minimum that all parties can agree on. “This is not very good for ensuring progress in areas like BEE… Economic redistribution is radical in its conception and cannot be achieved by lowest denominator politics,” contends Pillay (personal communication, July 6 and 19, 2021). Davies (personal communication, October 13, 2021) agrees with this assertion and opines that there were many illusions in government about what could be achieved in the transformation of the economy without biting the redistribution bullet, and that this had to do with the nature of the transition to democracy. “Redistribution was blunted by the onslaught of neo-liberalism and the nature of the transfer of power – the negotiated settlement, which also created rights for existing property owners. Those two factors taken together, meant that the search was always on for something that was other than radical redistribution. And [that approach] has not achieved very much,” elaborates Davis (personal communication, October 13, 2021).

Ruiters (personal communication, February 17, 2022) also observes that the BBBEE policy emerged out of a search for what ‘could be reasonably achieved’ and instruments that were available for use within the context of constitutional constraints, but not necessarily the most appropriate ones. “I am not sure that we were brave enough, whether we were innovative or bold enough… We created a very comfortable [BBBEE] framework, and maybe that is where history has judged us poorly,” concedes Ruiters (personal communication, February 17, 2022).

4.2.6.6 The patriotic bourgeoisie, BBBEE and redistribution

The idea from within the ranks of the ANC to create a high profile group of wealthy Black business people – the patriotic bourgeoisie – who would be used to strengthen the relationship between government and business as well as be part of the process to deracialise the economy also had a significant impact on how the BBBEE policy was conceptualised (Tangri and Southall, 2008). Davies (personal communication, October 13, 2021) submits as follows:

> “The idea of creating a wealthy Black business class partly arose when it became apparent to the ANC during the late 1990s that making a serious dent into unemployment, poverty and inequality

> was a daunting challenge. Supporting a small group of Black business people was a much lower hanging fruit and they could be used to transform the economy from the inside," (R. Davies, personal communication, October 13, 2021).

However, the project of the patriotic bourgeoisie of transforming the economy from the inside encountered significant institutional and political obstacles. This was partly because this approach was implemented in an untransformed economy where class and capitalist relations – in which white business class had the overwhelming power – still dictated the terms of engagement. As the findings have shown, the ANC failed to challenge this fundamental aspect of the economy and, in the end, this rendered the patriotic bourgeoisie appendages to an untransformed system of capitalism. The commitment of the patriotic bourgeoisie to the transformation agenda was also questionable. As Davies (personal communication, October 13, 2021) notes, many of the Black business class created by the ANC did not pursue the transformation agenda because it did not align with the survival of their business interests in a competitive capitalist market. "Although this Black business class became very rich through government's BBBEE policy, they did not invest back or become the industrialists government intended them to be, opting instead for self-enrichment," submits Fihla (personal communication, July 14, 2021).

This was one of the reasons the BBBEE Act was amended in 2013. One of the amendments in this regard sought to address the definition of "broad-based black economic empowerment". The BBBEE Act (2003) defined 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…". The BBBEE Amendment Act (2013) revised this definition to "the **viable** economic empowerment of all black people including, in particular women, workers, youth, people with disabilities and people living in rural areas…" in an attempt to ensure viable or meaningful Black economic interventions reached all Black people. The government also amended the Codes of Good Practice in 2013, with the biggest amendment being the review of the scorecards wherein a new scoring mechanism was introduced, focusing more on the elements of ownership, skill development, and enterprise development, making it more difficult to obtain a high score with BBBEE interventions that were not necessarily broad-based. (Department of Trade and Industry, 2013).

4.2.6.7 BBBEE policy instruments and redistribution

Government put in place a number of policy instruments to achieve BBBEE. The choice of these instruments also provides insights on the kind of redistribution envisaged by government through BBBEE. This section examines these policy instruments and how these articulated or engaged with concepts of redistribution.

- **The BBBEE Act**

The first of these policy instruments was BBBEE legislation, the BBBEE Act of 2003. The legislation was touted by government as an enabling framework for the promotion of BBBEE (DTI, 2003). Through the Act, the Minister of Trade and Industry would also be given the powers to issue guidelines and codes of good practice on BBBEE (DTI, 2003). The BBBEE Act is the focus of this study and findings on its redistributive intent will be dealt with in the sections that follow.

- **The Code of Good Practice**

The second policy instrument put in place by government were regulations, which essentially introduced the balanced scorecard (Code of Good Practice) to measure progress in achieving BBBEE by enterprises and sectors. The scorecard provided advantages to companies that attained a high score when measuring direct empowerment through ownership and control of enterprises and assets; human resource development and employment equity; and indirect empowerment through preferential procurement and enterprise development (DTI, 2003).

Erwin (personal communication, June 28, 2021) highlights that the regulations gave the state the power to impose empowerment conditions in areas it had full control. This approach is explained by Erwin (personal communication, June 28, 2021) as follows:

> "It was a conscious intervention to try and speed up participation in ownership… The approach we took was that government's ability to influence ownership was greatest in its own procurement processes and within the state sector itself or where it issues a license. The first significant legal step taken was in the mining sector, where the provision was put in that 25 per cent of any mine had to be Black owned. So, our focus on the first phase of BBBEE was on those areas where the state had the power to put conditions to various economic activities or licenses," (A. Erwin, personal communication, June 28, 2021).

October (personal communication, August 10, 2021) indicates that the concept of a Code of Good Practice was adapted from the labour movement, where it was used to good effect in the late 1990s to create progressive labour legislation. "We changed the behaviour of business [in the labour movement] through the concept of a Code of Good Practice. It was not a legally enforceable regulation [but was used as] a Trojan Horse, as it were, to bring business or owners of capital to opening up the economy," explains October (personal communication, August 10, 2021). The Code of Good Practice was admittedly a weak instrument, says October (personal communication, August 10, 2021), but the only one that government could put in place because there was resistance to a legally binding instrument.

Ruiters (personal communication, February 17, 2022) says the Code of Good Practice had both a transferring and conferring redistributive intent:

> "First, the Code of Good Practice was a consensus based instrument which was persuasive in nature in its attempt to get white business to transfer wealth; but it also gave business the opportunity to change the way it structured itself with respect to shareholding and ownership to allow for a gradual transfer of wealth to Black people over time," (A. Ruiters, personal communication, February 17, 2022).

But, according to Brown, “the balanced scorecard ended up being a box ticking exercise with companies implementing bare minimum requirements just so they could attain some kind of BBBEE score,” (A. Brown, personal communication, May 13, 2022). Even with such weaknesses, however, Brown (personal communication, May 13, 2022) argues, the balanced scorecard intervention needed to be about creating an understanding and commitment to transformation by all role players because any other compelling intervention such as a law, would not have succeeded.

Ruiters (personal communication, February 17, 2022) also points out that government further sought to use the Code of Good Practice to confer wealth to Black people by mandating a certain portion of Black ownership in sectors where it issued licenses and public procurement. Public procurement referred to preferential procurement by government – another policy instrument for BBBEE – which aimed to favour Black-owned businesses in government procurement, using specified targets (DTI, 2003).

The implementation of the scorecard, however, proved to be controversial. One of the issues that emerged was that it did not standardise the measurement of BBBEE. For instance, Gqubule (personal communication, June 15 and July 1, 2021) says when the scorecard was first implemented it was discredited because it did not clearly define Black ownership. The effect was that there was no relationship between actual Black ownership – as reported by companies in their annual reports – and the figures appearing on their BBBEE scorecards. In other words, the lack of clarity on Black ownership created discrepancies in measuring actual Black ownership and measuring Black ownership for the purposes of scoring points on a BBBEE scorecard (Gqubule, 2021).

An example provided by Gqubule (2021) in this regard relates to the Continuing Consequences Principle in the Code of Good Practice, which allowed companies to retain 40 per cent of their points after the exit of Black shareholders from the company. Three conditions had to be met to retain these points as per the Continuing Consequences Principle, explains Gqubule (2021). First, the Black investors must have held the shares for at least three years. Second, the empowerment transaction must have created net value for the Black investors after settling the debt of the transaction. Third, transformation must have taken place in the company. Gqubule

(2021) also notes that companies could continue to earn BBBEE points for longer than the period the shares were held by Black investors. In theory, argues Gqubule (2021), this meant companies could continue to get recognition for a decade, since most BBBEE transactions had ten year funding periods.

In the result, argues Gqubule (personal communication, June 15 and July 1, 2021), companies with no clear Black ownership were being allocated points for Black ownership. According to Gqubule (personal communication, June 15 and July 1, 2021), this problem was partly created by government's engagement of a private company to develop the Code of Good Practice. At the implementation of the Code of Good Practice, this private company became a major service provider to companies that needed their empowerment status verified, essentially rendering the company a player and referee in the empowerment process. Armed with a deep understanding of the codes it helped develop, [the company] became the go-to company for a good BBBEE score (D. Gqubule, personal communication, June 15 and July 1, 2021).

Davies (personal communication, October 13, 2021) also alludes to problems created by the use of private verification agencies in general, suggesting that some of them undertook fraudulent activities. "If you paid a higher fee, you received a higher [BBBEE rating]. There was this phenomenon of a fairly significant number of companies claiming fairly high BBBEE scores, but if you looked at the micro picture – the state of [Black] ownership, control, participation, management, there was very little redistribution," argues Davies (personal communication, October 13, 2021). This rendered the BBBEE scorecard 'an exam that was too easy to pass' as loopholes in key terms of the Code of Good Practice were exploited, suggests Gqubule (personal communication, June 15 and July 1, 2021). Exploiting these loopholes was important for established white business because, as Davies (personal communication, October 13, 2021) contends, a perception of participation in BBBEE enabled them to demonstrate credentials of some sort that could be used to secure government contracts.

So endemic was the problem of misrepresenting Black ownership or fronting, that in 2006 the Department of Minerals and Energy (DME) announced that it would be hiring more staff to help with the vetting of empowerment deals in the mining sector. This was because when many of the empowerment deals were put to scrutiny, they revealed that the equity stake given to Black shareholders were much less than what was presented (Tangri and Southall, 2008). The widespread practice of fronting eventually led to government including a section in the Broad-Based Black Economic Empowerment Amendment Act (2013) to try and curb the practice. For the first time, the practice of fronting was given a legal definition in the Amendment Act as ‘a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement or the implementation’ of the Act. Such acts or conducts included, but not limited to, a BBBEE initiative in terms of which Black persons appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; a BBBEE initiative in terms of which the economic benefits received as a result of BBBEE status of an enterprise do not flow to Black people in the ratio specified in the relevant legal documentation; a BBBEE initiative involving the conclusion of a legal relationship with a Black person for the purpose of that enterprise achieving a certain level of BBBEE compliance without granting that Black person the economic benefits that would reasonably be expected to be associated with the status or position held by that Black person; and a BBBEE initiative involving the conclusion of an agreement with another enterprise in order to achieve or enhance a BBBEE status (Parliament, 2013). Despite these measures, the practice of fronting continues to be a key challenge impacting the implementation of the BBBEE policy, with the Department of Trade, Industry and Competition (2020) reporting that it had received 687 complaints about fronting since 2016 originating mostly from mining, transport, construction and engineering sectors.

- **Partnerships and Charters**

The final BBBEE policy instrument to be discussed is referred to in the BBBEE policy as Partnerships and Charters (DTI, 2003). The partnerships envisaged in the policy referred to charters through which sectors or enterprises could determine what their contribution would be to achieving BBBEE. These charters would facilitate voluntary compliance with BBBEE. Through the charters, sectors and enterprises would also be strongly encouraged to set specific BBBEE targets and outline concrete plans to achieve these targets (DTI, 2003).

The idea of partnerships and charters was first introduced by the BEECom (2001), which proposed that stakeholders should reach consensus on an Investment and Growth Accord highlighting their participation in Black business development, as well as investments in social and economic infrastructure and human capital. According to Brown (personal communication, May 13, 2022), the idea to put in place charters was informed by the need to understand the business and socio-economic dynamics of various sectors in order to formulate the best approach for facilitating a growth and empowerment plan for each sector. "The BEECom accepted that the market forces were not enough on their own to redistribute and that other instruments were required… [But] because there was a recognition that you cannot force business to implement BBBEE, there needed to be other processes put in place to persuade business that BBBEE was in the best interest of everyone," elaborates Brown (personal communication, May 13, 2022) on the idea behind the use of charters as an instrument to promote private sector cooperation on BBBEE. These charters, adds Brown (personal communication, May 13, 2022), were about establishing social contracts between government and business.

Although Erwin (personal communication, June 28, 2021) argues that the social contract was not at the core of the overall BBBEE policy in its original conception, the partnerships and charters envisaged in government's BBBEE policy appeared to have the hallmarks of a social contract, crafted specifically for the redistribution of wealth. A social contract is defined as "a dynamic agreement between state and society, including different groups in society, on how to live together, how power is exercised and how resources are distributed. It allows for the peaceful mediation of conflicting interests and different expectations and understandings of rights and responsibilities over time, and in response to contextual factors, through varied mechanisms, institutions and processes," (McCandless et al., 2018).

Erwin (personal communication, June 28, 2021) states that, following the introduction of the BBBEE Act, a number of industries adopted charters on their own accord, without the assistance of the government. Many of the industries, argues Erwin (personal communication, June 28, 2021), took this step to even-out the competitive playing field in the market and limit the ability of any industry player gaining an advantage through BBBEE. However, instead of promoting meaningful participation of Black people in the economy, the industry charters promoted ownership fronting, notes Erwin (personal communication, June 28, 2021). “We had stressed that being a shareholder can either be a front or it can be serious, [putting up capital and sharing in the risks of the business]. The [BBBEE] Act was clear that BBBEE had to be more than just ownership; it had to incorporate affirmative action, enterprise development, and training… so it was broader than just the ownership requirement,” states Erwin (personal communication, June 28, 2021), explaining how industry and business had deliberately opted for a narrow interpretation of BBBEE in their charters.

This approach to BBBEE by industry and business, suggests Erwin (personal communication, June 28, 2021), had the effect of slowing down BBBEE in some respects. Erwin (personal communication, June 28, 2021) explains as follows:

> “President Mbeki warned right at the beginning that when [you put in place laws like the BBBEE Act] in a market economy you very often achieve a rent-seeking effect. So, all that the Black participants in the economy become are rent seekers in the economy [and] that is not a growth enhancing factor. So, we were very clear about the possible dangers of BBBEE, which to a large extent, have in fact eventuated. Much of BBBEE at present is rent-seeking. By and large the focus has been on ownership and a form of ownership which is not necessarily full economic value,” (A. Erwin, personal communication, June 28, 2021).

Erwin (personal communication, June 28, 2021) concedes that government had not clearly defined the concept of ‘economic value’ when it introduced the BBBEE policy and Act and that this assisted those industries and businesses that wanted to front. However, this was not the only factor that led to fronting. Davies (personal communication, October 13, 2021) also argues that the initial BBBEE policy framework did not clearly define the idea of ‘ownership and control’ of the economy and this opened the door to fronting through charters:

> “Ownership and control was not limited to share ownership or participation in the JSE. It also had to do with the control of the

powers of economic ownership [and] the powers of running companies… Sometimes the shares granted to BBBEE recipients did not have full voting rights, or rights of representation on the board, so the actual control of the company remained in the hands of the existing owners. Very seldom did you find that any Black person who is recruited into management or the board is taken through the process of understanding the core business or takes a leadership role in the core business," (R. Davies, personal communication, October 13, 2021).

This problem was highlighted in the mining sector. In 2006, for instance, the DME raised a concern that many BBBEE deals contained a 'deferred ownership' clause whereby Black empowerment partners paid for their shares with future earnings and only received shareholder rights at some future date, usually five to ten years later. Yet, white companies were counting such transactions for full direct ownership points on the scorecard needed to qualify for licences and state contracts. The result of such transactions was that no true economic value accrued to Black shareholders (Tangri and Southall, 2008). In other words, no redistribution took place.

4.3 Conclusion

4.3.1 Findings on the conception and development of the concepts of redistribution in the Broad Based Black Economic Empowerment policy

The following section provides a discussion of the findings by way of conclusion. It revisits the aims, objectives of the study before proceeding with a discussion of the findings.

Primary data in this study was collected through in-depth interviews undertaken with policy-makers who were involved in the process of developing the BBBEE policy and legislation. The interviews were conducted with the aim to develop an understanding of the conceptions and codifications of redistribution that informed the BBBEE policy. In addition to the interviews with policy-makers, the study reviewed key policy documents from which ideas on redistribution through the BBBEE policy before 2003 emerged. These are the RDP (ANC, 1994), GEAR (Department of Finance, 1996), the ANC's 50th Conference Resolutions on Economic Transformation (1997), the BEECom Report (2001), the ANC's 51st Conference Resolutions on Economic Transformation and Black Economic Empowerment (2002), and South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (DTI, 2003).

To understand how the concepts of redistribution were conceived and developed in the BBBEE policy, one secondary question needed to be answered. This question sought to identify the concepts of redistribution adopted in the BBBEE policy. These findings have been presented in section 4.2 of the study and provide the basis for the following analysis on how the concepts of redistribution have been conceived and developed in the BBBEE policy.

4.3.1.1 Redistribution on BBBEE – talking left, walking right

i. The RDP and the pursuit of socio-economic justice

The ANC based its campaign for the first democratic elections on the RDP. Emboldened by the political whirlwind of the time, which gave it near certainty of winning the national election by a landslide majority, the ANC took an ostensibly radical approach in its redistribution aims, declaring that once in power, it would deracialise the economy and reverse the racially distorted distribution of the past. Black economic empowerment was identified as a key programme in this regard and would be implemented to change the demographic structure of the economy.

The ANC made these bold declarations despite the fact that in the negotiations with the white minority regime of the National Party leading up to 1994, white business had been unequivocal in its position opposing any kind of redistribution that was not preceded by economic growth (R. Davies, personal communication, October 13, 2021). The ANC continued arguing for redistribution, however, because, for once, racialised political power was democratically transferred to the Black population through electoral means. It is also apparent from the evidence available that the ANC, through the RDP, wanted to pursue the deracialisation of the economy as a means to attain justice for the disadvantaged Black population. As Erwin (personal communication, June 28, 2021) notes, the ANC was conscious of the reality that Black people's assets had been taken from them and that considerable Black wealth had been destroyed during apartheid. There was also a recognition that government needed to intervene to deracialise the economy as the market forces by themselves would not correct the distorted racial distribution that maintained (A. Erwin, personal communication, June 28, 2021).

The objectives of Black economic empowerment as envisaged in the RDP presupposed the centrality of the state in the organisation of fiscal resources and their just distribution to society to reverse the economic injustices of the past. As such, the economic empowerment interventions targeted by the RDP were centred on state interventionism. The form of efficient redistribution envisaged in the RDP was in line with the pursuit of socio-economic justice – the redistribution of wealth and opportunities to those who suffered injustices and economic exclusion.

ii. GEAR and the delinking of race from redistribution

Once the ANC took political office after winning the elections in April 1994, it was confronted with a new reality of being a governing party. Faced with the challenge of an ailing economy with no resources to aid redistribution, and the daunting challenge of bringing development to the majority Black population, reducing unemployment and inequality, the ANC government chose to introduce the fiscally conservative GEAR macro-economic framework in 1996 as a strategy to rebuild and restructure the economy. According to Davies (2021), the economic rebuilding programme required financing that was not readily available in the national fiscus, as the ANC had inherited a budget deficit from the apartheid government. These circumstances compelled the ANC government to go to the international market to raise funds. As Erwin (personal communication, June 28, 2021) notes, GEAR emerged out of this context – it was a demand by the international investor community placed on the ANC government to reform the way it was handling the macro economy of the country. In essence, the introduction of GEAR meant that international investors had gained influence over how the South African macro economy was run, and limited the ANC government's power and influence in the process. This shift in power also ushered a shift in power relations in the country as the demands of international investors were congruent with the demands of established white business in the country with regards to pursuing economic growth as a priority and deferring redistribution. GEAR, which president Mandela is said to have announced as being beyond discussion, was the culmination of the rightward turn (Freund, 2013). The power of the electorate that buoyed the ANC leading up to the first democratic elections had all but dissipated as the realities of being a governing party in a globalised world set in (Booysen, 2011).

The shift in power relations was in clear display in the manner in which the redistributive intent of the election-winning manifesto, the RDP, lost relevance following the introduction of GEAR. To begin with, GEAR moved away from the key strategic thrust of the RDP that economic growth and redistribution could take place simultaneously. Instead, GEAR conditioned redistribution on economic growth, thus reverting to the pre-1994 ideas expressed by established white business that there could be no immediate redistribution of wealth and that only the future fruits of the economy could be subjected to redistribution. In the result, GEAR placed no redistribution obligation on business and instead targeted state-driven interventions for redistribution – an approach that would fail to get off the starting blocks given that the government had very little resources and no real influence in the economy.

A key component for economic development of Black people was land redistribution. Land distribution policy presented conceptual challenges for GEAR that were not easily reconcilable. The democratic government in the GEAR document recognised land as a productive asset that, once redistributed, would play a key role in improving the distribution of income and economic activity (Department of Finance, 1996). As has been discussed, land redistribution policy in GEAR was linked to the government's land reform programme – the White Paper on South African Land Policy (Department of Land Affairs, 1997). According to this policy, land reform was being implemented to redress the injustices of apartheid and to alleviate the impoverishment and suffering it caused (Department of Land Affairs, 1997). The policy had three components, namely; redistribution, which aimed to provide the disadvantaged and the poor with access to land for residential and productive purposes; land restitution, which aimed to return land to those who were forcibly removed from their land as a result of the 1913 Land Act; and land tenure reform, which sought to improve tenure security for all South Africans (Department of Land Affairs, 1997). It has been argued that the South African Land Policy was stillborn because it was not conceptually aligned to section 25 of the Constitution (which provides for property protections) and government's willing-buyer-willing-seller policy. The result of this conceptual misalignment, it has been argued, is that two decades since the introduction of the South African Land Policy, whites continued to own 72 per cent of the total land surface of the country, according to the Department of Rural Development and Land Reform's 2017 Land Audit Report.

The GEAR macro-economic policy framework also presented conceptual challenges to the codification of Black economic empowerment. As the findings of this study have shown, GEAR is silent on Black economic empowerment and how redistribution through Black economic empowerment would be attained. However, because the Department of Finance (1996) claimed that GEAR was introduced as a strategy in pursuance of the goals of the RDP, it follows that, as with the RDP, it would be a reasonable policy expectation that GEAR should have aimed to deracialise business ownership and control, as well as change the demographic structure of the economy through Black economic empowerment.

However, GEAR does not mention the Black population group as intended beneficiaries of a deracialised economy throughout the document. If it was correct, as claimed by the architects of GEAR, that it was a strategy to implement the RDP as the overarching economic policy programme, it needed to use the same language as the RDP to clarify intent. A strategy to implement a policy is meant to be more specific on the objectives of the policy. As such, it was not unreasonable to expect GEAR to provide greater detail about interventions to deracialise the economy in favour of Black people, and in particular, structurally impoverished Blacks. And yet, GEAR did not address this. Nor did it identify Black people as a population group requiring support to participate meaningfully in the economy. Instead, it used general terms such as 'the poor' where it discussed redistribution. The lack of specificity in this regard made the intent of the strategy unclear and questionable with regards to redistribution for the benefit of Black people. It certainly gave credence to the assertion that GEAR was not aligned to the redistributive intent of the RDP and that it had, in fact, replaced the RDP as the flagship programme and continued to shape government economic policies at least until the early 2000s (Davies, 2021).

The impact of GEAR's delinking of race from its conception of redistribution was the effective dismissal of the centrality of racism in creating the racial inequality that persists up to this day and that the BBBEE policy was meant to address. By not recognising the impoverishment of Black people on the basis of the social class ascribed to them as a result of their race, GEAR proved to be misaligned to the redistributive intent of the RDP and positioned itself to protect the economic benefits that accrued to white people through a racialised economy, purely on the basis of being white.

Two years after the introduction of GEAR, government, through a resolution of the ANC's 50th Conference, established the National Empowerment Fund (NEF). The stated aim of the NEF was to redress economic inequality that resulted from past unfair discrimination against historically disadvantaged persons (National Empowerment Fund Act, 1998b). Redress, which is a form of socio-economic justice, is mentioned as a primary goal. However, no detail is provided in the Act on how this justice will be achieved; that is, there is no process set out to identify the injustices committed and identify the most appropriate remedies thereof, namely, the most appropriate forms of redistribution.

As with GEAR, the NEF Act failed to identify Black people as primary beneficiaries of economic redress, opting instead to use the general term 'historically disadvantaged persons' – defined in the Act as those persons or categories of persons, who prior to the new democratic dispensation marked by the adoption and coming into force of the constitution of the Republic of South Africa Act, 1996, were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons.

There are at least two problems with the use of the term 'historically disadvantaged persons' as defined in the NEF Act. First, it assumes that disadvantage is a phenomenon of the past that has not persisted beyond 1996. It implies that discrimination only occurred before the adoption of the constitution and that no one should claim to be disadvantaged or seek recourse from disadvantage after the coming into effect of the constitution. Strictly speaking, it therefore limits the scope of applicability to a timeframe linked to the adoption of the constitution. The effect of this is the imposition of a deadline on redistribution and Black economic empowerment that is not linked to the material change or improvement of Black people's lives. As this study has argued, redistribution is born out of the idea of justice and its success must be measured on the improvements in the quality of life and wellbeing of people (Sen, 2009). Second, by not declaring Black people as the intended beneficiaries of economic redress and instead using the term 'historically disadvantaged persons' as defined, it means it cannot be taken for granted that a Black person in South Africa was unfairly discriminated against. It places the burden on Black people to prove their disadvantage before any redress can take place. Redistribution in this strict sense therefore becomes for those who can legally prove discrimination against them. When issues of redistribution become matters of legal disputes, the ambiguity of terms such as 'historically disadvantaged persons' can become obstacles to Black economic empowerment.

In line with GEAR, the redistribution envisaged through the NEF targeted state-driven interventions that would utilise resources available from government. As Davies (personal communication, October 13, 2021), October (personal communication, August 10, 2021) and Ruiters (personal communication, February 17, 2022) have argued, these interventions failed before they could be implemented because the government sorely lacked the resources to get them off the ground. It is not that the government was unaware of its own dire financial position when it made these proposals. On the contrary, it was aware. The question that arises in this instance is whether government was politically committed to redistribution through the NEF. This is debatable. However, what is clear is that government had no means to implement state-driven redistribution in the short to medium term as it was focused on implementing GEAR by pursuing macro-economic stability and was averse to any intervention that would jeopardise the attainment of a budget surplus (A. Ruiters, personal communication, February 17, 2022). In the result, the redistributive interventions targeted through the NEF could only be implemented once macro-economic stability had been achieved. Redistribution in this sense was not a pursuit of justice but merely an offshoot of the primary policy objective for macro-economic stability aimed at not alienating the investor community.

iii. The BBECom and the creation of the illusion of broad-based redistribution

The limited reformism that resulted from the relegation of redistribution into a secondary consideration created grounds for organisations such as the Black Management Forum and Black Business Council to question Black economic empowerment. In the resulting discontent, Deputy President Mbeki invited the Black Business Council to make proposals on BBBEE. This led to the establishment of the BEECom with a mandate to construct a clear and unambiguous definition of BBBEE, among other objectives. Following extensive debates, the BEECom, according to Gqubule (personal communication, June 15 and July 1, 2021) and Mosala (personal communication, October 25, 2021), adopted a minimalist approach to BBBEE, which defined BBBEE in terms of creating a new circuit of racial accumulation or a Black business class. This approach to BBBEE had been promoted by Deputy President Mbeki (1999), who argued for the creation of a Black bourgeoisie, whose presence in the economy and society would be part of a process to deracialise the economy. According to this approach, therefore, redistribution through BBBEE would be a long-term process beginning with the creation of a small elite of Black business people who would in turn transform the economy from the inside for the benefit of the broader Black population.

There was an assumption that this elite Black business class was committed to this cause and would contribute as expected by starting industrialisation and growing the economy for the benefit of the Black population. They did not invest back as anticipated, however (M. Fihla, personal communication, July 14, 2021). As the study has shown, the BEECom did not place focus on changing the apartheid era economic relations between Blacks and whites, and instead concentrated on finding ways to assimilate the envisaged new Black business class into existing ownership structures of the previous apartheid era in the economy. In the result, this approach to redistribution was not conceptualised to transform a racial capitalist economy that left the majority of Black people structurally impoverished for centuries.

Despite this, the BEECom Report (2001) described its final definition of BBBEE as a 'broad definition', which would fit into the national transformation programme and redress the imbalances of the past through an equitable transfer and confer of economic resources. Although on paper the BEECom's final definition of BBBEE touched on some of the most essential elements of redistribution, namely, redress (for the attainment of socio-economic justice), transfer (the intent to move resources from one group to another) and confer (an unconditional granting of economic resources as redress), in reality, this was not the kind of redistribution envisaged by the BEECom, as explained below.

With regards to redress, the BEECom made a proposal on a form of reparative justice. It called for the financial sector to divert a minimum of ten per cent of its total assets towards reproductive investment in areas of national priority (A. Brown, personal communication, May 13, 2022). As will be shown later, any kind of redistribution that placed an obligation on the private sector was rejected by government because the balance of forces effectively meant that it possessed limited bargaining strength relative to the capitalist establishment. With regards to the transfers envisaged by the BBECom, these were market-based transfers which the broader Black population had no financial means to activate. The property protections in the constitution also meant that the transfers were not guaranteed. These transfers as a form of redistribution were also inconsistent with the idea of justice as advocated by Sen (2009), in that they denied structurally poor Black people the opportunity to improve their lives by conditioning redistribution on the ability of Black people to pay for the transfers. Furthermore, the conferring of economic resources were discussed as the government's contribution to redistribution, meaning government would use its own means to acquire economic resources and then confer them to Black people through development finance institutions such as the IDC, Land Bank, NEF, Umsobomvu Trust, Khula and the Development Bank of Southern Africa (DBSA). This meant that the redistribution envisaged in this regard was a form of internal redistribution of state resources derived from taxes that must fund other competing priorities. As has been discussed, this kind of redistribution was against the GEAR programme, which was in force at the time, with a strong focus on limiting government spending and creating a budget surplus as demanded by the international investor community. The unfavourable power relations between the global markets and the government meant that any conferring of resources to the general Black population was significantly constrained. Although the BEECom made a recommendation for reforming state development finance institutions for a focus on BBBEE, these institutions were poorly resourced, as the study has shown, and their ability to redistribute was limited.

Moreover, as the study has revealed, discussions in the BEECom were focused on the Black business class. In other words, the aim was for redress to secure the interests primarily of the Black business class or the patriotic bourgeoisie, and, if all goes well, extend the redress to the rest of the Black population. However, the 'broad definition' of BBBEE was not about the broad Black population. Instead, it was about broadening access points into the economy (A. Brown, personal communication, May 13, 2022) for the Black business class that was envisaged. This was an example of talking left and walking right (using transformative rhetoric while being conservative in policy action) by advocating for redistribution (albeit limited) while not fully engaging with the unfavourable power relations in the economy that were at the root of the challenge purporting to be resolved. This was clarified even further when the BEECom's proposals on BBBEE were taken to government and were further diluted, both on paper and in practice.

iv. An obligation-free investment in the Black business class

Following the release of the BEECom's report in 2001, the ANC held its 51st conference in 2002, out of which emerged resolutions on BBBEE. These resolutions were influenced by a group of Black business people within the ANC who wanted the organisation, through government, to formalise a BBBEE policy that would ensure an allocation of resources to Black businesses (A. Ruiters, personal communication, February 17, 2022). The policy narrative that emerged out of the 51st conference continued to place a focus on supporting the 'emergent Black capitalist class' in a joint commitment to improve the quality of life of the Black population.

As with the BEECom report, the 51st conference resolutions put forward the need to broaden the access points into the economy (broad based sector empowerment) for the new Black capitalist class, and for using state-led interventions to facilitate the participation of the Black capitalist class in the economy. The Black capitalist class in the ANC were therefore using their proximity to policymakers and the policymaking process to secure a position of privilege in the hierarchy of wealth creation opportunities. They were seeking an immediate allocation (redistribution) of resources to themselves in the promise that they would assist to build the economy and bring more Black people into economic activity. Although they made a demand for 'clearly defined targets' for the empowerment programmes they were pushing for, they made no reciprocal commitment on the broad redistribution or economic transformation they would deliver once they were empowered. In essence, they were offering no guarantees that the investment they wanted made in them would yield returns and, in fact, the BEECom was placing no obligation on them to implement redistribution as new owners of capital.

The theme of an obligation-free participation of business – whether the emergent Black business class or established white business – in BBBEE extended into government's formal policy on BBBEE. As the study has shown, the interventions for redistribution targeted in the policy were state-led interventions because government chose to focus BBBEE on those economic activities it had the power to place conditions on (A. Erwin, personal communication, June 28, 2021) – particularly, public sector preferential procurement, which continues to be the hallmark of BBBEE up to this day. Whilst the policy recognised that BBBEE would not be effective if government acted alone without the private sector, it placed no obligation on the private sector to play any particular role. Instead, the policy proposed a collaboration between government and the private sector in the form of partnerships and charters through which business would determine its own form and manner to contribute to BBBEE. In essence, government was relying on the owners of a racialised economy to relinquish their monopoly of the economy, through which they had greatly benefited for hundreds of years, in pursuance of redress or justice. This was a highly improbable proposition for realising the policy objective of substantive redistribution, as evidenced by the intra-race inequality that continues to expand up to this day, driven largely by the disproportionate domination of the white population in economic activity (Gumede, 2018). The fact that BBBEE was not made mandatory for a private sector that had driven the racialisation of the economy to the disadvantage of Black people indicates that the ANC government lacked the effective power and influence to redistribute the economy and deliver justice for the Black population.

Erwin (personal communication, June 28, 2021) submits that government could not compel the private sector to implement BBBEE because South Africa was not, and still is not, a strong state according to Erwin, and doing so would have driven investment away. October (personal communication, August 10, 2021) and Ruiters (personal communication, February 17, 2022) state that the South African government conceded to international pressure in opting not to make BBBEE about redistribution. According to this argument, the geopolitical pressures and the unfavourable local economic power structures through which the Washington Consensus and market liberalism were promoted at the time, convinced the South African government that any kind of redistribution would not be good for the economy. Hence, BBBEE was defined as a far-sighted partnership to stabilise and grow the economy and not merely a redistribution of existing wealth (Mbeki, 2003). By this definition, the assertion of established white business in the negotiations for democracy that only the fruits of future growth could be distributed, had become government policy.

This deferment of redistribution and making it conditional on growth ensured that redistribution would be severely curtailed as long as the markets and business expressed a view that growth was not sufficient. So, instead of ensuring true broad-based empowerment, government's BBBEE policy promoted an illusion of redistribution by placing a focus on Black share ownership in companies owned by white people (one of three core elements of BBBEE measured by the balanced scorecard). Because these were market-based transfers, it meant that only a few Black business people, many identified by white business for their political influence, could access the financing required to complete these transactions through white owned commercial banks and through government support (P. Pillay, personal communication, July 6 and 19, 2021). This process gave rise to the Black capitalist class or a Black bourgeoisie, as referred to by Mbeki (1999). As Davies (personal communication, October 13, 2021) notes, having these token Blacks in their companies made white businesses look good and positioned them well for accessing lucrative government contracts.

v. Further conceptual considerations of redistribution in BBBEE

There were other elements of the BBBEE policy that pointed to the conceptualisation of redistribution in BBBEE.

THE CONTRADICTIONS OF THE MARKET

The policy called for the transfer of ownership, management and control of the economy to Black people. Specifically, this meant the movement from one person to another of an instrument of ownership or asset (A. Erwin, personal communication, June 28, 2021). However, the exact mechanisms for these transfers were not specified because, according to Erwin (personal communication, June 28, 2021), this was left to the market forces. Ironically, the key reason put forward by government at the time of introducing the BBBEE policy was that market forces had failed to equitably redistribute the economy in the democratic era (A. Erwin, personal communication, June 28, 2021). Leaving the transfer of ownership, management and control of the economy to Black people to market forces therefore guaranteed that redistribution through BBBEE would be unworkable in the terms established in the original framework, not least because the majority of Black people had no means to participate in the market as equals to white owners of capital.

THE PURSUIT OF MACRO-ECONOMIC STABILITY AND THE FRUSTRATION OF REDISTRIBUTION

A key component in implementing a policy is securing adequate funding for the implementation of the policy. What has emerged from the findings of this study is that key national state development finance institutions, which were earmarked to give impetus to BBBEE through financing, were not structured and resourced for their development mandate. The insistence of government (DTI, 2003) that the financing of BBBEE should take place within the framework of maintaining a budget surplus in pursuit of macro-economic stability as per the GEAR strategy, had the effect of undercapitalising these institutions and forcing them to commercialise their operations to stay afloat. Redistribution in these circumstances was compromised as it was relegated to a secondary consideration. Furthermore, government regarded macro-economic stability as a necessary requirement for economic growth (A. Erwin, personal communication, June 28, 2021). Consequently, the pursuit of growth had the effect of deferring redistribution by curtailing government funding of state development finance institutions through fiscal restraint as long as the markets indicated that growth was insufficient.

The need for economic restraint was also the result of the negotiated compromises of the transition to democracy (M. Fihla, personal communication, July 14, 2021 and Davies, 2021), particularly the outcomes of the Mont Fleur Scenarios process that promoted macro-economic stability and fiscal containment as a primary policy objective. Through this process, it was agreed that South Africa would adopt ‘sound social and economic policies that observe macro-economic constraints’ (Kahane, 1992). This was in line with the changing global context which saw the ideas of neoliberalism or the Washington Consensus imposed on countries across the world (R. Davies, personal communication, October 13, 2021). The IMF and World Bank led this global drive and their influence was also extended to a transitioning South Africa and resulted in post-apartheid economic policy focusing on macro-economic stability and budget deficit reductions (R. Davies, personal communication, October 13, 2021). These circumstances made it difficult for the democratic government to finance redistribution as this did not align with the ideas of fiscal restraint, macro-economic balance and market liberalism promoted by the Washington Consensus. The government was powerless in the face of pressure from the investor community.

CONCEPTUAL CHALLENGES THAT RESTRICTED REDISTRIBUTION

As a result of various pressures as discussed above, government adopted BBBEE policy instruments that had conceptual flaws as discussed in this thesis and could not therefore redistribute for the benefit of the Black population. This was mainly caused by government avoiding the use of any language in these instruments that would make the investor community uneasy or suggest that the property protections guaranteed in the Constitution were in jeopardy. The Code of Good Practice was discredited for its lack of clarity in defining Black ownership, which resulted in failure to standardise the measurement of redistribution to Black people. The vagueness of the instrument in this regard allowed companies to implement the bare minimum on BBBEE but still obtain BBBEE credentials that placed them in good stead with government.

Partnerships and charters, as instruments for BBBEE, had similar conceptual challenges. To begin with, there seems to be disagreement between those who were responsible for formulating the policy on whether the charters were a social contract or not. Whilst Erwin (personal communication, June 28, 2021) suggests that the charters were not a social contract between established white business, government and other stakeholders, October (personal communication, August 10, 2021) and Brown (personal communication, May 13, 2022) are adamant that they were conceived as social contracts, although they were not implemented as such. The significance of whether the charters were social contracts lies in the fact that, in their conception, social contracts are agreements on how resources are distributed, among other related matters. For an agreement to be in place, it requires all parties to the agreement to participate in the formulation of the terms of the agreement. Therefore, the formulation and implementation of the charters as something other than a social contract exempted established white business from the obligation of an agreement. Established white business did not need to consult anyone on their contribution to BBBEE and therefore remained unaccountable with regards to redistribution through BBBEE. Furthermore, they could conceptualise their own ideas of redistribution through BBBEE and implement those. Because the overall policy on BBBEE was not sufficiently clear on ideas such as ‘Black ownership and control’ and the attainment of full economic value for BBBEE beneficiaries, it allowed established white business to formulate their own self-interested conceptions of these ideas, allowing themselves to avoid meaningful redistribution in the process. White business could do this because their power over government had been asserted by the Washington Consensus implemented through GEAR and protected by the constitution.

Chapter Five

Have the concepts of redistribution in the BBBEE policy been applied consistently in the BBBEE Act? – The Findings

5.1 Introduction

This chapter presents findings on the consistency with which the concepts of redistribution identified in the policy have been captured in the BBBEE Act. The following analysis of the findings relies on critical theory, which is about facilitating transformation by exposing the social conditions under which a society's knowledge about itself is articulated through systems such as public policy and law for purposes of enlightenment and ending prejudice. For South Africa as a country emerging from conflict and an extended period of human rights violations, redistribution carries an additional purpose to deliver justice to victims of past wrongdoing. Through the ideas of redistribution and transformation implied in the BBBEE policy, as well as their effectiveness, critical theory is applied as a framework for interpreting empirical results on the conceptualisation of redistribution in the policy.

Central to this study is an inquiry on how the concepts of redistribution have been conceived and developed in both the BBBEE policy and the BBBEE Act, and whether there is consistent application of these concepts in the policy and Act. At the core of the BBBEE policy is the attainment of meaningful and equitable participation of Black people in the national economy in order to redress the inequities resulting from the apartheid past. The BBBEE policy, therefore, has symbolic significance for both the government (which is largely Black) and the private sector (which is largely white) to be seen to be addressing the inequities of the past.

5.2 The concepts of redistribution in the BBBEE Act

The BBBEE Act (Parliament, 2003) sought to promote economic transformation – defined by then President Mbeki (2003) as the attainment of a stable and growing economy that erases the inequities of the past, while creating a prosperous and equitable future for all South Africans. Primarily, according to the BBBEE Act (Parliament, 2003), this would be achieved through a substantial change in the racial composition of ownership and management structures of *existing and new* enterprises (emphasis added). The BBBEE Act (Parliament, 2003) further made provision for the transformation charters and codes of good practice to be recognised as instruments for achieving BBBEE.

By targeting a substantial change in the racial composition of ownership and management structures of *existing and new* enterprises, the BBBEE Act (Parliament, 2003) sought the redistribution of wealth and management opportunities in existing enterprises, as well as in the future, in new enterprises. However, section 3(b) of the BBBEE Act (Parliament, 2003) also states that the provisions of the Act must be interpreted so as to comply with the constitution. Section 3(b) of the BBBEE Act creates at least two challenges for achieving a substantial change in the racial composition of ownership and management structures of existing and new enterprises. First, as this study has argued, the constitution does not recognise economic justice as either a right nor a founding value of the Republic of South Africa. Whilst the constitution proclaims equality of all persons before the law, it speaks of no right that can be invoked to enforce meaningful participation by Black people in the economy, or to rectify economic injustice, particularly economic injustices created by the country's past. Second, the constitution affords protection to existing property owners by prohibiting arbitrary deprivation of property (Durgard, 2018). In the result, the achievement of a substantial change in the racial composition of ownership and management structures of existing and new enterprises sought by the BBBEE Act (Parliament, 2003) was unattainable unless those who control the economy were willing to voluntarily redistribute.

The government understood these limitations and therefore turned the focus of BBBEE redistributive initiatives to those that could be implemented by itself. Erwin (personal communication, June 28, 2021) states that the logic of the BBBEE Act (Parliament, 2003) was in setting BBBEE conditions in areas where government was transacting, whether this involved issuing licenses or public sector procurement. "If government did not abide by that, then the person in government – an accounting officer – would be in default [or in] violation of the Act and you could act against them," explains Erwin (personal communication, June 28, 2021).

According to Erwin (personal communication, June 28, 2021), the BBBEE Act (Parliament, 2003) did not, and could not, place similar conditions on the private sector because this would have resulted in disinvestment in the country. Erwin (personal communication, June 28, 2021) notes that it was government's view at the time that any attempt to compel the private sector to implement BBBEE would have resulted in distortions such as rent-seeking that would have slowed down the accumulation of capital by Black people and jeopardised economic growth. "From the beginning we were clear that you cannot force a capitalist economy to do what the investor does not want to do, because investors have got options – they leave! Unless you are a strong state – and we were not a strong state, and still are not a strong state – you [will not] be capable of leading economic reform and growth," elaborates Erwin (personal communication, June 28, 2021). The official opposition at the time, the Democratice Alliance (DA), aligned with this kind of thinking as it argued for abandoning discussions on Black economic empowerment. "What the ANC does not seem to understand is that money knows no colour. Investors are not interested in racial 'transformation'. They are interested in profit, pure and simple… We simply cannot afford to be hostile to investors…" argued DA leader, Tony Leon (Mail & Guardian, 2004).

However, Davies (personal communication, October 13, 2021) argues that the BBBEE Act (Parliament, 2003) also did not regulate sufficiently to compel the public sector into action on BBBEE. Section 10 of the BBBEE Act (Parliament, 2003) made provisions for determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law; developing and implementing a preferential procurement policy; determining qualification criteria for the sale of state-owned enterprises; and developing criteria for entering into partnerships with the private sector. This section of the Act, argues Davies (personal communication, October 13, 2021), did not use language that would make it a requirement for public sector institutions to implement BBBEE and the provisions stated therein. "The 2003 Act said that all state entities should 'take into account, *and as far as reasonably possible*,' apply the codes (emphasis added). The phrase 'as far as reasonably possible' was recognised as what is known in trade-negotiation jargon as 'best endeavour' language, meaning there was no legally binding obligation and entities had wide discretion in deciding whether or not to apply the codes," explains Davies (2021:147). In essence, this meant that public sector contracts, which would have been reserved for Black companies, were still accessible to white companies. This would render BBBEE and it redistributive intent in this regard ineffective.

This best endeavour or laissez-faire approach to BBBEE was also reflected in the manner government approached the monitoring of the implementation of the policy. First, government's laissez-faire approach to the monitoring of the implementation of BBBEE is demonstrated by the lack of a provision in the BBBEE Act (Parliament, 2003) for a broad framework to monitor progress in implementing the objectives of the Act. Second, the lack of capacity by government's main monitoring agency, Statistics South Africa, to track the implementation of BBBEE also provides insights into government's thinking about the policy.

At the time of the introduction of the BBBEE policy, Statistics South Africa was responsible for the collection, production and dissemination of official and other statistics for purposes of monitoring or assessing policies, amongst others (Parliament, 1999). Lehohla (personal communication, September 12, 2021), who served as the head of Statistics South Africa at the time the BBBEE policy was introduced by government, notes that Statistics South Africa found it difficult to monitor progress in the implementation of the BBBEE policy because the monitoring tools available to the organisation were undermined by the negotiated national political settlement. Lehohla (personal communication, September 12, 2021) explains as follows:

> "The tools [we had] were greatly undermined on the eve of freedom. There was a demand by the ANC [during the negotiations to do away with] classification by race [in the statute book]. The Afrikaners agreed because they understood [the benefits] this would deliver [for them], and then the racial classification in the statute book was removed… Economic statistics are driven by administrative records, and when an administrative record, [the identity document], does not have that [racial] identifier, it gets very

> difficult to identify who is Black and who is not Black… Then how do you reform? When things become matters law, you need data in the form of a legal instrument. When the racial identifier is in the identity document, it has a greater refinement. But when it is removed from the identity document [you lose] that refinement," (P. Lehohla, personal communication, September 12, 2021).

In the result, according to Lehohla (personal communication, September 12, 2021), Statistics South Africa could not track Black participation in business. Thus, Statistics South Africa did not have a deliberate instrument and/or rigorous method to track BBBEE (P. Lehohla, personal communication, September 12, 2021). In the end, government had to rely on the goodwill of white business to report the relevant BBBEE statistics through survey programmes. This kind of a monitoring process, according to Lehohla (personal communication, September 12, 2021), was compromised because it gave government only the demographics of the business and not the demographics of the owners of the business to track Black business ownership, for example. As such, even though the BBBEE Act (Parliament, 2003) aimed to enable the meaningful participation of Black people in the economy, it had no objective way of tracking this.

October (personal communication, August 10, 2021), the then deputy director-general of the Department of Trade and Industry (DTI), states that the BBBEE Act (Parliament, 2003) was opposed by white business as they were against any legally binding instrument for the implementation of BBBEE. Ruiters (personal communication, February 17, 2022) a past director-general of the DTI and chairperson of the NEF, also recalls that in their engagements with big business they were repeatedly warned against making BBBEE a legal requirement as this would result in the violation of property rights and lead to disinvestment in the country. "In the end," states Ruiters (personal communication, February 17, 2022), "the BBBEE Act (Parliament, 2003) was made deliberately broad but at the same time giving the Minister of Trade and Industry the powers to make regulations on BBBEE as an ongoing safeguard to improve the implementation of BBBEE as time progressed." This demonstrated how white big business use their economic power to successfully lobby for policies and regulations that favour their positions (Goga and Mondliwa, 2021). According to Brown (personal communication, May 13, 2022), it was the hope of the policy and legislation crafters that, over time, all role players on BBBEE would recognise and understand that the policy was in the best interest of everyone. However, states Brown (personal communication, May 13, 2022), it was difficult for the government to write an understanding of the importance of transformation into a law. As such, it was important for the BBBEE Act (Parliament, 2003) to make provision for the transformation charters and codes of good practice as a form of social compact with business (A. Brown, personal communication, May 13, 2022).

5.3 On whether the concepts of redistribution in the BBBEE policy have been applied consistently in the BBBEE Act

This section presents findings on whether the concepts of redistribution in the BBBEE policy have been applied consistently in the BBBEE Act. The findings show that the conceptual challenges in the BBBEE policy as discussed in the preceding section were transferred to the BBBEE Act and demonstrate the reality of the power contestations through which law is produced.

As the study has shown, the constitution of the Republic constrained the state's ability to legislate for redistribution to Black people because it does not recognise economic justice or meaningful economic participation as neither a right nor a founding value of the Republic. The protection of property rights in the constitution also ensured that redistribution could only take place if those who control the economy were willing to voluntarily redistribute. The framing of the constitution in this manner essentially reinforced white material hegemony in ways that legitimised the continued economic subordination of the majority of Black people in South Africa. It is important to note that at the time of drafting the BBBEE policy and enacting the BBBEE Act, the Black governing party, the ANC, enjoyed a two-thirds Parliamentary majority which gave it the ability to amend the constitution in favour of redistribution for the benefit of the entire Black population. That the governing party did not do this is testament to the greater power held by the international investor community and the white local private sector in the political economy of the country, the ground for which was prepared by the influence of the World Bank and IMF on ANC social and economic policy (Davies, 2021 and Bond, 2000). In the result, although the BBBEE Act targeted a racial transformation of existing enterprises as a form of redistribution, this was legally unattainable. The redistribution stated in the Act could therefore not be regarded arguably as meaningful.

Brown (personal communication, May 13, 2022), Davies (personal communication, October 13, 2021), Fihla (personal communication, July 14, 2021), October (personal communication, August 10, 2021), Pillay (personal communication, July 6 and 19, 2021) and Ruiters (personal communication, February 17, 2022) agree that the BBBEE Act was a weak instrument for its failure to compel the private sector to redistribute. In fact, Davies (personal communication, October 13, 2021), October (personal communication, August 10, 2021) and Ruiters (personal communication, February 17, 2022) point out that any form of legislation on BBBEE was vehemently opposed by business in the course of formulating the policy. Because of this resistance, in the end government opted for a policy that would legislate against itself by regulating BBBEE in the public sector, while leaving the private sector to determine its own actions on BBBEE. According to Erwin (personal communication, June 28, 2021), the BBBEE Act did not, and could not, place redistributive demands on the private sector because this would have resulted in disinvestment in the country. The power held by the private sector over government was yet again in sharp display in this instance.

But the failure to legislate against the private sector on BBBEE raises an important question about who owns the economy in a capitalist or free market economy as South Africa had been declared to be (A. Erwin, personal communication, June 28, 2021). This kind of economic system is characterised by individualism, private freedom, private property, property rights, decentralised decision making and limited government intervention where the means of production are held in private hands for private gain and government does not own property (Mohr, 2015). In such an unbridled free market system, government is not a direct participant in the economy – and cannot embark on an accumulation process of its own for redistribution to Black people because the system disallows it – and therefore legislation that seeks to achieve redistribution cannot be effective without a clear framework on how redistribution will be attained through interventions in the private sector. The BBBEE Act failed this test and placed the obligation to redistribute on a state that did not have the capacity to do so. Furthermore, Sikhakhane (personal communication, December 1, 2021) – a Senior

Counsel who practices in the areas of administrative and constitutioinal law, among others – proposes that law enacted for social transformation, as the BBBEE Act was, must be just or based on what is morally right and fair; it must be based on the ideology of socio-economic freedom; it must be legitimate in the eyes of the majority of the population; and it must be enforceable. The BBBEE Act also fails this test as the findings of this study have shown. In this sense, the Act advanced concepts of redistribution that were unattainable.

A critical analysis of the language used in the Act attests to this. Unlike the authoritative language commonly used in legal instruments, the BBBEE Act used indefinitive language to set out its objectives. For example, it stated that the objectives of the Act were to *facilitate* (emphasis added) BBBEE. According to the South African Oxford Dictionary (Soanes, 2002), to 'facilitate' is to make easy or easier. Stated differently, then, the objectives of the Act were intended to make it easy or easier to implement BBBEE and not to ensure it is implemented. In this sense, the objectives of the Act were not provisions or stipulations (conditions or requirements that are specified or demanded as part of a legal instrument).

The thrust of redistribution in the BBBEE policy was about bringing about significant increases in the numbers of Black people who have ownership and control of existing and new enterprises, particularly in the priority sectors of the economy identified by government. In other words, it was about economic transformation. The objective of the BBBEE Act that deals directly with this imperative is set out in section 2(a) of the Act and speaks of *promoting* (emphasis added) economic transformation in order to enable meaningful participation of Black people in the economy. The term 'promote' means to aid the progress of a cause (Soanes, 2002). This is also not definitive use of language that projects a decisive and authoritative intent on redistribution.

Further indefinitive language is found in the section of the BBBEE Act that deals with the implementation of the codes of good practice. Sections 9(3) (a) and (b) of the Act state that "A Code of Good Practice issued in terms of subsection (1) *may* (emphasis added) specify (a) targets consistent with the objectives of this Act; and (b) the period within which those targets must be achieved," (Parliament, 2003). The use of the word 'may' effectively communicates that a Code of Good Practice need not specify targets.

This leaves the implementation and monitoring of BBBEE to the discretion of the various sectors, and this was undesirable as it left government with no direct influence on its own policy programme for necessary social change. Another example of indefinitive language in the Act can be found in section 10 of the Act, as pointed out by Davies (personal communication, October 13, 2021). The language used in this instance basically states that organs of state and public entities should do their best to apply the codes of good practice, meaning there was no legally binding obligation and entities had wide discretion in deciding whether or not to apply the codes (Davies, 2021). The effect of this kind of language was that, despite the existence of the codes of good practice, the door was left open to established white business to secure contracts that are on paper reserved for empowerment companies in organs of state and public entities without there being adverse consequences. This use of language fitted in with the demands of established white business that there should be no legal obligation imposed on redistribution and that redistribution should be deferred to an unspecified future date, dependent on economic growth. In this sense, the Act failed to deliver economic justice to all Black people including women, workers, youth, people with disabilities and people living in rural areas, as envisaged by the Act.

In sum, the failure of the constitution to recognise economic justice for Black South Africans as an imperative consideration in the context of the country's oppressive history; the subsequent use by the private sector of constitutional protections and economic power to ensure the BBBEE Act did not compel private sector redistribution; the use of state-led interventions instead for BBBEE when the state clearly had no capacity to implement meaningful redistribution; and ultimately, the use of indefinitive language in the BBBEE Act to appease the private sector, all combined to make the Act ineffective for achieving the economic empowerment of Black people by advancing ineffective conceptions of redistribution.

Chapter Six

What the findings reveal about the conceptualisation of redistribution in the BBBEE policy framework

6.1 Introduction

This study has been undertaken to assess whether BBBEE policy failure in the democratic South Africa is explained in significant part by the absence of a common conceptualisation of redistribution in the BBBEE policy and BBBEE Act, the legal instrument created to support the implementation of the policy at their conception and formalisation in 2003. The problem statement of this study postulated that the BBBEE policy in its framing of redistribution, at its conception, was appropriately intentioned and positioned to bring about racial change in the ownership of the economy. The findings suggest that this was not so.

The research moved from the premise that the initial BBBEE law may have not rigorously conceptualised redistribution and, as a consequence, this may have contributed to the failure of the BBBEE policy. This premise has been shown by the findings of the study to be inaccurate. While the findings reveal that the initial BBBEE Act has wide ranging limitations with regards to its conceptualisation of redistribution, these limitations were not created in the law making process. Rather, the findings suggest, they were created in the policy making process. In the end, the law making process reproduced what was laid out in the policy making process. This process dates back to the crafting of the RDP on the eve of democracy.

6.2 Policy shifts on redistribution

BBBEE as first mentioned in the RDP was a programme for socio-economic justice with the aim to remedy historical social and economic inequalities. It was a programme to pursue redress for past economic injustices and the redistribution of wealth and opportunities for the benefit of the Black population. However, as the ANC, now a governing party, engaged with established white business on matters of redress and redistribution, they were confronted with an unwillingness on the part of white owners of capital to redistribute. Further yet, the ANC government found that they had no power to compel white business to redistribute as the skewed economic power relations continued to be in favour of whites. In fact, the ANC government needed white business to keep the country's ailing economy afloat. This led to a number of policy shifts and compromises on the side of the governing party in the crafting of the BBBEE policy.

The first of these shifts was the replacement of the RDP with GEAR as an overarching macro-economic programme. The findings of the study suggest that GEAR was introduced to appease global financial institutions, including local and international investors, with neoliberal economic policies that promoted market liberalism and market based distribution. As the findings of the study suggest, GEAR was introduced in direct response to demands by the global financial institutions and the investor community to focus the country's post 1994 socio-economic programme on economic growth and macroeconomic stability. The assumption of this approach, as advanced by the investor community, was that securing positive growth rates and macro-economic balance would be a catalyst for socio-economic development. Importantly, the argument from the international investor community went, the approach would lead to organic redistribution in the economy.

While those who were in cabinet at the time, such as Erwin (2021), argue that GEAR was implemented within the RDP framework, the findings of the study show that the RDP and its 'growth through redistribution' approach was abandoned in favour of the 'redistribution through growth' approach within the GEAR framework. This confirms findings by writers such as Terreblanche (2002), Davies (2021), as well as Padayachee and Van Niekerk (2019), who have also come to the same conclusion. The fundamental difference between the two approaches as it relates to redistribution was that the RDP approach sought redistribution to the Black population through the mobilisation of all people and resources available in the country to advance social services while stimulating growth. On the other hand, the GEAR approach deferred redistribution and instead prioritised economic growth. It is also clear that the RDP principle of 'growth through redistribution' could not be implemented within the GEAR framework of fiscal restraint and pursuing a budget surplus, as it would have required large scale government spending on infrastructure and social services. This shift had major implications for the conceptualisation and implementation of the BBBEE policy, which at its core, as described in the RDP, was about the urgent project to deracialise the economy through redistribution.

At the level of the lived experience of Black people, the policy shift that took place through the promotion of the GEAR programme over the RDP, was a shift against the Black population and the intention to deliver their meaningful participation in the economy. The neoliberal and free market language used by the investor community to justify the shift away from redistribution as envisaged in the RDP was a nuanced and covert intent by the white owners of capital to ensure that the economic system, in which whites maintain overwhelming control and power, would be maintained. The RDP was unequivocal in its aim to address the deliberate marginalisation of Black people from economic, political and social power. It noted that forces within the white minority had used their exclusive access to political and economic power to promote their own sectional interests by systematically exploiting and economically oppressing Black people. The RDP called for the immediate change of this situation. That the RDP was replaced by GEAR – a programme that did not mention the term 'Black' or identify Black people as a population group requiring support to participate meaningfully in the economy – was not incidental. It was an indication of the pressure brought to bear on government by the demands of neo-liberalism and the markets, as well as the pressures that came with the changes taking place in the world economy at the time with the introduction of the Washington Consensus.

In the result, the BBBEE policy as implemented within the GEAR framework looked different to the one envisaged in the RDP and was constrained for its lack of focus on the empowerment of the general Black population. In essence, the redistribution programme of the BBBEE policy was implemented through an elite compact between the owners of capital and the leadership of the ANC government that favoured a slower approach to the deracialisation of the economy and adopted a method that would see only a few Black individuals being assimilated into the commanding heights of the economy and business class, under the pretext of a long-term project to deracialise the economy from the inside. This approach was actively promoted at the highest levels of the ANC and government from the late the 1990s as the creation of a patriotic bourgeoisie, who would be used to strengthen the relationship between government and business as well as be part of the process to deracialise the economy. The findings suggest that the ANC government was co-opted into this approach by the investor community and global financing institutions who had imparted fear in the governing party that a more radical approach to BBBEE would lead to disinvestment in the country. Those in leadership positions in government at the time (A. Erwin, personal communication, June 28, 2021) have conceded that they did not possess the power as the state to make the owners of capital and investors in the South African capitalist economy prioritise the attainment of socio-economic justice through redistribution as outlined in the RDP.

When the BEECom was formed in 1998 to make proposals to government on an approach to Black Economic Empowerment, the idea of the patriotic bourgeoisie was already gaining momentum, championed by then ANC and South African deputy president, Thabo Mbeki. The BEECom was heavily sponsored by white business, multinational companies and international financing organisations[1] and a number of its commissioners were business people from the ANC or with links to the ANC, whom history records as some of the biggest beneficiaries of the patriotic bourgeoisie approach to redistribution. These commissioners included Cyril Ramaphosa (chairperson of the commission), who was ANC Secretary General in 1991 and lead negotiator for the ANC during the Codesa negotiations. Forbes (Nsehe, 2011) described Ramaphosa's rise in business as follows:

> "The BEE scheme favored black South Africans, enforcing measures such as Employment Equity, skills development, ownership, management for blacks. Using his deep political connections, shrewd negotiating skills and business savvy, Ramaphosa set out to build one of South-Africa's first BEE Investment holding companies. He first caught Forbes attention in 1998 when he appeared on a list of heavy hitters in 1998 with a net worth then of $25 million. At the time, he was an executive deputy

[1] Some sponsors, as outlined in the BEECom Report, were Absa, Firstrand, Investec, World Bank, Deutsche Bank, Anglo American, British Council, Nedcor, and Shell.

> chairman of NAIL [New Africa Investments Limited], the largest black-led business group, with $2.1 billion in assets and was also acting chairman of beer giant South African Breweries, and director at Nicky Oppenheimer's mining group Anglo American. Two years later, in 2000, he set up Shanduka Group, now a leading African black owned and managed investment holding company established with investments cutting across natural resources, financial services, property, energy, beverages and telecom. The company, majorly controlled by the Ramaphosa family trust, now has investments apparently worth close to a billion dollars."

Ramaphosa's Shanduka Group, founded in the same year the BEECom report was released, made some sizeable acquisitions in the period immediately after the formalisation of government's BBBEE policy in 2003. These included 16% of Alexander Forbes, worth R1,1-billion in 2006; 14,4% of Bidvest, worth R706-million in 2006; 1,2% of Standard Bank, worth R1,1-billion in 2006; 42% of Mondi Shanduka Newsprint and 40% of Mondi Packaging, worth about R980-million in 2006; 11,74% of Assore, worth R394-million in 2006; 1,5% in Liberty Life, worth R299-million in 2006; 25% of unlisted Downing, Reynard and Associates; and 40% of unlisted Kangra Coal (Robinson, Gedye and Makgetla, 2006).

Another prominent BEECom commissioner who came directly from the ANC and was part of the Black business elite that benefitted greatly from BBBEE was Saki Macozoma. The apartheid struggle activist, former Robben Island political prisoner and former ANC national executive committee member cut his political career short in 1996 to become the first Black Managing Director of Transnet. In 1998 he joined the board of Standard Bank and later held directorships in NAIL, Liberty Holdings, Stanlib, Tshipi é Ntle Manganese Mining, and Ntsimbintle Mining, among others (Top Empowerment, 2023).

Danisa Baloyi, who has described herself as a business activist (Unknown Author, 2003), was another BEECom commissioner with links to the ANC. As a student activist in the United States of America in the 1980s, she campaigned against companies with interests in South Africa demanding they disinvest from the country (Business Report, 2003). Through her activism, she is said to have received visits of support from former and late ANC president, Oliver Tambo, and the late anti-apartheid and human rights activist, Archbishop Desmond Tutu (Business Report, 2003). As a business person in the democratic South Africa, she has held several directorships, underscoring her influence as a powerful business person. Mathope (2017), described Danisa Baloyi's business interests as follows:

> "Previously an executive director of the National Black Business Caucus, she also served on the boards of the Johannesburg Stock Exchange (JSE) listed companies such as Absa Bank, The Don Hotels, Set Point Technologies, Enterprise Risk Management and African Merchant Bank (AMB). Baloyi also founded the Black Business Executive Circle (BBEC), the National Black Business Caucus (NBBC), Business Unity South Africa (BUSA), Chambers of Business in South Africa (CHAMSA), the Southern Africa Entrepreneurship and Small Business Association (SAEBSA) and the United Way Johannesburg and Candograph Investments Resources International (CIRI), a group that promotes business across nations, and is involved in the energy, biofuels, property development and aviation," (Mathope, 2017).

Danisa Baloyi's public sector involvement includes several directorships – including as chairperson and deputy chairperson of entities such Gauteng Tender Board and Gauteng Enterprise Propeller, the National Skills Authority (NSA), South African Tourism and the Institute of Directors of South Africa (IOD). She has also worked as a member of the Presidential Working Groups for Business, Women and Black Business (Mathope, 2017).

Turning to another BEECom commissioner, Reuel Khoza, his business career started in the 1980s and, as an emerging business leader, is said to have been instrumental in securing offices for the ANC in the centre of town in Johannesburg (Plaatjies, 2021). According to Sangri and Southall (2008), he was involved in one of the empowerment deals in the democratic era, when in 2005 petrochemicals giant, Sasol, sold a 25 per cent stake in its liquid fuel unit, which supplied about 41 per cent of South Africa's petrol and diesel, to Tshwarisano for R1.45 billion ($200 million). Reuel Khoza, together with Hixonia Nyasulu, a director on the boards of prominent companies, and former justice minister, Dr Penuell Maduna, owned about 30 per cent of Tshwarisano (Sangri and Southall, 2008). According to his website, Reuel J. Khoza (Khoza, 2023), he has chaired the boards of Eskom Holdings, Nedbank Group, Globeleq, GlaxoSmithKline South Africa and served as director of JSE Limited, IBM South Africa, Liberty Group, Standard Bank Group, Nampak Limited and Old Mutual plc. In 2004, Reuel Khoza was bestowed the Pioneers of Economic Empowerment Award by the Association of Black Securities and Investment Professionals (Plaatjies, 2021).

Other BEECom commissioners with links to the ANC included Lot Ndlovu, Moss Kgosana, Peter Vundla and others.

This meant that the BEECom was unlikely to formulate recommendations on BBBEE that would be too dissimilar to the ANC's own ideas and in line with the preferences of white business and the investor community, with whom the ANC as the governing party was already in discussions regarding approaches to redistribution. As the findings of this study have shown, white business and the local and international investor community, including global financing organisations, had already rejected the radical approach to redistribution outlined in the RDP and had expressed a preference for a focus on economic growth and macroeconomic stability, from which, they argued, organic redistribution would emerge. This aligned with the BEECom's adoption of a minimalist approach to BBBEE, which sought to create a new circuit of racial capital accumulation through the development of black-owned businesses or creation of a black business class (Edigheji, 1999). This approach was reinforced by the resolutions of the ANC's 51st Conference Resolutions on Economic Transformation and Black Economic Empowerment (2002), which continued to place a focus on supporting the 'emergent Black capitalist class', a narrative championed at the 2002 ANC Conference by the likes of Patrice Motsepe and Moss Ngoasheng, which evidence also suggests were some of the biggest beneficiaries of the patriotic bourgeoisie approach to redistribution.

The implementation of the patriotic bourgeoisie approach to redistribution, in fact, proved to be a failure of socio-economic justice as originally intended in the RDP. This failure of justice was two-fold. First, it was a failure at a general level to remedy historical social and economic inequalities by redistributing from the minority white population that owned the overwhelming majority of the economy, to the Black majority population. The second failure of justice that took place was the undertaking of redistribution to an elite group of Black business people associated with the ANC in the promise that they would assist to build the economy and bring more Black people into meaningful economic activity. The government was instrumental in facilitating economic transfers to these individuals but placed no conditions on them to offer guarantees that the investment made in them would yield returns in the form of increased or broader participation of Black people in the economy. There was no obligation on them to implement redistribution as new owners of capital and, in the result, they played only a limited role in remedying historical and economic inequalities that affected the Black population.

There was also a failure to hold the white owners of capital accountable for redistribution in line with the social contract envisaged in the conceptualisation of BBBEE charters. As the findings have shown, the ultimate formulation and implementation of the charters outside the idea of a social contract exempted established white business from the obligation of the envisaged agreement. This meant that established white business did not need to consult anyone on their contribution to BBBEE and therefore remained unaccountable with regards to redistribution through BBBEE.

They could conceptualise their own ideas of redistribution through BBBEE and implement those, as they did with the promotion of the small Black business class and the gradual approach to redistribution. This took the pressure off established white business to implement meaningful redistribution. Furthermore, because the overall policy on BBBEE was not sufficiently clear on ideas such as ‘Black ownership and control’ and the attainment of full economic value for BBBEE beneficiaries, it allowed established white business to formulate their own self-interested conceptions of these ideas and pass them on as legitimate redistribution, in the process giving themselves leeway to avoid meaningful redistribution.

The findings show that the National Empowerment Fund Act, which aimed to redistribute income generating assets, also had limiting factors with regards to redistribution to Black people. It also failed to directly challenge the continuing racial domination of Black people by assuming that economic deprivation is a phenomenon of the past that has not persisted beyond 1996. By describing racial disadvantage as something that took place before the adoption of the constitution in 1996, it inadvertently discounted current economic deprivation of Black people and the ongoing requirement for socio-economic justice. As a legal instrument, it makes it difficult to be employed to legally challenge systemic socio-economic injustices against Black people that persist in the country, including the lack of implementation of the National Empowerment Policy.

The findings of the study show that the National Empowerment Policy was not supported by practical operationalisation. The NEF, the main vehicle through which government aimed to provide historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares or interest in state Owned Commercial Enterprises being restructured or in private business enterprises, was grossly under-resourced for its mandate. This meant that BBBEE continued to be available only to the politically connected who could make use of special purpose vehicles financed through third parties or private financial institutions.

The important matter of availing funding for BBBEE did not only arise at the establishment of the NEF. As the findings have shown, debates on BBBEE financing began in the BEECom. The BEECom considered two approaches in this regard. The first one would see the establishment of a BBBEE state entity located in The Presidency and accountable to Parliament that would drive the BBBEE agenda throughout government, particularly the financing of the programme. Furthermore, state development finance institutions would be reformed to prioritise BBBEE. The second approach considered by the BBECom related to creating a government BBBEE fund to finance the BBBEE programme, partly by accessing resources in the state-owned short-term insurer, Sasria. The envisaged BBBEE fund would also be financed through a proposed general tax. This second approach was rejected by the BEECom and was not included in its final report in 2001. There was agreement within the BEECom on the first approach, but only as it concerned reforming state development finance institutions for a focus on BBBEE. The proposal for a BBBEE state entity located in The Presidency was rejected.

Even when the BBECom agreed to make progressive proposals regarding the financing of BBBEE programmes by calling for the financial sector, particularly life and retirement companies, to divert a minimum of ten per cent of its total assets towards reproductive investment in areas of national priority over an adjustment period of five to seven years, as an economic stimulus and a kind of reparations, these proposals were not included in the final BBBEE policy by government. In the end, therefore, no new money was proposed to come from the state for the financing of BBBEE, an approach consistent with the neoliberal policies of the investor community that called for fiscal restraint and the prioritisation of macroeconomic balance, growth and market-based redistribution. This also shielded established white business from taking responsibility for redistribution to Black people as a remedy for past socio-economic injustices. The impact of this lack of financing and capital provision for state development finance institutions that had been given the mandate to support the BBBEE programme, meant that the development or redistributive mandate of these institutions fell away as they commercialised to remain viable.

Even when the BBBEE policy document was introduced in 2003, government continued to insist that the financing of BBBEE would take place only within the framework of maintaining macroeconomic balance in line with the GEAR strategy that was in place at the time. This meant that it would be difficult for government departments to create new line items in their budgets for BBBEE and BBBEE could not be financed through government debt or large scale deficit financing.

Furthermore, government resisted calls for earmarked progressive taxes to capitalise programmes for BBBEE such as the NEF. This, again, served to protect established white business and wealthy white people, from acknowledging that they benefited from the injustices the majority of the Black people were subjected to, and from taking any action to offer remedies. This lack of funding for the BBBEE programme meant that its implementation was highly constrained and, as such, would remain an ideal rather than an effective programme for redistribution and the attainment of socio-economic justice, as long as the investor community and international financing institutions demanded the maintenance of macroeconomic balance and market-based redistribution. In the result, the lack of financing for BBBEE and the attainment of socio-economic justice remained a mirage for the general Black population – always promised, but never within reach.

These limitations on the redistributive capacity of the BBBEE policy ensured that the reach of the policy in the Black population would not be broad. The narrow focus that enabled only a few Black individuals to be supported through BBBEE appears to have been the intent of government from the introduction of GEAR in 1996. This assertion is supported, for example, by the statement made by then Deputy President Mbeki (1999) at the formation of the BBECom, wherein he stated that the role of the BEECom would be “to answer the question – how do we promote the formation of a black bourgeoisie which will itself be committed and contribute to black economic empowerment?” (Mbeki, 1999). The intent and outcome from the BBECom, as intimated by the findings, was about reform rather than the transformation of the economy and the economic system that continued to keep Black people out of meaningful economic activity. As the findings suggest, discussions in the BBECom did not explore the prevailing apartheid capitalist economic system and how it reproduced skewed economic relations between the Black and white sections of the population that kept Black people out of economic activity that could change their lives for the better. The Commission took a minimalist approach to BBBEE and did not explore how the conditions that simultaneously engendered privileges for whites on the one hand, and sustained the exploitation and marginalisation of Black people on the other, could be altered. It only sought to assimilate a few Black people into the commanding heights of the economic system with the hope that, once white domination in the economy was somewhat diluted, the market would take over redistribution by creating an opportunity for more Black people to become active participants in the economy.

By the time the BBBEE policy was introduced in 2003 the policy narrative was clear that empowerment would take place within the context of economic growth, macroeconomic stability and through long term market-based redistribution. This policy narrative was promoted at the same time the ANC promoted a political narrative that BBBEE would benefit the Black population in general. The ANC leadership maintained in public discourse that the need to introduce the BBBEE policy to drive effective and significant Black economic participation in the economy had become pressing (Mbeki, 2003 and Erwin, 2003). This deracialisation of the economy, stated the ANC, would be achieved through the transfer of ownership, management and control of the economy to Black people. This assertion gave the public impression that some kind of redistribution would take place to the Black population, when, in fact, this was not going to take place.

It could not take place because the entire premise of the macroeconomic programme in force at the time – GEAR – was against any form of redistribution of existing wealth. In fact, the findings show that there was an insistence within government circles that there should be no public statements on redistribution or actual attempts at redistribution so as to not erode investor confidence. Furthermore, the idea to transfer the ownership, management and control of the economy to Black people was impracticable as it was predicated on market-based redistribution, which had failed to deracialise the economy up to that far, as the ANC itself had conceded. But more importantly, the majority of Black people were not major participants in the market economy at the time. While empowerment deals created market participation opportunities for a small group of Black people from 1994, with at least 1 364 empowerment deals valued at R285 billion concluded between 1995 and 2005, the JSE top 200 companies with some form of Black ownership in the same period accounted for less than 2 per cent of the JSE's market capitalisation (Tangri and Southall, 2008). This under representation of Black people in the market meant that the majority of Black people participated in the market predominantly as consumers and not decision makers, producers or investors to whom the market could distribute through returns on investment. In such a situation, government would have required to insert itself as a market participant so it could redistribute to the majority of the Black population. Market liberalism implemented through GEAR precluded government from being an active participant in the economy. As such, the form of redistribution outlined in the BBBEE policy was unworkable for the general Black population. In the end, a number of measures were put in place by the ANC government to foster a public perception that redistribution would take place. These included the public sector preferential procurement system, the Small Business Centre attached to the DTI, the Ntsika Enterprise Promotion Agency to provide non-financial assistance to SMMEs, as well as the Khula Enterprise Finance Limited and Khula Credit Guarantee Limited for wholesale loans and loan guarantees, respectively, among others. None of these initiatives proved effective in promoting redistribution and deracialising the economy with about 50 per cent of the South African Black population living below the poverty line nearly fifteen years after the BBBEE policy framework was put in place (Statistics South Africa, 2017), white South Africans continuing to earn three times more than Black South Africans on average (Statistics South Africa, 2019c), and Black ownership in companies across the economy recorded at just 29 per cent in 2019, compared to 25 per cent in 2018 and 32 per cent in 2016 (Thomas, 2020).

Ultimately, the name and text of the BBBEE policy, like that of GEAR, belied the actual content of the policy as it related to redistribution. While the policy called for the transfer of the economy to Black people, it made no provision for any significant transfer to take place from the white owners of the economy within the historical context of the wealth that had been expropriated from Black people. Instead, the transfers that took place were only to a small number of the emergent Black capitalist class that had been promoted by the governing party, using market-based transfers and debt. In reality, even these transfers were not genuine transfers that would advance the idea of socio-economic justice. The Black majority ANC government was powerless against the white minority that owned the economy and decided to adopt the ideas of neoliberalism and free market capitalism (through the outcome of the Mont Fleur Scenarios process and the negotiated political settlement of 1994) that demanded zero government intervention in the economy and the autonomy of the market.

Recognising that they had no power to effect redistribution from the main economic players, namely, established white business, the ANC government turned the BBBEE policy impetus on to itself and made redistribution a matter of state concern. The BBBEE policy within this context became mainly about preferential procurement in the public sector. While the policy made some stipulations with regards to Black ownership for companies in industries requiring government licenses to operate, this idea also did not lead to significant transfers of the ownership of these companies to Black people because the policy failed to adequately define the meaning of a Black person as well as the concept of empowerment, and this led to fronting and the failure of the idea of redistribution. The ownership of the real economy largely remained untouched in white hands, while a Black government trying to reverse a budget deficit inherited from a white minority government struggled to find ways within itself to close the inequality gap through meaningful participation of the Black population in the economy.

This powerlessness to influence redistribution was also evident in the policy instruments put in place to try and effect redistribution. With regards to the Code of Good Practice or the Balanced Scorecard, the findings suggest that the instrument had a fundamental flaw that prevented it from influencing redistribution – it did not standardise the measurement of BBBEE for companies. This provided scope for the deliberate misrepresentation of Black ownership by companies, leading to white owned businesses receiving BBBEE ratings they did not qualify for, and the ability to tender for government contracts that were meant to be the preserve of empowerment companies or transformed companies. This undermined the struggle for economic transformation. The weakness of this instrument was exacerbated by the ANC government's relinquishing of the responsibility to assess empowerment in companies. Relinquishing this responsibility to a private enterprise, meant that there was no public accountability in relation to the BBBEE ratings issued to white companies and empowerment would be what the white companies said it was and government could not dispute that.

The partnerships and charters – another instrument of the BBBEE policy – also proved ineffective as a tool for redistribution. The lack of a rigorous approach in the monitoring of redistribution through partnerships and charters evident in the assumption that white companies would be honest in declaring their BBBEE statuses through the Code of Good Practice, was also evident in the provision for voluntary compliance with BBBEE. As the findings show, the end result was not BBBEE compliance. Instead it was fronting and the frustration of redistribution. Again, fronting became possible because a key term with regards to Black ownership was not clearly defined in the policy. Whilst the charters placed a focus on ownership, there was no explicit expression about the necessary economic value of this ownership. In the result, token ownership that did not result in real or meaningful ownership became a wide practice of white business in the process of resisting economic transformation and socio-economic justice.

But, what does all this mean for the BBBEE law and its role to ensure the implementation of the BBBEE policy within the context of redistribution and socio-economic justice?

As has been previously stated, this study takes the view that law is an authoritative policy instrument in a political system used to address the contested policy issues in a society for the benefit of one interest group or another (Wolpe, 1972 and De Coning, 2006). The findings of this study reveal that the BBBEE policy emerged out of a highly contested legal process that started many years before the policy was conceptualised. Ideas or policies regarding matters of redistribution and socio-economic justice were debated and, arguably, settled even before the democratic state of South Africa was declared in 1994. The power contestations that took place during the political negotiations for freedom influenced what economic system would be adopted in the country, what legal system would be put in place, what political institutions would be in place and what powers they would have, as well as what could or could not be done about the injustices of the past.

The white minority, led by the National Party, used its economic power to ensure that the post transition phase would continue to favour established white business and white property owners, assisted by the era of the Washington Consensus (1989) – the global economic compact that promoted free-market economic policies. On the eve of democracy between 1991 and 1992, in the Mont Fleur Scenarios process, it was agreed that a decisive political settlement would be reached and sound social and economic policies that observed macro-economic constraints adopted (Kahane, 1992), ideas promoted through the Washington Consensus. This had the effect of constraining future ANC economic policy before the ANC even took over political power.

Therefore, even as the ANC drafted the left leaning RDP leading up to 1994, it did so having already committed itself, through the Mont Fleur Scenario process, to implementing policies diametrically opposed to the RDP’s core idea of growth through redistribution or the use of state resources to drive social services that would promote economic growth. The free-market economic ideas of the Washington Consensus would not, for example, align with the idea of state intervention in the economy for purposes of redistribution, and would instead propagate that redistribution should solely be the function of the market. While the RDP was a useful political tool for the ANC leading up to the first democratic election, it appears, as the findings of the study indicate, its usefulness would end there. The findings of the study suggest that the RDP and its ideas of state-led redistribution were abandoned and replaced by GEAR in 1996 as the country's overarching macro-economic programme that pursued growth, first and foremost, and promoted fiscal restraint, the liberalisation of the economy and market driven redistribution.

The societal impact of abandoning the RDP was great for what it also meant about the ANC's fundamental thinking on issues of transformation as it took over government. As Coetzee (1993) explains, the meaning of 'reconstruction', as envisaged in the Reconstruction and Development Programme, implied a more fundamental societal change through rebuilding or reforming society. In this regard, argues Coetzee (1993), reconstruction meant a change in power relations between those who control or have access to power and the disenfranchised as an important way to bring about societal and economic transformation. It also meant a change in asset-based relations through measures to promote deconcentration in the economy, including land reform (Coetzee, 1993). In a reconstruction approach, development is viewed as a comprehensive process which requires more radical societal change than the incremental approach under market liberalism aimed mainly at increasing efficiency or output. It sees the eradication of poverty and unemployment as being important objectives of development, places less emphasis on market led growth, and is more concerned with changing power relations, redistribution, and justice for all – politically, economically and socially (Coetzee, 1993). These are the benefits the South African society, in particular the Black population, lost as a result of the abandoning of the RDP.

Another key outcome of the negotiated settlement was the adoption of the South African constitution. The constitution promoted non-racialism while also declaring that all people were equal before the law. The Constitutional Court has interpreted the constitutional provision to equality to mean justice and fairness rather than complete equality (Dlamini, 2002). The constitution further provided property rights protections and made no provisions for socio-economic justice even as it recognised the injustices of the past committed against Black people. Although the constitution based South Africa's legal system on human rights, it did not recognise meaningful economic participation as a right necessary to help citizens lead fulfilling lives or to rectify economic injustice, particularly economic injustices that derive from racism and are a direct result of the country's history of sustained Black economic exclusion. Thomas (2000) describes this as a colour-blind approach to constitutional interpretation that adheres to classically liberal notions of formal neutrality and equality that entrench, rather than correct, racial marginalisation. The framing of the constitution in this manner had the effect of normalising and ingraining economic racism as a feature of the social order in the democratic South Africa by leaving the economically excluded Black population with no justiciable right to meaningful economic inclusion. In essence, the law claimed to promote racial equality but in fact perpetuated racial inequality.

The constitution further put in place the political system through which public policies and laws would be managed. To this end, the constitution established the legislature, which is responsible for making laws; the executive, which makes policies and enforces laws; and the judiciary, which adjudicates conflicts in society by interpreting the law. The constitution further provided that every policy and law passed by the executive and the legislature, respectively, would have to be in line with the constitution, and the judiciary, as the interpreters of the constitution, would have the last word on the constitutionality of the policies and laws. In other words, the judiciary was given powers to veto any policy or law that is the outcome of political processes in the executive or legislature.

This is the context within which the BBBEE policy framework emerged. As the findings of the study have shown, the implementation of redistribution through BBBEE was greatly constrained by the GEAR programme that ensured government would not intervene in the economy to effect redistribution nor put in place measures to finance BBBEE; in line with the macro-economic constraints framework agreed to during the Mont Fleur Scenarios process. As such, Davies (2021) argues, the ANC policies were effectively decided before it came into power in 1994.

The declaration of non-racialism and equality before the law benefitted the white minority as it helped them find new avenues, different ways of securing invisibility in the process of accumulation and privilege (Steyn and Conway, 2010). Non-racialism has sustained racialised economic legacies that still condition the distribution of opportunity, resources and wealth in favour of whites and paradoxically protects their privilege through neo-liberal state policies and laws that legitimise a new form of oppressive domination and capital accumulation in the democratic era (Ruiters, 2020).

Subjecting every policy and law to the constitution, which only the judiciary has the power to interpret and make declarations on their constitutionality, also had a constraining effect on the BBBEE policy. As has been stated, the constitution makes no provision for socio-economic justice and protects the rights of property owners – including those who own property stolen during the colonial and apartheid eras. As an instrument for redistribution and socio-economic justice, the BBBEE Act was left greatly constrained by these ideological frameworks that failed to provide for socio-economic justice and adequately conceptualise redistributive intentions. This means that the BBBEE Act was structurally constrained in its ability to enforce or legalise redistribution from the white minority to the Black majority; it would not be able to facilitate the meaningful participation of the Black population in the economy. The protections in law designed for white capital and property owners ensured that they maintained control of the economy and could not be held legally accountable for failure to redistribute or facilitate a greater participation of Black people in the economy.

In essence, the failure by the democratic state to implement redistribution through the legal system signified reverting to the apartheid era state of affairs where the white minority relied on law to exercise its racialised political and economic power over the Black majority. The failure to put in place a legally binding redistribution instrument in the form of the BBBEE Act, meant that the racialised power structures of the apartheid past, which enabled white domination and the exclusion of Black South Africans from exercising control over the distribution of resources, would continue to be in force, working to protect the racialised privilege and accumulation interests of the white minority.

6.3 Conclusion on the findings – a failure of justice

From the foregoing discussion emerges an understanding that the conceptualisation of redistribution in the BBBEE policy moved – through various power contestations in the policy and law making processes – from a comparatively radical approach to redistribution as informed by the ideas contained in the RDP, to a conservative approach premised on GEAR. The ideas on redistribution within the governing party started off as broad-based targeting the entire Black population. This changed as the influence of international finance organisations on ANC economic policy grew, and the ruling party grappled with the challenges of being a governing party and having to balance the competing demands of the local and international investor community with the challenge of reversing inequality and ending poverty for the Black population that put them in power. With the influence and pressure of the investor community bearing down on the governing party to exercise economic restraint in the face of poverty in the Black population, the governing party searched for a compromise position on redistribution. This compromise involved deferring redistribution as had been demanded in the RDP and the creation of a Black business class that, it was hoped, would create industries that would impact the lives of the general Black population. This did not eventuate.

Since the introduction of GEAR, advocacy for radical redistribution continued to be marginalised as the narrative of the more powerful investor community took root. In the result, faced with a need to appease a Black population that had put them in power and demanding an equitable share in the ownership of the economy, the governing party used policy rhetoric that appeared to pursue real distribution whilst the policy detail was in contradiction to this rhetoric. Even the naming of key policy documents such as the Growth, Employment and *Redistribution* Strategy (emphasis added) and *Broad-Based Black* Economic Empowerment policy (emphasis added), belied their content.

The governing party talked left and walked right. It used unworkable concepts of redistribution in the various key Black empowerment policy documents discussed in this study and delinked race from its conception of redistribution, thus dismissing the centrality of racism in creating the racial inequality that persists up to this day. But most importantly, the governing party opted to conceptualise redistribution in the BBBEE policy outside the framework of justice for the Black population. As this study has argued, redistribution is a function of justice. As such, any sincere intervention on redistribution must have at its core the attainment of justice. This is important because, if justice is going to be served, at least four things must take place. First, there must be a recognition that an injustice took place. Second, there must be an admission by those identified as perpetrators of the injustice, or a finding by a relevant authority, that an injustice was committed. Third, the type of injustice committed must be clearly defined. Lastly, appropriate remedies must be put in place to redress the injustices defined and rules of distribution put in place to prevent a future reoccurrence of the injustice by the most powerful in a society (Ramose, 2002a). No such process took place in South Africa during the development of the BBBEE policy and the policy therefore could not pass the test for justice. As a result, the policy did not deliver on the promise of a better life for the Black population.

Chapter Seven

Reflections on the on the theoretical implications of the findings

7.1 Introduction

This chapter provides reflections on the theoretical implications of the findings in relation to public policies aimed at redistribution or the attainment of socio-economic justice in a society such as South Africa that is emerging from a past of racial discrimination and conflict. Using critical theory, and in particular the critical theory of race, as well as the theory of justice as advanced by Sen (2009) – that redistribution is born out of the idea of justice and its success must be measured on the improvements in the quality of life and on the well-being and freedoms enjoyed by human beings – this chapter reflects on important theoretical considerations emerging from the findings that should inform public policy analysis where redistributive justice is the ultimate aim.

7.2 The importance of critiquing redistributive policy

The findings of this study have demonstrated that government policies aimed at redistribution must be critiqued and not accepted at face value because of the transformative language they are often written in. The study has shown that it should not be taken for granted that, just because a public policy is given a name that suggests some form of redistribution or transformation, that the content of the policy follows suit. The BBBEE policy has shown, as demonstrated by the findings of this study, that the name of a public policy can belie its content. This is because, as again demonstrated by the findings of this study, politicians who govern have many interests to balance from multiple stakeholders with varying degrees of influence on them. As such, policymaking is a contested space where the outcomes attempt to accommodate the interests of various stakeholders. However, the critical policy content, as the findings of this study have shown, tends to favour those stakeholders with the most influence on the policymakers.

Furthermore, the public policy content that favours the most influential stakeholders is communicated in language that appears to be transformative in favour of the marginalised. The findings of this study have demonstrated how the language used in the BBBEE policy, including the GEAR framework in the context of which it was implemented, belied the objectives of the policy. The application of critical theory in the analysis of the findings has demonstrated the importance of analysing the construction of meaning through language, to be critical of the arguments presented to support the framing of policy, and to conduct interpretive analysis from the perspective of those that are meant to benefit from redistributive policy.

The findings have further demonstrated that, in evaluating public policies, a process of critical reflection must be undertaken to discover hidden assumptions and meanings that may render policies ineffective for their transformative objectives. To make public policies acceptable to the general public, policymakers may camouflage the prominent interests in policy of those with power and influence by making use of language to produce perceived and real meanings. In this sense, language is not a neutral medium, but is replete with meanings that limit and direct the policy. As Goga and Mondliwa (2021) observe, it is important to focus on the strategies of powerful groups as it allows for an exploration of how and why they intervene in policymaking and how policymaking institutions respond to the influence of the powerful. This, in turn, according to Goga and Mondliwa (2021), allows for better interventions for transformation that engage with the reality of the power balance in specific contexts. This study has shown that in the BBBEE policy, language was used as an instrument to diminish the redistributive impetus of the policy by not being clear in defining redistribution. The language of the BBBEE policy also had the impact of misdirecting the policy by not clearly defining Black people as the targeted beneficiaries of the policy.

7.3 The elusiveness of socio-economic justice

This study has demonstrated how elusive justice is within the context of socio-economic rights. Socio-economic justice is elusive because it must take place within a political environment that is a contested space. The study has shown that public policies and legal instruments that emerge from the political process can be limited in terms of what they can achieve for those who have been denied socio-economic rights and opportunities. This study has further shown the contestations that existed in the political environment from which the BBBEE policy emerged, first on the nature of the historical injustice, second, whether fundemental redistribution is necessary and, third, on the most appropriate mechanisms for redistribution.

Paradoxically, the voice of the marginalised tends to shrink in this process as the political and business elites engage to find a workable policy. In the end, as the findings of this study have shown, the outcome is a compromise of the elite that accommodates their interests, but promoted to the marginalised majority as a transformative project that will deliver socio-economic justice. The elite compromise also resulted in putting in place a non-binding policy framework on BBBEE. The study has shown that for redistributive justice to take place, justice must be binding on all role players. The failure, for example, to make the Code of Good Practice legally binding, greatly limited the redistributive justice the BBBEE policy could achieve. Furthermore, a failure to legally bind the Black business elite who entered the white business sector through the support of government also had a limiting effect on redistributive justice, as they were under no obligation to influence economic transformation from the corporate ranks.

The application of critical theory as an analytical framework brings forth these insights in the context of realising redistributive justice in environments shaped by powerful interests. Stated differently, and as elucidated by Higgs and Smith (2002) expounding on the usefulness of critical theory in explaining power dynamics in policy and law making, the application of critical theory analysis has revealed the uneven power relationships through which the BBBEE policy and Act were produced and has uncovered the hidden assumptions that informed the coding of redistribution in the BBBEE policy framework that rendered it ineffective. The unequal power held by different role players in the policy and law making process demonstrated, as argued previously in this study, that theories for redistributive justice that assume equality of persons and an underlying resolve for mutual benefit – such as Rawls' theory of justice – would have been less effective within the political context that produced the BBBEE policy framework where political and legal institutions are shaped by powerful interests and where societal pluralisation and polarisation have fragmented shared identities and eroded the means for consensus, as argued by Habermas (1996). Rawls' theory invoked the idea of a hypothetical contract to justify his principle – that a just distribution is one that is made under conditions of equality of opportunity, and to the greatest benefit of the least advantaged members of society (Furner, 2007). As argued in Sen's idea of justice (2009), the Rawlsian approach to justice places extensive focus on the ideal of just institutions and in the process is insufficient in its ability to offer practical guidance for advancing justice in an increasingly pluralistic and polarised world (Arjona, Jamal, Menkel-Meadow, Ramjan and Satiro, 2012). Coetzee (2002) proposes that justice is best attainable in social structures that make consensus possible. As noted by Gyekye (2002), the notions of 'sharing one another's fate', 'common assets', 'collective assets', and 'common benefit', found in Rawls' approach to justice would be more effective in a communitarian society than in a society like South Africa – which espouses individualism, the private ownership of the means of production and the maximisation of profits for private shareholders – instrumentally constructed by individuals in pursuit of their own egoistic advantages or ends.

The attempt to attain redistributive justice through the BBBEE policy framework in a setting of unequal power relations also has to do with the efficiency of a free market economy, as South Africa is, in relation to concerns of socio-economic redistribution (A. Erwin, personal communication, June 28, 2021). The free market economy, characterised by individualism and the private ownership of the means of production (Mohr, 2015), is essentially a system of rules, practices, beliefs, and theories that drive corporate leaders to maximise profits for executives and shareholders at the expense of value chain partners (Harris and Twomey, 2008), which oftentimes leads to inefficient redistribution. According to Acemoglu and Robinson (2001), inefficient redistribution relates to redistribution that benefits a select group of people and not society as a whole. The BBBEE policy and its promised trickledown effect, as the findings of the study have shown, is a representation of inefficient redistribution, primarily benefiting a small group of politically connected Black elite. When judged by the idea of justice as advocated for by Sen (2009), that the central concern for a theory of justice must be the question "what happens to people" (Maffettone, 2011), wherein redistribution is born out of the idea of justice and its success measured on the improvements in the quality of life and on the well-being and freedoms enjoyed by all human beings in a society – evidenced by increased economic participation, and improvements in purchasing power, educational outcomes, health and housing standards, among other outcomes (Martinussen, 1997) – the BBBEE policy framework had shortcomings.

As argued by Vandrau (2023), the BBBEE policy framework – designed to empower historically disadvantaged individuals, particularly Black citizens, by giving them access to the economy – has failed to meaningfully address social inequality in South Africa. South Africa is the most unequal country in the world, ranking first among 164 countries in the World Bank's global poverty database, according to the World Bank (Sulla, Zikhali and Cuevas, 2022). The level of human development in South Africa for the Black majority population was at its worst during apartheid and has not significantly improved in the democratic era, with about 50 per cent of the South African Black population living below the poverty line (Statistics South Africa, 2017). More than twenty years since the enactment of the BBBEE Act (2003), the control of the South African economy remains rigidly racialised, with Black ownership in reporting companies across the economy recorded at only 29 per cent in 2019, compared to 25 per cent in 2018 and 32 per cent in 2016, and not a single sector of the economy having more than 50 per cent Black ownership in large companies (Thomas, 2020). As the failure of the BBBEE policy has shown, the inability to attain meaningful redistribution or socio-economic justice for the majority of Black people in South Africa ensures that the enduring historic inequalities along the lines of race, space, class and wealth cause the country to remain deeply divided even in the democratic era (Southall, 2019).

This study has demonstrated the significance of critical race theory in analysing policies that are put in place to redress the discrimination of a population group on the basis of race. The importance of critical race theory is in its recognition of the social classes that emerge from the ascription of a racial identity. In the case of the BBBEE policy, Black South Africans were meant to be targeted for redistribution because of their historical marginalisation, and the subordinated social class they occupied as a consequence of economic marginalisation under the system of racial capitalism, which limited their access to economic, social and political opportunities. By applying critical race theory, the study's analysis of the BBBEE policy was able to assess whether the redistributive interventions put forward in the policy could be effective as redress for Black people as a social class that was resource weak, received lower quality education compared to other races, had limited exposure to economic activity and enjoyed little influence over the political elite in the policy making process. In this way, the study was able to demonstrate that some of the key redistributive interventions outlined in the BBBEE policy could not apply to the majority of Black people. For example, the market-based transfers outlined in the policy were out of reach for most Black people who did not have the means to buy shares, or the collateral needed to borrow from the financial market and buy the shares the policy said should be set aside for Black people. A further example that emerged from critical race theory analysis related to the clause in the BBBEE Act which stated that all redistributive interventions were to be done within the constitutional framework of the country, which protected property rights. This meant that the Black population, from whom productive land had been expropriated by the white minority through the Natives Land Act of 1913, and then reserved only 7% of the land for Blacks, could not access this productive land unless the white owners of the land relinquished it. The result was the creation of policy incoherence that had a limiting effect on what the BBBEE policy could achieve for the majority of the Black population.

The idea of the transfer of the ownership, management and control of the economy to Black people as stated in the BBBEE policy, also raised issues of justice. The aim to transfer the ownership, management and control of the economy to Black people was an attempt at redress and economic justice. The study has shown that the transfer of the economy failed to take place. One of the reasons for this, as the findings of this study demonstrate, was the failure by government to specify how these transfers would take place. In other words, it was the failure of the government to define the principle of justice in ways that allow for meaningful redistribution. Instead, and paradoxically, this was left to white business owners to decide how Black ownership would be incorporated in the economy.

From a critical race theory perspective, this meant that the white corporates – who had already been shown to possess greater bargaining power in determining the policy approach to redistribution – were given greater power to define the content of economic justice. This process also excluded the voice of the Black majority, whom the government was meant to represent, in defining economic justice. In the end, the exclusion of the majority of Black people in defining this justice gave white owners of the economy latitude to continue protecting their interests by putting in place a framework for redress that did not achieve its aim.

This demonstrates the importance of an inclusive consultative process in policymaking that guarantees the opportunity for all views to be accounted for, particularly those seeking justice or redress, when defining key elements of transformative or redistributive policies for a balanced outcome.

The failure to define the form of justice required and the specific modalities through which it would be achieved, extended to the financing of BBBEE. Because roles and responsibilities were not clearly defined with regards to how redress would be attained, the government ultimately took on disproportionate responsibility using its development financing organisations. However, the impact of this approach was minimal because of the limiting constraints placed on these organisations by the overarching government economic policy of the time for macroeconomic balance and fiscal constraint. In the end, neither the private sector nor the public sector could deliver redress through meaningful financial allocations.

These findings demonstrate the nuanced ways in which the detail of the BBBEE policy framework limited its ability to contribute towards the attainment of socio-economic justice.

7.4 Redistribution and the perpetuation of racial exclusion

The de facto delinking of race from redistribution in the BBBEE policy, as demonstrated by the findings of the study, provides key insights on the crafting of policies that aim to restructure society with a racially divided past. The BBBEE policy – as per the broad ideas borrowed from Malaysia to "eradicate poverty" regardless of race and to "restructure society" to eliminate the identification of race with economic function by creating, expanding and consolidating the Malay capitalist and middle classes (Jomo, 2004) – aimed to restructure South African society to eliminate the identification of race with economic function. This does not only mean deracialising the economy. Arguably, it has to go further and provide the race previously denied opportunities for meaningful economic activity the means to be economically active, thus reversing the economic function identifiable with their race.

Therefore, for countries emerging from situations of societal injustices, particularly racially motivated injustices as is the case in South Africa, it is important that when policies for redress are crafted for the development of those who have suffered injustices, that their ultimate effectiveness is not inadvertently diminished by other policy areas that may not support the objective for redress. The findings of this study have demonstrated that economic redistribution through BBBEE was diminished by a macroeconomic policy framework, GEAR, which favoured established white business, as well as a country's basic law, the constitution, that protected the white minority's property acquired through historical dispossession. In other words, the white population's conquest over Black people and the appropriation of their property, was legitimated as a legal right, thus transforming an original historical injustice into a continuing social justice in contradiction furthermore to the general principle of law that a right cannot arise from a wrong (Ramose, 2002a). The legal and macroeconomic environment that the BBBEE policy was implemented within, protected white economic privilege and therefore hindered progress towards the deracialisation of the economy.

The neo-liberal macroeconomics promoted through GEAR ensured that the majority of Black people remained excluded from meaningful economic activity by insisting that the market will continue to act as the main distributor of wealth and thereby placing limits on the redistribution that could take place to Black people, the majority of whom were not participants in the economy – except as consumers. The insistence with market-based distribution also ensured that government had a limited role in the redistribution of wealth as market liberalism prohibits government intervention in the functioning of the market. The protection of property rights also ensured that access to productive land would be limited for the majority.

In this sense, the BBBEE policy failed to transform economic relations and maintained existing power relations linked to race and class in the economy. Instead, it only succeeded to assimilate a few Black elites in the economy through elite agreements reached with the white business class and the political elite (Mbeki, 2009; Terreblanche, 2012; and du Toit, 2022). Mosala, Venter and Bain (2017) have further argued that the deracialisation championed by the BBBEE policy is not tantamount to economic transformation as envisaged by the National Democratic Revolution and the Freedom Charter, but is a reformist programme of the national elite which perpetuates the colonial economic system. The redistributive intent of the BBBEE policy framework, observe Mosala, Venter and Bain (2017), illustrated a deviation from the National Democratic Revolution and the Freedom Charter by the ANC, even though in its policy, strategy and tactics documents, and discussion papers, it stated that the National Democratic Revolution and the Freedom Charter remained their guiding compass.

The failure to transform economic relations and similarly maintain existing power relations linked to race and class in the economy, present implications for redistribution policy that are at least two-fold. First, it demonstrates that there must be alignment between the macroeconomic policy environment and the policy being introduced for the policy to achieve its aims. The BBBEE policy was not in synch with GEAR and, in the result, was constrained by the GEAR macroeconomic framework. Second, it demonstrates that there must be alignment between the legal environment and the policy being introduced for the policy to achieve its aims. While the BBBEE policy was said to be targeting the transfer of the ownership, management and control of the economy from the white business class to the Black population, the legal framework in place prevented it from fully realising this objective because of the protections it provided to the white business class and the white population at large.

The structuring of the macro-economy and the legal system in a manner that did not promote the deracialisation of the economy, also points to the institutionalisation of racial disadvantage for the majority of the Black population and the maintenance of white control and power in the economy. As argued by Masiga (2022) from a critical race theory perspective, when racial disadvantage is institutionalised, systemic racial inequality favouring one race over another emerges. The failure of BBBEE to address race and class inequities in South African society, therefore, points to the failure of government to foreground race in policy development and law making. It is also an example, as argued by Delgado and Stefancic (2001), that when racism is normalised, it is difficult to recognise and cure in social systems such as public policy and law.

7.5 Globalisation and its impact on national redistribution

The findings of the study also demonstrate that the pursuit of socio-economic justice and redistribution in a country can have a global dimension that mediates its implementation and that may require government's consideration when crafting policies in this regard. The study has shown that the Washington Consensus – the global economic compact adopted in 1989 – limited South Africa's, and indeed many other countries', economic policy choices. The advice of fiscal austerity, privatisation, and market liberalisation advanced through the Washington Consensus placed constraints on the role the South African government could play in transforming the country's economy. Redistribution in contrast, implies the financing of public services around a logic of rights and a principle of equal access to goods and opportunities for the improvement in the quality of life and well-being of people (Piketty, 2017). As Stiglitz (2017) notes, the approach of the Washington Consensus faced a fundamental criticism of not acknowledging that development requires a transformation of a society and an additional criticism of paying little attention to issues of distribution or 'fairness'.

The study has also shown that the ANC government was compelled by the international financial markets to defer its policy positions on socio-economic justice and redistribution when it approached them seeking developmental financing. Erwin (personal communication, June 28, 2021), who was the Minister of Trade and Industry at the time, noted that the ANC government had no option but to accede to the demands of the international investors because only "strong" states can be firm in such circumstances, and South Africa is not a strong state. The result of this as argued, was the adoption of the market-friendly GEAR economic programme which constrained what could be achieved through the BBBEE policy. Under the GEAR economic programme, argue Ponte, Roberts and Van Sittert (2007), the BBBEE policy focused less on equity and reassured white capital that radical redistribution of assets would not take place.

A key theoretical question that arises from this relates to national sovereignty and whether governments that rely on international investors enjoy the sovereignty to put in place their own economic policies, in line with the demands of the populations they serve. Is socio-economic justice or redistribution possible in resource weak countries? Or is it something that remains elusive as long as countries have to rely on international markets to fund their development? In the context of the African continent, where socio-economic justice is a priority policy objective in many countries, these questions should be considered by policymakers to ensure that the interests of the majority of their populations are addressed in the way they codify redistribution.

Furthermore, the conditionality imposed by international financial institutions such as the International Monetary Fund can turn loans into a policy tool with adverse political, economic and social effects for a developing country like South Africa (Stiglitz, 2017). As noted by Stiglitz (2017), such conditions can be seen as an intrusion by the neo-colonial power on the country's own sovereignty. This is important because when governments yield to the demands of international investors at the expense of national imperatives, it creates a policy dilemma that, as the findings on the BBBEE policy have shown, can make a government appear incoherent – communicating different messages to investors and its citizens in an endeavour to appease. For example, the BBBEE policy was given a name that intimated it would pursue broad-based redistribution for the broad Black population, when, in fact, as the findings of the study suggest, it meant to give broad access to the economy to a new circuit of racial accumulation or a small group of an elite Black business class.

In the end, this represented conceptual challenges for the BBBEE policy and failed to position it to realise the expectations of the majority of the Black population. The conceptual choices for redistribution made in the BBBEE policy gave credence to the argument that the power relations favoured the international investor community and the government was compelled to accept their ideas on redistribution and implement those, even though their prospects of deracialising the economy for the benefit of the general Black population were questionable.

7.6 Policy incoherence and policy failure

The findings of the study also suggest that the conceptual challenges of redistribution in the BBBEE policy were brought about by a lack of policy coherence in government at the time the policy was introduced. Policy coherence is achieved when various policies are aligned so that efforts in one policy area do not undermine efforts in another policy area (Parsons and Hawkes, 2019).

As the findings have shown, the pursuit of market liberalism – which favoured minimal state intervention in the economy – and the reliance on market forces for redistribution, coupled with the pursuit of macroeconomic stability through the GEAR programme, frustrated redistribution and, in the end, compelled the government to introduce a conceptually weakened idea of redistribution as opposed to the one advocated in the RDP.

The conceptions of redistribution used in the BBBEE Act also created policy incoherence. It has been established that the BBBEE Act targeted a substantial change in the racial composition of ownership and management structures of existing and new enterprises. Yet, as has been discussed in the findings, section 3(b) of the Act created obstacles for the attainment of this objective. Because of these limitations, BBBEE changed from an idea about changing the composition of ownership and management structures of private enterprises, to an idea about state driven redistribution, primarily through public sector procurement. The crafting of the Act in this manner favoured established white business, demonstrated the power they held which they used to sway government away from looking to the private sector for redistribution, and exposed the application by law makers of analytically indeterminate legal principles in a way that perpetuates racial hierarchy.

Therefore, the policy incoherence created by the BBBEE Act contributed significantly to the BBBEE policy framework not achieving its purpose. However, policy incoherence was also created by the BBBEE Act's failure to regulate sufficiently to compel the public sector to action on BBBEE. As the findings have demonstrated, the Act used 'best endeavour' language and placed no obligation on public entities (as listed in Schedule 2 or 3 to the Public Finance Management Act, Act No. 1 of 1999) to apply the BBBEE Code of Good Practice. This had the effect of presenting the opportunity for white owned businesses to continue accessing public sector contracts, an outcome that did not align with redistribution for the achievement of a substantial change in the racial composition of the economy.

There were other issues in law that created policy incoherence in the BBBEE policy. As has been noted in the findings, Statistics South Africa, which was responsible for monitoring policy implementation at the time the BBBEE policy was introduced by government, could not track Black participation in business because the racial identifier in the identity document – the administrative record that drives economic statistics – had been removed at the insistence of the ANC during the CODESA political negotiations that led to the constitutional political settlement. Although the removal of the racial identifier in the identity document was consistent with the overall approach of the ruling party to not affirm apartheid era racial categories, this had the effect of creating a tension between redress imperatives and deracialisation imperatives.

This demonstrates the importance of all sectors and spheres of government working in unison to ensure a decision in one policy area does not impede the objectives of another policy area. This also demonstrates the importance of ensuring that throughout government, policy goals are aligned for the best results. It also demonstrates that when a role player possesses much more power and influence – as did established white business in South Africa – policies can be rendered incoherent in their favour, when consultations take place selectively. A key consideration for policymakers emanating from this scenario is how to ensure that policies are not dominated by the ideas of those who have the most power and influence, and that, instead, policies represent the aspirations of the majority of the population and those who are disadvantaged.

7.7 Conclusion

A number of important theoretical considerations have emerged from the findings of the study that can be used to inform public policy analysis for policies aimed at redistributive or socio-economic justice. The difficult nature of the subject of socio-economic justice has demonstrated the importance of an inclusive consultative process in policymaking that guarantees the opportunity for all views to be accounted for in the policymaking process for redistributive policy. This is not only for the sake of inclusivity but also to ensure all the necessary views are considered in the defining of key policy concepts, as well as crafting the policy in the manner that excludes any representation of racial bias or bias against a sector of society.

Another key theoretical consideration emerging from the findings pertains to the role of globalisation in local or national policy. It has been noted in the preceding discussion that, when certain global institutions have influence over a government, it complicates the policymaking process and may lead to the implementation of policies that do not serve the interests of the majority of the citizens of the country (Stiglitz, 2017). This necessitates the ability by policymakers to strike a balance between local and global interests in policymaking.

Finally, the findings of the study have exposed how policy incoherence emerges when the country's economic system, its laws, and policies are not aligned. The findings of the study have highlighted the importance of paying meticulous attention to ensuring that the parts of the state responsible for policymaking and law-making work in tandem for the consistent application of key policy concepts as well as the alignment of policy objectives.

Critical theory, therefore, allows scholars to occupy the space overlooked by Rawls' theory in relation to finding distributive justice in inegalitarian societies, particularly the problem of how policy and law making institutions can realise distributive justice in contexts shaped by powerful interests.

Chapter Eight
Conclusion – In search of meaningful redistribution

8.1 Introduction

This study has been concerned with the relationship between the BBBEE policy and the conceptualisations of redistribution in post-apartheid South Africa. The BBBEE policy, acting through the BBBEE Act, aimed to redress the racialised distribution and resultant economic inequities of the apartheid past by advancing Black ownership of and control over the economy (Southall, 2006). The policy has emerged as a key instrument for economic redistribution in post-apartheid South Africa (Francis and Webster, 2019). Therefore, this study sought to interrogate and provide a critical analysis of this aim and the contested legal meanings and conceptualisations of redistribution in the BBBEE policy, when it was conceived and formalised during 1994 to 2003, in order to provide insights on why the BBBEE policy has not achieved its redistributive objectives in a democratic South Africa.

Redistribution is informed by the fundamental idea that genuine socio-economic development must translate into meaningful transformation of the lives of the disadvantaged, poor and resource-weak groups in society – evidenced by increased economic participation, and improvements in purchasing power, educational outcomes, health and housing standards, among other outcomes (Martinussen, 1997). A redistributive policy intention must be assessed by its effects on economic development and eradication of poverty. In this sense, as Sen (2009) points out, redistribution is born out of the idea of justice and its success must be measured on the improvements in the quality of life and on the well-being and freedoms enjoyed by human beings. The BBBEE policy has produced only limited reformism in economic relations and has not contributed to the socio-economic improvement of the lives of Black people in South Africa.

8.2 The failure of BBBEE

The BBBEE Act aimed to promote economic transformation in order to enable meaningful participation of Black people in the economy, as well as achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises. The Act also sought to reverse engendered economic inequality by increasing the extent to which Black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training.

The outcomes of the BBBEE policy have been below expectations in many respects (B-BBEE Commission, 2017, 2020) and its poor performance is reflective of a policy framework that could not address the systemic features of the economy and society (Vilakazi and Ponte, 2022).

One of the key themes that emerges from the study is that the BBBEE policy at its conception in the years leading up to its adoption in 2003 was deeply constrained by external factors, such as the need to retain and promote local and foreign investment to grow the economy, the need to demonstrate sound economic policy in line with the dominant economic paradigm of the time informed by the Washington Consensus, as well as the need to be seen to uphold the values of a constitutional democratic society. The skewed power relations between the ruling party since 1994 and the owners of capital resulted in the BBBEE policy being ineffective because the greater bargaining power of capital was brought to bear on the policy to ensure it had limited impact on the ownership structures in the economy.

The evidence of these limits, as the findings of the study have shown, includes the placing of limitations on the mechanisms that could be used for BBBEE, and using this narrower focus to create an elite Black business class as opposed to empowering the general Black population. The study has also shown that the negotiated political settlement, at its core characterised by lowest denominator politics, had an adverse effect in the manner redistribution was ultimately conceptualised in the BBBEE policy as it meant that the search was always on for something other than radical redistribution. Ultimately, the BBBEE policy emerged out of a search for what could be reasonably achieved and instruments that were available for use within the context of economic policy constraints circumscribed by neo-liberalism, as well as constitutional constraints that, for example, legislated protections for private property. In the end, the government made a decision to appease the demands of the investor community. This demonstrates the limits of redistributive imperatives and intentions in the BBBEE policy within the context of the transition era.

The findings of the study have shown that at the time of the introduction of the BBBEE policy in 2003, there was a dominant view in government rejecting redistribution and advancing the notion that the BBBEE policy was not necessary as Black participation in the economy would emerge organically as the economy grew. In the result, the findings show, government introduced the BBBEE policy not as a programme for redistribution. In other words, the extent to which redistributive imperatives informed the BBBEE policy was very limited.

As this study has argued, ineffective conceptions of redistribution have been used in the documents that constitute the BBBEE framework and this has led to the maintenance of white privilege and the frustration of redistribution efforts to the Black population. The ineffective conceptions of redistribution and ambiguity in the meaning of key provisions in the BBBEE policy are an indication that there are fault lines in the conceptual foundations of this policy.

These fault lines, as the study has shown, included the delinking of race from redistribution in the overarching macro-economic programme of the immediate post 1994 democratic era – GEAR – through which BBBEE was formulated and implemented; the advancement of an illusion of broad-based redistribution in BBBEE, whereas the policy was always targeted at the creation of a small Black business class; the advancement of an 'emergent Black capitalist class' (Mbeki, 1999) in a joint commitment to improve the quality of life of the Black population that did not eventuate; the reliance on market forces to redistribute through BBBEE whereas there was agreement that the unequal and racialised distribution of the past resulted from the failure of market forces to distribute fairly; the failure to capitalise BBBEE programmes – and thus contribute to their failure – as a result of the relentless pursuit of macro-economic stability; and the failure to link redistribution through BBBEE to the attainment of justice for the Black population. It is also the argument of this study that the fault lines in the conceptual foundations of the policy were transferred to the BBBEE Act. The lack of redistribution envisaged in the intent of the BBBEE policy and BBBEE Act as per the common expectations of Black South Africans, continues because the conceptualisation of redistribution in both policy and law has not been effectively developed, resulting in policy failure.

This study has argued that the manner in which redistribution is defined in policy and law plays a significant role in determining whether redistributive outcomes will be achieved (Luebker, 2014). The findings of this study show that conceptual challenges in the BBBEE policy were transferred to the BBBEE Act and in the process rendered it ineffective as an authoritative legal instrument of the policy that could be relied on to ensure redistribution. Whilst the Act cannot be singled out as the primary determinant of BBBEE redistribution policy failure, the study shows that it was weakened by the concepts of redistribution used in it and could not play its role to provide authority in the regulation, implementation, monitoring, evaluation and enforcement of the BBBEE policy.

8.3 Towards meaningful redistribution – an epilogue

The absence of any reference to justice in both the BBBEE policy and Act points to a critical flaw in the conceptualisation of the policy and its redistributive intent. The argument that has been advanced to defend this omission is that justice was inherent or implied in the policy, and that matters of justice are adequately dealt with in the constitution of the Republic. However, this argument is unconvincing. This is because the constitution is the national legal compass and not the final policy implementation instrument. The burden of proof for policy intent rests with the relevant policy instrument, with support for this intent derived from the constitution – not the other way round as was presumably done with the BBBEE policy. As the Constitutional Court has declared, when policies become matters of law, it is the policy instruments, the specific legislation, that form the basis for primary argumentation in courts of law, not the constitution (Ngcobo, 2007).

Furthermore, whilst the constitution proclaims equality of all persons, it speaks of no right that can be invoked to enforce meaningful participation by Black people in the economy, or to rectify economic injustice, particularly economic injustices emanating from the country's colonial and apartheid past. The omission of economic rights in the constitution despite the Constitutional Court (1996) observing in the final stages of the drafting of the constitution that such rights could be justiciable, indicates one of at least two points.

First, it may indicate that the narrative of white business who wanted to preserve their economic privilege prevailed by taking advantage of skewed power relations during the negotiation process. Alternatively, it may indicate that the ANC colluded with white business by allowing the omission of economic rights in the constitution and not challenging it. Some commentators (Mbeki, 2009; Terreblanche, 2012; and du Toit, 2022) in this regard have argued that the white business class created Black economic empowerment as a quid pro quo between the corporate sector and the ANC leadership core that involved creating lucrative opportunities for the emerging ANC elite to join the white capitalist elite and secure their material interests in the system of capitalism to stop them from adopting radical, redistributive policies and making demands for nationalisation and mass redistribution.

Either way, the omission of justiciable economic rights rendered the supreme law an instrument of the elite across political and business sectors for protecting their vested economic interests.

South Africa is characterised by economic and social inequality. Within this context, an approach to justice that assumes equality of all persons ignores the important reality of how ideas of justice and equality can be shaped by powerful interests to represent their power and status, and which keep them in a position of advantage. The omission of the requirement for any form of justice, economic or social, in the main provisions of the constitution and the assumption of equality of all persons, regardless of the continued economic exclusion of Black people, exposes the constraints and contradictions of the intent of the constitution to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" as captured in its preamble.

Arguably, nothing in this intent speaks of ‘righting a wrong’ (reparative justice) or ‘repairing the harm’ (restorative justice) or ‘remedying historical social and economic inequalities’ (socio-economic justice) for the purpose of delivering justice to victims, the Black South African population, that was excluded and continues to be excluded from meaningful economic participation. The omission of the requirement for any form of justice in the main provisions of the constitution and the assumption of equality of all persons is therefore an attempt to escape accountability for past injustices and to establish an illusion of justice and fairness moving forward. However, justice is not only a forward looking concept. It is also a backward looking concept rooted in historical events. For meaningful justice to be attained, historical injustices must be recognised, acknowledged by the perpetrators or declared by a relevant authority, and clearly defined. Then appropriate remedies must be put in place to redress the historical injustices defined. This clarity of justice is sorely lacking in the constitution and, by extension the BBBEE policy framework.

The fact that BBBEE was defined outside of the imperative of justice, as this study has established, demonstrates that the policy was not conceived for redistribution. This is why, it is argued, the BBBEE policy framework does not place race at the centre of its redistribution intent; it does not introduce measures aimed at empowering the general Black population as opposed to a small Black business class; and fails to give the state the power to intervene in the economy for redistribution in favour of the poor Black population. This study, therefore, argues that ‘race’ must be re-engaged in the discourses on redistribution as an integral step towards justice for the poor Black population. Any amendment made to the BBBEE policy framework to improve its effectiveness that does not simultaneously correct the conceptual foundations of the BBBEE policy to ground it on justice for the poor Black majority, will only be superficial and will not realise meaningful redistribution and the effective participation of Black people in the economy.

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