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An Examination of the Effectiveness of Race-Based Distributive Justice in South Africa

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Research report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Arts, Applied Ethics for Professionals

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DECLARATION

I declare that this research report is my own, unaided work. It is submitted towards completion of the degree of Master of Arts, Applied Ethics for Professionals, at the University of the Witwatersrand, Johannesburg. The work has not been submitted before for any other degree or examination at any other university or learning institution.

Rajitha Rajaram
Date: 8 November 2022

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RESEARCH SYNOPSIS

In this research project, I argue that the adoption of race-based distributive justice in South Africa (SA) has not benefited the groups that are targeted in the policy. To achieve this, I set the scene with the historical landscape of SA, as a precursor to understanding and appreciating the context. In adopting race-based justice, SA created an alternative mechanism to maintain a hold over individuals and has not created a fair environment that adequately supports just distribution or restorative justice. The patterns by which distributions are designed and implemented have created dependencies that prevent individuals from emancipating themselves sufficiently to live autonomous lives. I intend to assert that the quality of distributions is poor and contribute to restricting previously disadvantaged individuals from fully exploring their own potential in attaining economic emancipation and becoming fruitful contributors to society as a whole. This cycle of oppression also has a negative impact on the dignity and self-worth of previously disadvantaged groups.

Redistribution is intended to compensate or restore that which people have lost, in this instance, due to the apartheid legislation and historical suffering. Robert Nozick's entitlement theory focuses on historical injustice and is an appropriate setting for the exploration of this research. The three principles of the entitlement theory guide the need and the nature of the appropriate compensation.

I further purport that the alternative approach of class-based distributive justice is more focused and has a wider reach in the audience it intends to target than race-based distributions. The class-based approach has a greater impact on the lives of citizens that are in need and deserving of restitution, with the primary focus being upliftment of individuals at a more holistic level and, in doing so, has a positive impact on the lives and dignity of the people. My approach for this research includes interrogation of the

applicable legislation, namely the Broad-Based Black Economic Empowerment (BBBEE) Act and its related impact on previously marginalised citizens. BBBEE and other similar legislation are devised to right the wrongs of the apartheid legislation. Apartheid deprived all black citizens of economic exposure and opportunity to accumulate wealth, and the dawn of democracy provided an opportunity for the wrong to be corrected.

The year 2022 marks the 26th year since the first democratic election and neither BBBEE nor the other restorative legislation have achieved their desired goals, necessitating an investigation into the effectiveness of race-based distributive justice interventions. This begs the question: “Was the decision to implement race based distributive justice the right choice?”

My approach includes the expansion of the provisions of the BBBEE Act and the impact and promise of this. I explore my particular points of interest outlined below by analysing the expectation of the legislation to the implementation and the reality of the people of South Africa. My sources of literature were scholarly articles and opinions on these aspects, as well as verifiable data sources that provide details of the impact in the lives of previously disadvantaged citizens.

SECTION 1: PREAMBLE

Introduction

The 1973 UN Convention declared that “apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security” (United Nations, 2018). The Merriam-Webster dictionary defines a crime against humanity as an “atrocity (such as extermination or enslavement) that is directed especially against an entire population or part of a population on specious grounds and without regard to individual guilt or responsibility even on such grounds.”

The atrocity of apartheid inevitably had a negative impact on the lives and dignity of those subjected to it. With the abolishment of apartheid, there would be two important considerations: firstly, the punishment of the perpetrators and, secondly, the restitution to the victims. On the first consideration of punishment, it would be an almost impossible task to determine who should be punished. Those responsible for the decision-making have long perished, and it would be an equal injustice to assume that the entire white population, although the primary beneficiaries, had to be punished for the apartheid system. This aspect does not feature strongly in my research. The second consideration restitution does feature prominently, and the two aspects that I intended to explore are the impact of race-based distributive justice as a direct response to race-based marginalisation, and, to a lesser extent, the impact of apartheid on the dignity of the victims thereof.

My primary intention is to examine the effectiveness of race-based distributive justice in South Africa by exploring the legislative parameters of the BBBEE Act and the implementation of affirmative action as a means of restitution to the marginalised population groups, to explore the impact of this decision on the lives and dignity of citizens and to propose an alternative approach that is more encompassing of all disadvantaged and deserving citizens in the country at large. I will be exploring the unintended consequences of race-based legislative justice, such as the negative impact on the education of the youth of the country, the creation of a sense of entitlement among many of the previously disadvantaged citizens, the creation of a culture of unjust entitlement among the politically connected and, lastly, the consequences of negatively impacting the dignity and sense of self-worth of previously disadvantaged citizens.

Historical Landscape of South Africa

To appreciate the study and recognise its purpose, it is important to understand its basis, the most significant of which is emphasised below to create context. According to History.com, racial segregation has been present in South Africa before the introduction of apartheid laws but the promulgation of the Land Act in 1913 fuelled this practice by forcing black citizens to live on reserves, for the most part prohibiting them from owning land or being party to land use and growth cooperatives. The great depression and the world war caused much strife in South Africa and in 1948, when the Afrikaner National Party was elected into power, racial segregation was further extended to include tribal segregation that was intended to manage any type of resistance that may occur. In 1950, the government introduced the Population Registration Act of 1950 and prohibited marriages between the designated race groups, namely Bantu/blacks (all Africans), coloured (mixed race), white and Asian

(Indian and Pakistani). Designated areas were allocated to each racial group, and non-whites were required to produce a “passbook” when they ventured into non-designated areas. The apartheid system was refined with the promulgation of the Promotion of Bantu Self-Government Act of 1959, and 10 Bantu homelands were created. All black citizens were mandated to live in one of the homelands, where they were purported to have full political rights within the homeland, but they were effectively removed from the mainstream economy. One of the gravest atrocities of the apartheid era occurred in 1961, with the forced removal of 3.5 million black citizens from their homes for relocation to the homelands. Consequently, they were forced to sell their homes and land to white citizens at ridiculously low prices. The apartheid system did not only define the geographical location of citizens, but it also restricted freedom of movement and marriage, determined the type and level of education afforded to people, work opportunities and a greater sense of autonomy. In addition to those mentioned above, the other apartheid laws that directly impacted the people and the economy were the Native Administration Act of 1927, the Prohibition of Mixed Marriages Act of 1949, the Separate Registration of Voters Act, of 1951, the Bantu Authorities Act of 1951, the Bantu Education Act of 1953, and the Group Areas Act of 1950, which restricted and controlled all aspects of the lives of the oppressed people.

Numerous resistance movements emerged such as the African National Congress (ANC), the South Indian National Congress, and the Congress of the People and the Pan-African Congress (PAC). One of the most impactful events of resistance was the Sharpeville march in 1960 that led to the death of 67 unarmed citizens. By 1961, most resistance leaders were captured and sentenced to life imprisonment. Despite this, the liberation struggle continued. One of the most famous resistance leaders, Nelson Mandela, was incarcerated from 1963 to 1990.

Citizens continued to struggle but small incremental changes were introduced such as the House of Delegates that represented the Indian population and South African Coloured People Organisation (SACPO) that represented the coloured population in Parliament, but the majority black population were still oppressed and excluded to the greatest degree.

The 45-year span of the apartheid regime gave rise to a battered country with poor economic forecasts, little to no foreign investment, exclusion from international politics and sport, extreme inequality in education and skills levels, and abject living conditions for millions of citizens. In 1990, when the absence of foreign investment and continued sanctions by the international community severely threatened the survival of the country, it was clear that the apartheid era had to end. The transitory emancipation of the country began on 2 February 1990 with the unbanning of the ANC liberation movement and the commencement of negotiations to end apartheid.

Change was justly necessary in South Africa and the newly elected government prioritised social and economic reform, commencing with the abolishment of apartheid laws and the introduction of new legislation. Equally important was the restorative justice process seeking to compensate the marginalised citizens and rectifying the wrong that had been perpetrated against them for decades.

Racial segregation had eroded economic stability and growth in the country and consequently deprived citizens of autonomy, freedom and dignity. The focus of my study is distributive justice in post-apartheid South Africa, exploring the parameters and impact of a race-based restorative process with some contrast to class-based restorative processes.

SECTION 2: WHY DO THIS RESEARCH?

Research Question

The question that will guide my research is: “How just and effective is the implementation of race-based distribute justice in South Africa?”

In engaging with this question, my research seeks to discuss issues around whether the adoption and implementation of race-based distributive justice has been successful in achieving social justice, upliftment and economic freedom for those that it is intended to benefit. The exploration intends to question the implementation and success factors of the restorative justice processes, interrogating the laws and regulations implemented in respect of the Broad-based Black Economic Empowerment (BBBEE) Act 53 of 2003, and the ensuing impact on its citizens.

The distinction of race

The division of humanity into groups on the basis of some distinction has existed since the dawn of the time. *The Sandford Encyclopaedia of Philosophy* (2022) classifies the division into five criteria as follows: “1) Races reflect some type of biological foundation, be it Aristotelian essences or modern genes; 2) This biological foundation generates discrete racial groupings, such that all members of one race share a set of biological characteristics that are not shared by members of other races; 3) This biological foundation is inherited from generation to generation, allowing observers to identify an individual’s race through her ancestry and genealogy; 4) Genealogical investigation should identify each race’s geographic origin, typically in Africa, Europe, Asia or North and South America; and 5) This inherited racial biological foundation manifests itself primarily in physical phenotypes, such as skin colour, eye shape, hair texture and bone structure and perhaps also behavioural phenotypes, such as intelligence or delinquency.”(Mack 2020, 1)

The colonisation of the continent introduced the European interpretation and acceptance of the classification of race groups. The sentiments of Hume, “I am apt to suspect the Negroes and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to whites.”(Zack 2002, 15) seems to have set the tone for race classification in South Africa. Hendrik Verwoerd, known as the father of apartheid, echoed the sentiments of Hume and stated that the presence of large numbers of black inhabitants was threatening the security and comfort of the white people, hence the introduction of racial segregation. Apartheid was born in South Africa in 1948 based on physical phenotypes, colour of the skin being the most prevalent.

The impact of the distinction

The apartheid system was premised on a patterning system with deliberate distinction in the distribution of benefits and burdens between the race groups. In addition to the absolute prohibition of mixed-race marriages and the ownership of property by black citizens, other patterns of distribution were attached to benefits. To demonstrate the patterned system, I explored the education system that was implemented to manage marginalisation within the race groups.

The education system was structured to the greatest advantage of the white race group where the schools were fully equipped with the best educational resources in terms of books and learning aids, built on large pieces of land that accommodated swimming pools, gymnasiums, tennis courts and sport training grounds, and were serviced by an abundant supply of well-trained teachers. Indian schools were also built on fairly large pieces of ground, equipped with adequate learning material and some aids. Sports grounds were available at all schools but there was a definite absence of tennis courts, swimming pools and facilities for specialist sports such as rugby.

Coloured schools were equipped with aids similar to those of Indian schools but with lower quality of education and amenities. In general, few schools were built for the black population.

The materials used and the general quality of the buildings were extremely poor, with most lacking the basic amenities such as water and sanitation. The quality of the education was controlled via the segregated curriculum. Mathematics and science subjects were completely absent from the curriculum of black schools, effectively prohibiting black children from potentially pursuing careers in the medical, science and engineering fields. The marginalisation within the education sector continued in tertiary education where black citizens had little choice in furthering their education because of the lack of facilities available to them. All educational institutions were open to white students and only approximately 40% of them allowed enrolment by students of other races.

This type of systematic, deliberate, well-orchestrated marginalisation were equally applied in other sectors, such as healthcare, basic services of electricity, water, sanitation and transportation. The effects of this marginalisation are still visible today with millions of citizens being exposed to sub-standard medical care, characterised by a shortage of adequately trained doctors, insufficient supplies of medicine, poor specialist facilities, being subject to long queues when treatment is required, and still living without sanitation and water. Each of the categories mentioned above can be further scrutinised to determine where and how the marginalisation continues.

Importance of the Research

The question is important because it seeks to engage with the historical injustice of the apartheid system and discuss the effectiveness of the implementation of race-

based distributive justice in South Africa and the continued inequality and economic marginalisation of those targeted by the restorative legislation.

Complete rectification may never be achieved and coming close might be the best that can be expected. For example, the United States of America was largely steeped in the tradition of slavery, a practice abolished completely in 1865. It would be expected that the integration of society would be completed 156 years later and that there would exist a seamlessness among all citizens, yet this was not the case. News feeds constantly highlight incidents where black Americans are oppressed, harmed or senselessly killed. The killing of George Floyd in 2020 that sparked the worldwide "Black Lives Matter" phenomenon highlights the continued injustice that black people are subjected to.

Meanwhile, 28 years after the dawn of democracy, South Africa remains a country of mass inequality, despite the eradication of inequality being a key focus of the democratic government. This commitment is guided by section 9(1) of the Constitution of South Africa, 1996 (Constitution), which states, "Everyone is equal before the law and has the right to equal protection and benefit of the law" And section 9(2) which states "Equality includes the full and equal enjoyment of rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken". Determining a time frame that is "reasonable" for the complete rectification of justice is almost impossible but incremental progress is necessary.

The moral justification for historical redress is sometimes questioned on the basis that those who perpetrated the injustice are no longer alive to address their actions and

those who were discriminated against are also not alive to receive redress. The question thus arises, “Should current generations be liable for the redress to atone for the injustice of their predecessors and, similarly, should current generations be recipients of the redress that they have not justly earned?”

It is my position that historical redress is morally justifiable. The fact that those directly responsible for the injustice are not in a position to make redress does not mean that the redress is not important or necessary. The effects of injustice are not confined to the generation that was directly impacted, but the residual effects are felt by many future generations.

A black South African living in 1948 was prohibited from owning land and only had access to sub-standard education and limited employment opportunities. These individuals would not have had any opportunity to accrue wealth or uplift the lives of their family members, which translates into generational injustice and, consequently, a need for generational redress.

Armstrong defines distributive justice as “the ways that benefits and burdens of our lives are shared between members of a society or community.” (Armstrong: 2012). The principles of distributive justice serve as a moral compass for the just distribution of benefits and burdens. The research is significant because it seeks to assess the effectiveness of race-based distributive justice in South Africa. The research aims to highlight that there is a moral obligation to address the damage and disadvantage caused by the apartheid era. The study has the following intentions:

1. To determine the effectiveness of the race-based distributive justice by interrogating some of the applicable legislation.

2. To highlight the unintended consequences of race-based distributive justice and of not considering the needs of all citizens.

3. To propose class based restorative justice as an alternative.

The rectification of injustice cannot be achieved over a short period of time; therefore, it is important and essential to periodically examine the effectiveness of the restitutive measures. The legislations, guidelines and practices introduced were crafted after much research and exploration and have the intention of uplifting individuals, whole communities and the country holistically. At the point of drafting legislation, the envisaged success is theoretical, as the effectiveness and value of any upliftment mechanism can only be established once there are results that can be measured to determine the benefits derived against the intended goals.

In addition, where the greater good of legislation introduced is upliftment of the entire country, addressing historical injustice and the consequent adoption of race-based distributive justice in South Africa in response to the damage and disadvantage caused by apartheid, a significant part of the problem is addressed, but some matters are still left unaddressed. Assuming that every black, Indian and coloured person were negatively affected to the same extent or in the same way by the apartheid era would be an unfair assumption; similarly, it would be short sighted to assume that every single white citizen benefitted from apartheid to the same extent and were not disadvantaged by apartheid at all. Therefore, it is important to determine proportionately how the restorative processes introduced should be implemented for the benefit of the entire country and all citizens.

The proposal of a class-based restorative process seeks to address the injustice in the context in which it is experienced by those who were impacted, taking into

consideration the extent of their damage or disadvantage. This approach has the advantage of providing restitution to those in need, where the need has been established in a structured manner and not primarily of the categorisation by race but is also inclusive of other citizens. The research intended to demonstrate that there is a greater good that can be achieved with class-based restorative justice as opposed to race-based restorative justice while still maintaining the moral obligation to address injustices of the past.

SECTION 3: PHILOSOPHICAL FOUNDATION FOR HISTORICAL INJUSTICES OF APARTHEID

What has been discussed so far points to the apartheid system being unjust. Nevertheless, before delving more into this injustice, I provide some philosophical foundation for the historical injustice of apartheid by looking at Robert Nozick's libertarian theory or entitlement theory of justice.

It is important to understand the relevance of Nozick's (1974) entitlement theory and the differences in "time-slice" or "end result" principles of justice and historical principles of justice. The basic conception of the "time-slice" principle is that the determination whether a distribution is just or unjust is based on the distribution at a particular point in time. It is questionable whether a given point in time provides an accurate reflection of a particular situation or a holistic view of all the material elements of that situation. If one has to, today, reflect on the life of a 50-year-old middle-class black South African, one will probably deduce that the individual does not need too much in the sense of distribution. However, the pattern of today, does not provide an accurate reflection of the person's life journey, especially considering that they would have lived in the time of apartheid, been subject to the restrictions of movement, sub-standard education, poor living conditions, oppression of their liberties and all the other

hardships that were part of the apartheid system. Therefore, “time-slice” or “end-result” principles do not justly represent an option for distributive justice for the previously oppressed South African citizens; neither is it representative of many other citizens because the changing economic landscape in the country has given rise to an entirely new population dynamic. The economic classification of citizens into lower, middle or upper income has significantly shifted since the abolishment of apartheid.

Nozick (1974) does not interpret “time-slice” or “end-result” principles to be a natural way of interpreting a situation, purporting that people want to know how things originated in the first place and whether the current situation justly represents its history. As an example, if faced with a situation where the legitimacy of student admissions at the university is being questioned, one will have to look back on the applicable admission requirements for the relevant faculty as well as the application process, interrogate each application to determine if every student was legitimately admitted and if those that were denied admittance were correctly treated. It is the history of the application process that will determine its legitimacy. Similarly, with distributive justice, it is important to establish the legitimacy of the distribution that individuals may be entitled to in order to determine its justness.

Nozick (1974) further strengthens his argument that justice is historical by citing his famous Wilt Chamberlain example, which illustrates that patterns of distribution cannot be maintained at the expense of individual liberty. Nozick (1974) uses this example to illustrate that the end-state or time-slice principles of justice that are based on a just pattern of distribution are not possible without the violation of people’s rights or without disruption of their lives. In the Wilt Chamberlain example, considering that when he was playing, the attendance at home games increased significantly, he agreed to receive an extra 25 cents from every ticket sold for his games. There are numerous

factors of liberty that are present in this example: Wilt's liberty to charge the additional fee, the stadium's and team managers' acceptance of the arrangement, the exercising of free will by the supporters to pay the extra 25 cents and the acceptance by the other players that Wilt will be paid more than them. In referencing this example, Nozick (1974) highlights that redistributions that intend to create equality infringe on the rights of individuals. Similarly, purporting that justice would be served if all South Africans were equal or were treated equally in terms of distributions would not be justice at all. The implementation of race-based distributive justice does not take into consideration that some may need more than others or that some previously disadvantaged citizens were affected more than others. Nozick (1974) claims that the upshot of all this is that the only promising theory of justice is a historical one, which is not pre-occupied with a particular pattern of distribution of wealth which a society must agree to and which must be permanently maintained, but rather one which places emphasis on the process by which any given distribution of wealth has historically come about (Kowalenko 2020, 15).

Nozick's principle of distributive justice can be summarised that a distribution of wealth is just if everyone is entitled to the holdings they possess under the distribution. Injustice in South Africa is historical and the entitlement theory explores historical injustice with the principles of justice in acquisition and justice in transfer that provide an appropriate setting for the study and the rectification of justice principle that will especially explore the effectiveness of distributive justice in South Africa.

The entitlement theory is an appropriate foundation for the exploration of my research and comprises the following principles:

a) “A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.” The principle of justice of acquisition can be complicated because proof of the acquisition is not always possible, especially related to historical acquisitions. Nozick leans on John Locke’s idea that mixing one’s labours with the world can generate ownership of some part of the world. Nozick questions why mixing one’s labour results in the acquisition of new and not the loss of the old? Nozick concludes that “what is so significant about mixing our labour with the material world is that in doing so, we tend to increase the value of it, so that self-ownership can lead to ownership of the external world in such cases” (Nozick 1974, 149-182). In John Exdell’s (1977, 144) interrogation of Nozick’s distributive justice, he shared Nozick’s sentiments by stating, “This notion of property helps us understand why earlier theorists spoke of people as having property in themselves and their labour. They viewed each person as having a right to reap the benefits of what he did.” An important aspect of this argument is that people have the right to decide about themselves for themselves and the extent to which they will use their labour to benefit themselves.

This foundational principle is appropriate for the exploration of injustice in a South African context because before colonisation and settlement of European populations in Southern Africa, two major groups existed, namely the Bantu and Khoisan populations. The Khoisan people first lived in what is now called South Africa between 80 000 and 100 000 years ago. The Khoisan people generally followed a pastoral or hunter-gatherer lifestyle and did not move across vast planes of land, but were more concentrated to particular areas. It is believed that the Bantu inhabitants first lived in South Africa between 300 and 500 AD. The Bantu inhabitants were more inclined to farming and metallurgy, were more adaptive to move freely across large pieces of land and have a strong presence across the entire expanse of the country. The Bantu

inhabitants were able to sustain larger populations and spread easier than the smaller pastoralist and hunter-gatherer populations. These movements resulted in some societies, such as the Zulu kingdom, becoming particularly prominent in particular areas. Their movements stopped around the 1700s when the migration of European people began.

Due to the nature of their farming lifestyle, the Bantu inhabitants mixed their labour with the land to produce food supplies for nourishment and sustenance for themselves and their families. Mixing one's labour with the land does not only yield a single benefit to those working the land, but also contributes to improving the land by increasing its value. The actions of tilling and farming transform land from barren and unused to fertile, usable and valuable.

Nozick (1974) explains that for justice in holdings to be permissible, it must be a "back-ward looking account that would have determined how the holding originated." He further purports that "if the holding came about by permissible and title-conferring modes of action, the possessor will be entitled to it. If the holding came about by modes of action that are not permissible (or are permissible but not title-conferring) the possessor will not be entitled to it. Thus, entitlements are historical" (Mack 2018, 18).

When the European settlers displaced the original inhabitants in South Africa, they did not do so by virtue of any "title-conferring" actions, but rather by forcible removal. This action does not constitute a just holding and entitlement cannot be conferred.

When applied, the principle of justice in acquisition relates to two criteria: 1) the method of the original acquisition and 2) determining if the person acquiring the holding is rightfully deserving thereof. When apartheid legislation was introduced "In one of the most devastating aspects of apartheid, the government forcibly removed black South

Africans from rural areas designated as “white” to the homelands and sold their land at low prices to white farmers. From 1961 to 1994, more than 3.5 million people were forcibly removed from their homes and deposited in the Bantustans, where they were plunged into poverty and hopelessness” (history.com). This act of forced removal of black communities and the subsequent ”ownership” of the land by the white population do not satisfy the justice in acquisition principle and bring into question their entitlement thereto.

Speaking about these principles, Coleman, Frankel and Phillips (1976, 438) note that justice is inherent “in the process by which holdings were obtained, and is content with whatever distribution results from that process”. Justice in acquisition provides that an individual can enforce their rights to a holding and for the principle to be true, no person can take or use the holding of another without violating their rights. The forced removal of black citizens from their land was in direct violation of their rights and the principle of justice in acquisition.

In post-apartheid South Africa, the necessity for the redistribution of land has been established as one of the fundamental steps in the reconciliation process. The expropriation of the land is one of the most important, but equally one of the most contentious, issues. It is essential to determine how just and equitable redistribution of the land in question will take place, without causing further harm to social considerations such as people’s dignity and economic aspects such as food security. To complicate this matter further, the Constitution does not make any specific pronouncements on the topic and addresses it only in a basic sense; for instance, that expropriation must be “for a public purpose or in the public interest” and “subject to compensation” decided by agreement or by the courts (Republic of South Africa, 1996,

sec. 25). Following the same path of forcible removal and reallocation of land is not a viable in option and will not meet the entitlement requirement of justice in acquisition.

b) “A person who acquires a holding in accordance with the principle of justice in transfer from someone else entitled to the holding, is entitled to the holding.”

The justice in transfer principle is premised on the willing transfer of acquisitions from one party to another provided that the original acquisition was just. An individual cannot transfer to another a holding that he acquired through theft or forced removal, because the original acquisition was unjust. We have already established that the transfer of holdings from previously disadvantaged groups by the white population group during apartheid is flawed and unjust. Therefore, the transfer of those holdings to future generations of the white race group would not constitute a just transfer. Consequently, the generational wealth accumulated from these holdings has not been earned justly. Justice in transfer can only apply to holdings that were legitimately acquired.

Another critical aspect of justice in transfer is the willingness of the individual to be party to the transfer. “From each as he chooses… to each as he has chosen” (Exdell 1977, 145). Individuals should have the option to exercise autonomy in transfer of their holdings on a willing seller, willing buyer, or willing giver, willing receiver arrangement. The forced removal (no willingness) of previously disadvantaged citizens from their land does not satisfy the provision of Nozick’s second principle.

Justice in transfer is not confined to holdings, but also extends to labour. We can choose to give away our labour, trade it or keep it for ourselves. It would be just to exercise any of these options autonomously, but being forced to utilise one’s labour for the benefit of another would be contrary to the principles of justice in transfer. In

addition previously disadvantaged groups experiencing forced removals from their land, they were forced to work on the same land for the benefit of others.

There are numerous instances where land was successfully expropriated and handed back to the communities who were forcibly removed from it, but the lack of education and support resulted in many of these failing or not yielding the desired level of upliftment. I have identified above that the land restitution process implemented by the South African government does not support a just acquisition nor does it support a just transfer because there is an element of harm that is caused for those who benefitted from the land, which is contrary to Nozick's principles.

c) "No one is entitled to a holding except by (repeated) application of (a) and (b)" (Nozick 1974, 151).

Nozick's third principle makes space for the continuation of just acquisition and transfer of benefits and burdens to following generations. If this cycle continues, it will create a fair landscape for future generations.

"The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings" (Arnold, Beauchamp and Bowie 2014, 553). The violations perpetrated by the European settlers by forcibly removing citizens from their justly acquired land are a violation of the first two principles of justice in holdings. The principle of justice in rectification is available as restitution for the violations suffered by those whose land was taken away from them. "If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices?" (Coleman et al. 1976, 453). Apartheid favoured the white race group in all aspects: employment, housing, property and others.

However, it would stand to reason that present holdings are not reflective of a just society and rectification would be essential.

Therefore, of paramount importance here are Nozick's sentiments "that one may not acquire property if something of one's ownership would harm others." One should not take for themselves more than they need, and take with due consideration of the needs of others. The mind-set of providing enough for all and considering all when allocating benefits is a catalyst for considering all parties relevant to a transaction. This essential component of equity and justice was blatantly absent in the apartheid era.

In the South African context, unjust enrichment, explored further, especially in relation to politically connected persons, was in direct contravention of just acquisition. The actions of politically connected persons caused much harm to the masses of previously disadvantaged citizens. There was no justice in the manner in which these acquisitions were made because those benefitting from these transactions were not entitled to the holdings. Just rectification would recognise that even if it is not possible to identify those individuals from whom the holding was initially expropriated, it would be important to consider rectification at a more societal level to contribute to the upliftment and betterment of all black people.

SECTION 4: RATIONALE AND ARGUMENTS FOR RACE-BASED POLICIES

Rationale and political argument of race-based policies

Once apartheid ended, the restitution process had to begin. Apartheid was ruled a crime against humanity, and it was important to acknowledge the ills that were perpetrated against the black, Indian and coloured race groups. In contrast to countries like the United States of America where there has been no acknowledgement of the wrongs of segregation and slavery, South Africa made a decision to establish a mechanism to allow victims and oppressors to seek out the truth by sharing their respective experiences. The Truth and Reconciliation Commission was established in a court-like format and gave a voice to victims of gross human rights violations. This voice could express their hurt, seek answers for their suffering and try to establish the fate of lost loved ones.

This was an important step in the reconciliation process that allowed oppressed citizens an opportunity to seek and receive answers and allowed perpetrators to explain, repent and seek forgiveness. This process was important because it highlighted that not all white citizens supported the apartheid regime. Many felt compelled to abide by the rules and laws established by the minority government and did not support the system of apartheid but were too afraid of retaliation, therefore they did not speak out or object at the time. However, when the Truth and Reconciliation Commission was established, many took the opportunity to account for their actions by sharing the truth about the actions they were forced to take.

The prioritisation of the groups directly impacted by the apartheid legislation seems reasonable considering the arduous lives they lived. The ANCs rationale to prioritise those who were most affected by apartheid seems reasonable in the context, but

assumes that black, Indian and coloured citizens were the only groups affected by apartheid. In prioritising only those who were mentioned in the apartheid legislation, the ANC implemented legislation that defies the equality provisions contained in their founding documents and legislation. Consequently, they created an insincere environment which they purport to be grounded on creating an equal society for all citizens, but their position, actions and decisions eventually taken are contrary to the position they promoted initially, to gain the trust and support of the people. The rational of race-based distributive justice defies the foundation that South Africa is a country for all its people.

Philosophical or moral argument for race-based policies

The implementation of race-based justice that focuses only on black, coloured and Indian citizen's purports to create a better life for these race groups. When one collectively reflects on the country as a whole, it would be difficult to ignore the millions of white citizens who are living in abject poverty. Race-based distributive justice does not provide for the inclusion of the white race group. "A white skin in South Africa is a protection against racial discrimination: it offers no defence against poverty, and for generations, large sections of whites have lived below subsistence level" (Sachs, 2012).The apartheid system created many opportunities for white citizens and shielded them from many ills but it did not guarantee a lucrative lifestyle or protection against menial labour prospects. Consequently, there are many white citizens who are poor, whether due to their own bad luck or just sheer lack of appreciation for the advantages afforded to them during the apartheid era. A critical assertion that I make in this study is that decisions made and actions taken related to restitution should consider all citizens who are disadvantaged or deserving and not be solely based on racial considerations. Excluding white citizens from the restitution equation does not

align to the prescripts of the Freedom Charter "….*that South Africa belongs to all who live in it, black and white…"* (Freedom Charter, 1955).These practices contribute to South Africa being one of the most unequal countries in the world. As quoted by Louis P. Kruger (2014, 442), Thuli Madonsela shared the same sentiments in her speech at Stellenbosch University where she added, "Compounding the situation is that poverty and unemployment have worsened and also the fact that, that too follows the contours of racial, gender and other forms of structural inequality or discrimination".

The restitution is also completely blind to social suffering. The prohibition of mixed marriages affected people across all racial lines. Restitution in this respect would be challenging, but it does demonstrate that the effects and impact of apartheid reached beyond the marginalised groups and affected other citizens as well.

It cannot be assumed in the context of South Africa that the first principle of Nozick's theory "A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding" (Nozick 1974, 151) can be justly applied to all white South Africans. Not every white citizen had the opportunity or took advantage of the opportunities the apartheid system presented. Many white citizens did not agree with apartheid and displayed enormous support for the liberation movements.

According to the publication "White Opposition to Apartheid in the 1950s", between the years 1950 and 1953, numerous white citizens opposed the stance of the Nationalist Party and thousands joined the night-time marches to oppose actions such as the removal of the names of Indian and coloured candidates from the voters' roll. They further supported the Congress Alliance to highlight the repressive apartheid laws and drew support for the Congress Alliance. (Everatt 2010, 33 – 47).

Just as blanket restitution to black, Indian and coloured citizens does not address the extent to which each was affected and prejudiced by the apartheid system, the assumption that all white citizens benefitted extensively and were not at all prejudiced is a short-sighted assumption. In this study, I explore class-based distributive justice as an alternative distributive option for inclusion of all citizens of the country.

SECTION 5: INTERROGATION OF THE APPLICABLE RACE-BASED LEGISLATION

In my examination of the effectiveness of race-based distributive justice in South Africa, I explored the Broad-Based Black Economic Empowerment Act (BBBEE) Act, the implementation of which is commonly known as affirmative action. My arguments firstly interrogate the prescripts of the act, demonstrating the shortcomings of its implementation and then the impact to the designated groups in relation to their own economic prosperity and consequential impact on their dignity and wellbeing.

Broad-based Black Economic Empowerment Act

What is Broad-Based Black Economic Empowerment?

"The BBBEE Act strives for the effective participation of black people in the economy in order to achieve the economic unity of the nation" (Kovacevic 2007, 6). The implementation of BBBEE is the practice or policy of favouring individuals belonging to groups regarded as disadvantaged or subject to discrimination. The BBBEE Act was developed to advance the economic transformation of the country and promote the inclusion of Black people into the mainstream economy. The Act was developed with specific focus on the previously disadvantaged black, Indian and coloured race groups, in particular women, youth, workers, people with disabilities and people living in rural areas. Extracts from the Act define its major focus as,

a) increasing the number of black people that manage, own and control enterprises and productive assets; b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; c) human resource and skills development; d) achieving equitable representation in all occupational categories and levels in the workforce; e) preferential procurement from enterprises that are owned or managed by black people; f) investment in enterprises that are owned or managed by black people. (Republic of South Africa, 2003).

Exploration of the Code

a) *Increasing the number of black people that manage, own and control enterprises and productive assets*

For this goal to be achieved or at least be achievable, it would be essential that the targeted group be equipped to appreciate the benefits the legislation was intended to bring them. To be equipped to manage, own and control an enterprise, it would be essential that black people targeted by the Act should be educated and trained to do this. With the marginalisation that black people were subjected to, especially with regard to education, this is not a goal that would be fulfilled easily. During the apartheid era, black people did not have access to quality, broad-scoped learning, such as business studies and mathematics, among others. The education system governed by the Bantu Education Act, 1953, was effectively one that prescribed inferior education to black students. The primary aim of the education system was for black students to be and remain unskilled or semi-skilled labourers and consequently remain subservient to white South Africans. Jansen (1990), quotes Horrell (1963, p41), "The differentiated curricula introduced in Black South African schools in 1922 had two

essential features: (a) teaching of the vernacular was made compulsory in all primary classes and (b) practical skills were emphasized; hygiene, handwork, gardening, agriculture, housecraft, and needlework featured prominently in the syllabi. Greater curriculum uniformity existed at the high school level between black and white schools." Despite a greater uniformity at high school level, without exposure to foundational elements of mathematics, business studies and science, the majority of black students were still not able to benefit, so they continued to be disadvantaged. In addition, very few opportunities for tertiary education existed for black students. In 1959, the National Party passed the Extension of University Education Act, No. 45 of 1959, which extended the apartheid principles to be applied at higher education levels as well. In Modernising Racial Domination (1971), Heribert Adam notes "With regard to educational opportunities, the five non-white universities have on the whole been successful in terms of the apartheid programs, despite the limitations placed on them as separate institutions under paternalistic Afrikaner guidance" (Politicsweb, 2012) Despite there being dedicated universities for marginalised groups, they were not able to cater for the majority of the designated groups in terms of numbers. Furthermore, due to the limited curriculum at school level, many students did not meet the entrance requirements for the courses they wanted to pursue, especially those in the business and science faculties.

To some extent, the need to assist black people was recognised; consequently, the codes of good practice were drafted to provide guidance for the implementation of the Act and familiarise recipients with the key elements. Furthermore, some reprieve was afforded to start-up enterprises with regard to qualification requirements; however, the costs involved in complying with these requirements were a major drawback to start-up enterprises and further contributed to the hindering of the progress of the black

population groups. According to Kovacevic (2007, 6) “Whether the new legislation is government-sponsored discrimination or rightful redress of apartheid injustice, remains a matter of controversy. What is clear is that the initiative is an inadequate approach to extending prosperity.”

The BBBEE codes were intended to smooth the integration process, and the drafting of the charters included the involvement of a small group of selected black citizens, most of whom already had some exposure to business transactions. They were not able to relate to or cater for the needs and interest of a first-time businessman who were intended to be the primary beneficiaries of the legislation. The small complement of representatives does not fully and sufficiently represent the population affected by discrimination, not in terms of numbers and especially not in terms of interests. In addition, the exposure of black people in general to fundamental business practices, the latest technologies and so on would be limited due to their isolation and lack of exposure to the outside world. Selective inclusion of black representatives in this context is unjust and reminiscent of the segregation brought about by apartheid.

b) Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises

The focus of the initial BBBEE legislation was very narrow and concentrated on affording opportunity primarily to those who were already wealthy or politically connected. BusinessTech (2015) states that, according to Dr Anthea Jeffery, Head of Policy Research at the Institute of Race Relations (IRR), “BEE is a key reason why economic growth in South Africa lags so far behind other emerging countries.” According to research, BBBEE has benefitted approximately 15% of the 44.2 million black people in the country. The other 85% of the population previously disadvantaged

by apartheid legislation continues to be disadvantaged. The government continues to promote that BBBEE is beneficial to the country; however, research data has shown that the majority of the previously disadvantaged population continue to be poor despite some improvement in the economic standing of a few individuals. In 2015, 14% of the previously disadvantaged population group were dollar millionaires, which has increased to 45% in 2017. While this trend is positive, it is reflective of high net worth individuals and not the population at large. These statistics serve as testimony that BBBEE benefits a few elite and not the greater population it was devised to benefit.

c) Human resource and skills development

An appropriate opportunity to commence with integration efforts at community level would have involved mechanisms for the sharing of knowledge and defined processes for skills transfer. The white population possessed knowledge, experience and exposure to all facets of business processes. The new regime would have been wise to have engaged these groups to encourage community based education. They could have introduced incentive schemes to reward those who are will to share knowledge. It would have also been an opportunity to educate both black and white citizens that upliftment on a greater societal scale ultimately benefits all citizens and consequently the country.

d) Achieving equitable representation in all occupational categories and levels in the workforce

A severe shortcoming in the original versions of the Act was the lack of focus on the empowerment of black women and persons with disabilities. Subsequent amendments were more specific in aligning to the demographic presence of the

related population groups in the country, including the inclusion of persons with disabilities and particular focus on women empowerment was elevated. Despite this, Nomalungelo Gina, Deputy Minister of Trade and Industry, in her speech at the second Women's Empowerment Conference in 2019 cited the recent studies conducted by the BBBEE Commission for 2017 and 2018 that state, "Black women still occupy less positions compared to males and white people on the boards of entities listed on the Johannesburg Stock Exchange (JSE), standing at 18% in 2017 and 21.63% in 2018, despite women being the majority in this country. Further, in terms of ownership, Black women were sitting at about 9% in 2017 and 10.1% in 2018, which remains low considering the demographics" (Gina 2019). Considering that the BBBEE Act was created with the specific intention to uplift previously disadvantaged citizens, the statistics should show a positive trend 24 years after the Act had been implemented; however, this is not representative of the demographics of the country as a whole.

According to the Quarterly Labour Force Survey of the 2nd quarter of 2021, women in South African remain disadvantaged. Forty-one percent of black women, 30% of coloured women and 22% of Indian women were unemployed, as compared to 8% of white women. (Stats SA 2021). Even when black women are able to take advantage of employment opportunities, appointments to decision-making positions and jobs in certain sectors, or of certain characteristics, remain elusive. In a 2018 Grant Thornton study, it was revealed that although almost one-third (29%) of senior roles in South Africa are now filled by women, one in five local businesses (20%) still have no women at all in senior positions. Twenty-four years after democracy, these statistics paint a grim picture of affirmative action.

e) Preferential procurement from enterprises that are owned or managed by black people

Another major inhibitor to the real economic transformation is fronting. A “fronting practice” is defined in the Amendment Act as “a transaction, arrangement or other act or conduct that directly or indirectly undermines the achievement of the objectives of the Act or the implementation of any of the provisions of this Act.” (BBBEE, Amendment. 4). The definition provides a list of fronting practices which include, but are not limited to, when “Black persons, who are appointed to an enterprise, are discouraged or inhibited from substantially participating in the core activities of that enterprise” and “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” (BBBEE Fronting, Schindler Attorneys). According to the Head of the B-BBEE Commission, Zodwa Ntuli, since 2016, the commission had received 800 complaints of fronting, cases that were in various stages of investigation. Fronting practices, poor implementation of the Act and inefficient management thereof have contributed to the slow economic transformation in the country.

Deputy Minister Nomalungelo Gina is quoted as saying, “Misrepresentation and fronting by white companies is a serious problem in this country and it has advanced itself to become too sophisticated to easily detect. Unfaithful entities have learnt how to blend their B-BBEE status to appear as genuinely complying with the codes and therefore escape transformation imperatives as set out by this government. But equally, because of desperation, these white companies find some willing black fronting tokens who agree to assist in these camouflaging efforts and be made to sign

shareholding equities whilst knowing that they are not" (www.sanews.gov.za Oct 2020). These sentiments are apt in summarising the consequences of race-based policies. It would have been wiser to consider allowing all citizens opportunities to do business, with the introduction of a scorecard that is not punitive to white citizens, but creates opportunity within the context of upliftment goals.

This would have severely reduced the need or inclination of companies to resort to such measures. Furthermore, as detailed above, the poor socialisation of the legislation among those it seeks to benefit has allowed desperation to fester and, ironically, created additional opportunity for the exploitation of the previously disadvantaged. Louis Kruger, in his 2014 paper, *Broad-based Black Economic Empowerment (B-BBEE) in South Africa: A Moral and Ethical Management Perspective* raises the moral and ethical standpoint of BBBEE, especially in comparison to the UN declaration of independence which affords all people, irrespective of their nationality, sex, ethnic origin, colour, religion or any other distinctions the respect to be treated equally.

The BBBEE Act in its current application is contrary to this provision, and the consequence of unequal treatment raises additional challenges, such as fronting. Fronting practices use black people as pawns. They are used as facilitators in the registration process of entities to support the achievement of a particular BBBEE rating, but are not afforded the corresponding opportunity to derive an economic benefit from the enterprise. The cyclical effect of continued injustice stifles the economic growth prospects of the country. Kruger (2014) quotes Jeffery in her analysis of the BBBEE Act, "… lack of critical scrutiny of BEE in all its aspects… partly because of its supposedly remedial aims, which tend to be taken at face value, so limiting proper evaluation" (Jeffery 2014, 25). Evaluation would be important to

determine if the Act meets its intended purpose and benefits those it is intended to benefit. Periodic evaluation would also assist in identifying areas of weakness, strengths, inefficiencies and provisions that need to be amended, which can contribute to the refinement of processes that have greater benefit for the people and country as a whole.

f) Investment in enterprises that are owned or managed by black people

In its 1994 Reconstruction and Development Programme (RDP) document, the ANC declared that a "central objective of the RDP is to de-racialise business ownership completely through focused policies of Black economic empowerment" (Southall 2008, 699). The ANC government does not display a firm commitment to the implementation of the BBBEE Act. There seems to be reluctance by the government to compel white-owned businesses to contribute to economic transformation for fear of consequential economic impact of white disinvestment in the economy. However, "the government has co-operated with corporate capital empowerment targets acceptable to local industry and foreign companies. Black business has been peripheral to the empowerment process. Black business has expressed criticism at the slow pace of reducing white domination of the corporate while labour has criticised BEE deals for enriching a small number of senior ANC figures" (Southall 2008, 699).

For the most part, the government failed to implement BBBEE decisively and are grappling with primary issues such as, should BBBEE involve a transfer of ownership; if so, what should the percentage be; should the percentage constitute a majority shareholder and how should that be determined? Corporate enterprises, on the other hand, attempted to engage in the transfer of share options to previously marginalised groups by creating BBBEE share schemes. As an example, "Sasol, in 2008, have

been more broad-based with a larger percentage of shares being set aside for employees and trusts representing black women, the disabled and community groups. In addition, union investment companies deploy assets of around R2 billion ($275 million), supposedly on behalf of their members. But the transfer of shares has been predominantly to individuals close to the ANC government" (Southall 2008, 700). An Ernst & Young survey revealed that the value of empowerment deals between the years 1995 – 2005 was R285 million, which indicates some positivity in the upliftment of black people; however, these deals were not to the benefit of the majority of the marginalised racial groups.

Nozick's entitlement theory principles are premised on justice and are not concerned with equality; consequently, it would be important for those affected by the injustice to be justly compensated, but it does not dictate that this compensation would be equal.

Implementation and Impact of Affirmative Action

Ratuva (2013) states that "Affirmative action is a mechanism for 'Black empowerment', the term used to ensure higher levels of economic, educational, cultural and political attainment for previously oppressed blacks." Fullinwider, in the *Stanford Encyclopaedia of Philosophy* (2018) takes affirmative action as involving a policy whereby "positive steps [are] taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded. When those steps involve preferential selection – selection on the basis of race, gender, or ethnicity – affirmative action generates intense controversy." In addition, affirmative action in South Africa is defined in the Employment Equity Act, No. 55 of 1998 (Act) as "Measures designed to ensure that suitably qualified people from designated groups have equal employment

opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."

Affirmative action in South Africa was introduced to ensure that those formerly disadvantaged, also referred to as designated groups in Section 1 of the Employment Equity Act No. 55 of 1998 (South African Government 1998), enjoyed the same benefits and opportunities guaranteed in the post-apartheid Constitution. On this premise, the first democratically elected government, led by the ANC, implemented race-based distributive justice, otherwise known as positive discrimination, in response to the race-based marginalisation of designated groups. The policy supports the aims of the BBBEE Act.

Consequently, in corporate South Africa, there are some attempts to include black population groups into the mainstream corporate economy with the implementation of affirmative action. Affirmative action, as defined in the Act, incorporates the aspect of “suitably qualified” implying that individuals require a particular level of formalised education, skill or exposure to appropriate training to be eligible to be considered for an occupation. Requiring that individuals be suitably qualified, would probably be rationalised by the need to create efficiency in these processes, which would be reasonable if the opportunity to gain the relevant qualifications was freely available. In my analysis below the impact of educational opportunities are further explored and demonstrates the difficulty in meeting the requirement of “suitably qualified”.

Comparison of the data between the Statistics SA 1994 October Household Survey and the 2014 Living Conditions Survey indicated that that there has been an improvement in the proportion of skilled workers in all race groups over the 20-year period. The shifts were quite significant among the white labour group with shifts from

42% to 61%. The only previously marginalised group that showed a significant movement was the Indian population who moved from 25% in 1994 to 51% in 2014. The disappointing statistic was among the black African population group with only a slight upward movement of 3% towards skilled labour, 6% improvement in semi-skilled labour and a decrease of 9% for low-skilled labourers. Further interrogation of the statistics per age group reveals that there was a positive shift in all population groups towards skilled labour, except for the African youths, which showed a 15% decrease (statssa.gov.za)

When initially reflecting on the numerous definitions and intentions of affirmative action, it is difficult not to be optimistic that its implementation will yield positive results for the previously disadvantaged groups. However, on closer interrogation it became evident that the implementation of race-based distributive justice, has been selectively positive for some citizens, but the benefits to the greater majority of the disadvantaged communities were limited, as evidenced in the survey quoted above.

These statistics can be an indicator of two things: (1) Employers have not invested sufficiently in creating an environment that assists previously disadvantaged black people from emancipating themselves and (2) Citizens are not fully utilising the advantages that the affirmative action legislation affords to them. While South African employers made some effort to integrate marginalised citizens and comply with the law, they have chosen to do so with a one-size fits all approach. Apartheid was not implemented in this way; there were vast inconsistencies between the benefits and burdens of each race group. It would not be just to assume that all persons from marginalised groups had the opportunity to acquire a primary level of skill, neither would assuming the converse be just. Therefore, it would have been appropriate for employers to take time to establish the level of support that was needed and was

appropriate for each of the marginalised groups. Similarly, employees should take the time to understand the implications of the affirmative action legislation and the advantages it presents to them.

The implementation of affirmative action to the extent that it benefits the ruling elite is contrary to Nozick's principles of justice. Justice would be served if affirmative action were implemented in ways that take into account previous acts of historical injustices and in the case of South Africa that would invariably be for the most part the marginalised groups of the population. The affirmative action programme is wide and seeks to make restitution in many aspects. In what follows I look at the impact of affirmative action in the following areas:

1. The youth considering the impact on their education
2. From a community perspective related to the creation of an entitlement mentality
3. Unjust enrichment
4. The impact of affirmative action on the dignity, well-being and self-worth of individuals

1. Impact of affirmative action on the education of previously disadvantaged youth

South Africa defines youth as individuals between the ages of 14 and 35 years, and in 2010, this group comprised 19.1 million individuals. Since 1994, youth development has been a priority with various legislative changes, such as the South African Schools Act (1996), the Employment of Educators Act (1998) and the establishment of the National Youth Development Agency (NYDA) in 2008, to create and promote educational and job opportunities, especially for previously disadvantaged youth.

Since 1994, school enrolment figures have increased drastically as parents acknowledge and appreciate the benefit of education. Between 1975 and 1994, the enrolment rates of black South Africans increased by 154%. Despite this increase in enrolment, on average, 500, 000 youth drop out of school annually.

Education analyst Nic Spaull reported that 1, 002, 500 pupils registered for Grade 1 in 2007, but only 512, 700 (51% of these students) wrote their matric examinations in 2018. It is difficult to ignore the fact that 49% of these students dropped out from the system somewhere along the way. According to the Department of Education, the number of students who matriculated between 1995 and 2006 increased among all race groups, but the increase among black South African youth has been the lowest at just 4%. According to the 2019 Households General Survey, 21.6% of students did not attend school due to a lack of money, 22.6% due to poor academic performance, 8% due to family commitments and 8% felt that education is useless. (Stats SA, 2019). These statistics offer a window to dissect the plight of South African youth further.

Two of the above statistics are discussed: lack of money and poor academic performance. There are approximately 25, 000 schools in South Africa. The Department of Education declared approximately 10, 200 of these schools as no fee schools, after a similar trend in other countries where, “over the past decade, a number of developing countries, many of them in sub-Saharan Africa, have eliminated fees associated with primary school attendance” (Fiske and Ladd 2011, 66). These schools are available in all provinces and accessible to all students who are unable to meet the school fee requirements and they seem to offer a lifeline to the 21.6% of students who cannot meet the fee requirements. Exercising this option will allow a greater number of youth to complete a minimum high school education. However, the

affirmative action policies implemented do not prioritise the quality of the education being offered at these schools, only their availability.

The Department of Education classifying schools as no fee schools is seen as a positive step in addressing past injustices and positioning them to serve the best interests of the disadvantaged communities. South Africa has made numerous inroads into offering quality education. In their paper *Equity and 'No Fee' Schools in South Africa: Challenges and Prospects* (2012), Yusuf Sayed and Shireen Motala, describe these as the introduction of the South African Schools Act, which affords school governing bodies authority to act in the best interest of the school; the introduction of the equitable share formula, which creates parameters within which provinces must determine the value of actual resources spent on each learner; and the National Norms and Standards for School Funding, which establishes that 60% of the resources should go to 40% of the poorest learners. The mechanisms exist to create an environment for meaningful schooling. The schools are available, but the education offered, or its quality, does not serve the youth of the country.

Two aspects that have largely contributed to hindering the progress in education were the shortage of suitably qualified teachers and the decisions taken to continually reduce the minimum pass mark in schools.

Having instruction delivered by well-trained, experienced teachers in schools that are well equipped with the required books and supplies would contribute to improving the level and quality of education and would, in turn, contribute to the upliftment of disadvantaged youth by providing them with quality skills and requisite knowledge to excel in society. Furthermore, suitably qualified and experienced teachers would also be trained to deal with the socio-economic challenges of these youth and would be

able to keep them interested in school. The ability to impress on the youth the importance of an education and the consequential positive impact thereof on them becoming a contributing member of society and the value added to their own life is essential for an educator in a developing country. Between 1994 and 2000, a decision was made to close down many teacher training colleges, which contributed to the shortage of qualified teachers. This invariably resulted in the student-teacher ratios in the schools being disproportionate, which further compromised the teachers' ability to deliver quality education.

In an effort to compensate for the divide that the apartheid education system created between the races, the Department of Education reduced the minimum pass mark to allow a greater number of previously disadvantaged youth to progress through the system. Pushing students through the system may seem like a good solution to increase the number of school leavers, but the long-term effects can be detrimental to both the students/youth and the country. Having a poor quality of education invariably results in job prospects being reduced and significantly affecting the value of their lives.

If the intention of the ruling party was to uplift previously disadvantaged communities, making a concerted effort to ensure that the educational foundation is valuable would be an appropriate point to start. With the initial implementation of affirmative action, the overhauling of the education system should have been prioritised and it would have provided a platform to significantly increase the quality and not just the number of school graduates, and, consequently, contribute to increasing the education and literacy levels of the country.

An added challenge to the no fee schools is their accessibility and proximity to the mainstream economic hubs in the country. Many of the no fee schools are located in areas that were formerly part of the homelands to which marginalised groups, especially blacks, were relocated. The location of these schools, compounded by the lack of quality of education and accessibility of amenities, does not make them attractive options to the youth. Further compounding the disadvantage of black youth is the poor state of these schools they are forced to attend. The schools lack proper infrastructure, construction quality is low, or they are in a state of disrepair or neglect. This type of environment is not conducive to learning and is not attractive to the youth, nor does it inspire a sense of learning in them. “If disadvantaged groups are to be uplifted, the government must place its primary focus on the quality and accessibility of education. South Africa’s schools are in desperate need of improvement, especially among the black population. Evaluations conducted by the Education Department exposed a striking disparity between Black and White educational institutions” (Kovacevic 2007, 6). Affirmative action is promoted as a mechanism that brings about equality and provides restitution for past harms; more attention should be paid to actually achieving equality. The hope that affirmative action promised has not sufficiently materialised in upliftment or a better life. It is not difficult to see why black youth are disillusioned and have, to a large extent, become complacent within the system.

2. Entitlement mentality

Economic transformation and inclusivity are two of the critical goals of affirmative action. A major concern with the implementation of affirmative action has been voiced in the foreword of the Millennium Development Goals Report, “We are confident that we have dealt effectively with the goal to half extreme poverty but we remain deeply

concerned that relative inequality remains high, as measured by the Gini coefficient. This is so in part because of the high unemployment rate and the low labour force participation rate in our country" (Stats SA 2013).

South Africa has one of the highest unemployment rates in the world, which currently stands at 34.9% (Stats SA 2021). The unavailability and inaccessibility of formal employment are some of the contributors to the high unemployment rates, but the low labour force participation rate is also a great cause for concern. Entrepreneurship is a key component of thriving economies and is especially important in emerging or developing economies like South Africa.

In many parts of the developing world, citizens make an effort to help themselves. Sanjeev Sanyal, an economist and writer, referring to the Academy Award-winning movie that exposed the gritty underbelly of the slum Dharavi in India says, "If one looks past the open drains and plastic sheets, one will see that slums are ecosystems buzzing with activity. Thousands of small businesses thrive in Dharavi, creating an informal economy with an annual turnover of $1 billion by some estimates." (Chandran, 2016).

The South African economy experienced a different reality where previously marginalised citizens did very little to help themselves. This could be partly attributed to the tone set by the ruling party, who have largely benefitted from the affirmative action policies. This created an expectation within the workforce that they too should benefit, because affirmative action was meant to benefit those who were marginalised by apartheid and, by definition, this included all black citizens – there were no other qualifying criteria. On this basis, many sat back and wait for their turn.

The Reconstruction and Development Programme (RDP) was one of the first affirmative action policies implemented. It was well intentioned with various goals, including providing 10 years of free compulsory education for all, building at least 1 million low-cost houses over the following five years and increasing accessibility to electricity of 2.5 million households by the year 2000. The manner in which these goals were set out created the expectation that they were achievable and would be met, and that those who have been earmarked to receive these houses should have the expectation that they would receive a house. These “false promises” bred a society that waited to receive and held to account those who made these promises.

The reality of the situation was that the RDP was not well executed and with majority of the goals not met. Of the R2.5 billion 1994-94 budget, R1.7 billion had been unspent and carried over to the next year. When the democratically elected government realised that for RDP to be achieved, it would require the collaboration and cooperation of social organisations and the private sector, would result in duplication of functions within existing government structures and would entail extremely costly implementation, the RDP office was closed down.

An additional mechanism of redress was the Growth, Employment and Redistribution Strategy (GEAR) of 2006. Ratuva (2013, 227) quotes Cargill, “GEAR aimed to create almost 1.5 million jobs over 5 years, as well as to promote competitiveness through trade liberalisation and productivity measures, to support direct investment and export orientation, to enhance the social and economic infrastructure and export orientation, to enhance the social and economic infrastructure through partnership with the private sector and improved flexibility in the labour market.” GEAR failed to meet its targets of job creation, which further stifled the economy.

An economy that is not characterised by growth and opportunity is not able to encourage or support entrepreneurial activities, which contributes to the complacency and lethargy of those deserving of retribution. The previously disadvantaged would require a catalyst to encourage or spur them into entrepreneurial activities. An environment ripe with opportunity would be the catalyst required. Both RDP and GEAR would have served as catalysts, had they been implemented adequately. But, instead, both programmes gave rays of hope to those who were destined to benefit, without presenting them with concrete opportunities.

Marginalised groups who would have liked to pursue entrepreneurial avenues are further discouraged from doing so due to the lack of accessibility to funding and socio-economic assistance. The Small Business Development Agency (SEDA) was established to provide funding to emerging businesses. The SEDA had numerous schemes that supported specific business types with specific requirements for qualification, which included aspects such as the entity must have been operational for a minimum of 12 months, must be registered with the particular bodies, the CIPC and others. The segment of the population most severely affected by apartheid did not have the means to establish and run an enterprise for 12 months before qualifying for assistance from SEDA; many would be hindered by the red tape around these processes because they did not understand them and were not able to comply with the requirements. The shortcoming in the government's efforts to encourage entrepreneurial spirit was the lack of socialisation of these processes and adequate support mechanisms to ensure that processes were used successfully. The efforts that have been made to assist previously disadvantaged citizens to lift themselves out of poverty were counter-productive to their purpose, causing many to become disillusioned and develop a mind-set that inhibits their progress.

It is the duty of a ruling party to live up to the promises they made to the people of South Africa during their election campaigns. The falsehoods fed to the citizens during the election did not materialise. Instead, the ruling party made a concerted effort to implemented affirmative action in a manner that primarily benefitted those who were politically connected, except for a few tokens of assistance being rendered to some communities or persons as a means of diversion from the widespread self-interest that the members of the ruling elite engaged in. Affirmative action in this form effectively shut out the majority of the population, those mostly affected by apartheid and living in abject poverty.

When the first democratic election was held and won by the ANC in 1994, it was on the back foot of oppression and hopelessness. The election represented hope and a new beginning. Sadie, quoted by Ratuva (2013, 219) says this of President Nelson Mandela who expressed the following sentiment, “the whole social programme of the new democratic government which we envisage for South Africa will be one of affirmative action.” Similar utterances graces the pages of the history books written by other ANC stalwarts. Armed with these types of assurances, the promises of RDP and GEAR, the previously disadvantaged had no reason not to be invested in this expectation and await the arrival of affirmative action programmes that would uplift and improve their lives.

Through the Black Economic Empowerment (BEE) programme, a number of black middle-class citizens were elevated to top business and political positions. “Ultimately, affirmative action and black economic empowerment only added a few ‘upper and middle classed’ Africans into the league of rich South Africans” (Matambo and Ani 2015, 280). Selective benefit of government policy also created a new divide and gave rise to the new black middle class. The poor witnessed the extent to which the lives of

the ruling elite changed and cannot be persecuted for believing that they too would benefit from policies that were designed for the greater good of all disadvantaged people. This mind-set has given rise to an entitlement community of “let’s wait to receive what the government has promised.”

The inability of the government to fulfil its promises and the people’s expectation that the promises they made should be fulfilled created a tug-of-war scenario. Consequently, communities embarked on frequent service delivery protests when their expectations were not met. Some of these protests might have some merit, especially when they were related to basic services, but many of these protests were marred by the violent, destructive behaviour, which deflected from the importance of the matters they were raising. The government’s response to the service delivery protests was intermittent, with temporary relief offered to the communities on the issues they raised. These communities lived in a cycle of needs not being satisfied – protests – temporary relief and back to needs not being satisfied. This is a very basic but accurate representation of the situation that the poorest of South African’s found themselves in. It is the hopelessness that these citizens were enveloped in that consumed their everyday lives, which was an unintended consequence of the affirmative action programme.

3. Unjust enrichment

The ANC was duly elected and the legitimacy of them governing the country cannot be disputed. The ANC government can be commended for some the efforts they have made in post-apartheid reconstruction and reconciliation. They have been able to make a few formidable strides in bettering the lives of some citizens with the formulation of the South African Constitution and other laws that were created especially for this purpose. According to Chris Nissen, Western Cape Commissioner

for the South African Human Rights Commission, “South Africa has the best Constitution in the world. It is hailed by many and used as an example for many other countries. It is a model for law and constitutional experts. It seeks to establish a society based on democratic values, social justice and fundamental human rights.” (Business Media Mags).

Before democracy, all black, Indian and coloured race groups had been collectively classified as the disadvantaged, but the extent to which these race groups had been marginalised differed. Indians had been marginalised to a lesser extent, such that the development of the Indian merchant class had been possible, but this cannot be compared to the black trading class who had been subject to far greater levels of oppression and discrimination. The abolishment of apartheid led to many legislative and socio-economic changes in the country. The lives of all citizens changed, with previously disadvantaged groups having the freedom to engage in many activities that had previously been prohibited or restricted to them. This included freedom of movement, expansion of social domains and increased access to economic opportunities. Increased economic activity by previously disadvantaged groups contributed to social segmentation and gave rise to different social classes.

In 2017, the National Income Dynamics Study (NICS) determined that South Africa had five social classes: the chronically poor, the transient poor, the vulnerable middle class, the stable middle class and the elite. According to an October 2017 Business Tech article entitled *South Africa’s middle class is smaller than we think* quoted that Stats SA determines 55% of the population as being poor and unable to meet their basic needs. Considering these statistics and the expectation that affirmative action was intended to uplift disadvantaged communities, one would expect the predicament of the disadvantaged to have changed significantly. (Business Tech. 2017). But it has

not for many. The question that emerges is “Who is benefiting from the reform in the country?”

The answer, according to Tom Lodge (2022, 22), is “those people who constitute the ‘governing class: presidents, premiers, members of the cabinet and executive (provincial) councils as well as the heads of civil service departments.” These also include heads of parastatals as included by Southall (2004), “As well as being the key political decision-makers, this small, relatively tight group is bonded together by an ideology of public service and, for the majority, by loyalty to the ANC” (Southall 2004, 532). In Repression and Resistance, Nzimande (1990) refers to this segment of the population as the Corporate Black Bourgeoisie “whose rise has been greatly supported by BEE and AA initiatives and has given rise to many serial entrepreneurs, colloquially known as “tender-entrepreneurs.” ‘Tenderpreneur' is a South African colloquialism for a businessperson who uses political contacts to secure government procurement contracts.

The ruling party mostly consisted of individuals who had either returned from exile or were imprisoned under apartheid law and did not possess the skill required to run a country. The only example they had to follow was that of the previous government. During apartheid, the landscape of the country was that those who ruled, were rich and benefitted greatly from the economic and natural resources of the country. The newly elected democratic government felt entitled to have the same privilege. The righteousness with which they began, which is evident in the Constitution, soon ran low when they realised that running a country was difficult and they would need to be very deliberate in their efforts to enrich themselves. This was where the entitlement mentality originated – it was the turn of the black people to benefit. The affirmative action policies crafted and implemented by the new government were more self-

serving to the political elite than they were to the benefit of the greater disadvantaged population.

Tenderpreneurs do not represent the greater societal complement, especially not those most severely impacted by the apartheid, but rather a small complement of well-connected individuals. The political connections of these individuals provide them with a perfect position to capitalise on their relationships with absolute disregard for those most in need. “Cronyism” is another term used to describe the act of favouring friendships and the politically connected and is widely used in South Africa.

Numerous allegations of unjust enrichment by virtue of association and friendship with political figures were evident in the current landscape, the most famous being the Gupta scandal linked to the State Capture scandal. Other allegations made were against ministers in healthcare, spouses of public figures and related to involvement in corrupt activities pertaining to protective equipment and numerous instances. These cases cost the country billions of rands. Others included R246 million spent on former President Jacob Zuma’s home in Nkandla, allegations against ANC Secretary-General, Ace Magashule, relating to the R255 million Free State asbestos scandal, R191 million “Blue Lights” scandal allegations against senior police officials, including Johannes Phahlane, former acting National Commissioner of the South African Police Service (SAPS).

The policies created for the upliftment and economic inclusion of black people have been manipulated to seem to be aligned to BBBEE, for those well connect, influential individuals to benefit. The tenders were still awarded to black people and, on face value, seemed to be aligned to the purpose of BBBEE however, the exclusion of the

majority of the previously disadvantaged citizens highlights the unjust implementation of race-based distributive justice practices in South Africa.

The flaunting and customisation of procurement processes to suit the agenda of the politically connected contributed to the establishment of a new social class, the “black diamonds”. These members of society were those who have benefitted largely via collusive practices related to state contracts. “Neocosmos talks of the ‘black diamond’ as a newly favoured black cabal whose new-found wealth is not particularly geared towards national accumulation and development but primarily towards short-term, quick profits in a country where estimates put the poor at half the total population” (Matambo and Ani 2015, 274).

There are numerous examples, some detailed above, that give truth to this statement, State Capture being the most significant one. At a presentation at the University of Cape Town on 11 September 2017, former Finance Minister Pravin Gordhan estimated the cost of State Capture at 250 billion rand. The significance of this figure becomes apparent when you consider that the 2021/22 budget for the health was R62.5 billion, education R27 billion and housing R36.7 billion (National Treasury 2021). State Capture cost the South African people countless opportunities for quality education, credible healthcare and millions of housing opportunities. It also contributed to the rich getting richer and the poor getting poorer and being even more disadvantaged. The legislative parameters recognise that blacks, Indians and coloureds were treated unfairly during the apartheid era and therefore (and as will be recommended by Nozick’s principles of justice) owed a debt of restitution to those who have been unjustly treated. However, the application of the policies were far different and the restitution mechanisms, such as affirmative action, favoured the black middle class, tenderpreneurs and the “black diamonds”. Southall (2004) quotes Odendaal,

“who depicts the members of the early political organisations that proceeded the formation of the South African National Native Congress [SANNA, (forerunner to the ANC)] in 1912 as a political class that was ‘born into traditional African societies and equipped to fit into European society by virtue of their education, Christianity and economic assimilation’” (Southall 2004, 523), which lent itself to the assumption that a particular component of the black South Africans was not poor or destitute, even during the apartheid era.

This complement of well-connected, educated, experienced individuals were well placed to take charge during the transitory period and assumed high-placed positions in the ruling party. Black people were marginalised to such an extent that they saw these individuals as a ray of hope that would lead their emancipation. The unfortunate outcome is that the trust has been misplaced, because these well-connected individuals opted to enrich themselves at the expense of the greater complement of disadvantaged citizens.

4. Impact on dignity

The affirmative action policies proved to be significant, but the positive impact on the lives of South African citizens, especially those of the previously disadvantaged race groups, has been limited. The exploration of race-based distributive justice on youth education, creation of an entitlement mentality and unjust enrichment as detailed above accounts for some of the aspects that negatively impacted the lives of disadvantaged groups. Other aspects include, but are not limited to, factors such as access to quality healthcare, adequate housing and reliable transport systems, especially since this situation has continued more than 20 years after South Africa became a democracy. Over and above these physiological needs, respect, honour, dignity, autonomy and the freedom of decision making are critical components that

contribute to an individual's self-worth. A person's sense of self and dignity is impacted by the level of control they have over their own environments and the level of influence or choice they have over the decisions that affect their lives.

Article 1 of the Universal Declaration of Human Rights states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The declaration further states, "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." This declaration of human rights highlights an expectation of a minimum level of treatment, respect and appreciation of one's dignity that every human being is entitled to. Dignity differs from concepts such as honour and respect. Respect should be earned and is not bestowed upon a person, such that dignity becomes the basis of respect.

In her paper, "Dignity, Honour, and Human Rights: Kant's Perspective," Rachel Bayefsky (2013) explains that Immanuel Kant is often considered a key figure in a modern transition from social and political systems based on honour to those based on dignity, where "honour" is understood as a hierarchical measure of social value and "dignity" is understood as the inherent and equal worth of every individual. Kant's ethical view captured in one of the principles of the categorical imperative (the principle of humanity) is applicable here. The principle specifically focuses our attention on respect and dignity as the basis of our morality or our moral lives. The principle states, "Always treat a human being (yourself included) as an end, and never as a mere means" (Shafer-Landau 2012, 169). Within the ideas of the humanity principle, a good way to think of dignity is as follows. "Treating someone as an end is treating her with

the respect she deserves. Treating someone as a means is dealing with her so that she helps you achieve one of your goals" (Shafer-Landau 2012, 169). Being treated as a mere means is the position that the majority of previously disadvantaged South Africans found themselves in.

The elective processes in South Africa catered for the election of a party, headed by a leader chosen from within the ranks of the party and not by the people themselves. Political parties share their ideas, priorities and approach to governance with elaborate election manifestos launches. Their supporters do not have any input into both these processes and merely trust that the promises made in the manifesto will be delivered.

One of the promises in post-apartheid South Africa was the provision of housing to those deprived of the opportunity to have acquired it by their own merit. The Reconstruction and Development Programme (RDP) which was initiated in 1994 provided more than R3.5 million houses. The basic need to live a dignified life is that of shelter, a need that this goal satisfies. However, it would have been appropriate for the government to consider the needs of the recipients. It may not have been feasible to provide customised housing for each family, but it would not have been impossible to consider that every family does not have the same need. On a basic level, the community could have been divided on the basis of pensioners and families with two dwelling types being available. Pensioners could have been allocated single bedroom units and families, at a minimum a two bedroom unit. The development could have been planned with the pensioner houses closer to amenities such as shopping centres and families closer to schools. However, the reality was that recipients of these homes were forced to accept what has been decided upon by the paternalistic ruling ANC who have bestowed upon themselves the right to decide what is best for all black people.

Another factor that contributes to living a dignified life is access to good healthcare. An effective healthcare system is a basic human right. The South African health system is plagued with inefficiency, where on a daily basis, millions of citizens wait in snaking queues with the hope that they would receive the treatment they needed. Being treated in this manner is belittling to human beings and strips them of their dignity, especially considering that many of those who are dependent on the public healthcare system are old, frail and possibility nearing the end of their lives, and would like to die with dignity. It would be appropriate to capacitate the healthcare system with the required facilities and an adequate supply of trained professionals who are able to provide the much-needed care.

Instead, the government has decided to introduce a National Health Insurance (NHI) scheme, which would serve as a centralised base for the healthcare system. Theoretically, this seems just, but this centralised system is also a paternalistic tool of the ruling party to exert control over citizens. The NHI will effectively eliminate individual choice, as citizens will not have a choice of facility nor the doctor of their preference. It would be more prudent to capacitate the current system. For all citizens to have an opportunity to receive the best healthcare they are entitled to, it would be beneficial for the government to ensure the system is efficient and has a sufficient supply of resources and skills to cater for the entire population.

Chapter 3 of the Local Government Municipal Systems Act 32 of 2000 entrenches specific powers and functions applicable to all municipalities in the state. The South African system of governance bestows the powers to make service delivery-related decisions on the government. Basic services such as indoor running water, electricity, adequate housing and healthcare are amenities that contribute positively to the value of the life a person leads. Water collection at central water points, lack of electricity,

poor quality or inadequate housing and inefficient healthcare are all factors that diminish the quality of life of citizens.

The ANC government secures the loyalty of the voting public by dangling the proverbial “carrot”, with endless promises to heed the needs for the previously disadvantaged. The voting public’s negative experience with lawmakers of other race groups influenced the level of trust they placed in the ruling ANC for fear of returning to conditions similar to those experienced under apartheid. The ANC capitalises on this fear by manipulating the public into voting for them despite poor service delivery.

The inherent right to dignity includes autonomy, respect and all aspects of freedom, including freedom from manipulation. The legislation and policies implemented do not support the inherent right to dignity, but rather keep disadvantaged groups on a string of dependency on social grants and robs them of the opportunity to emancipate themselves to live as fully autonomous beings.

SECTION 6: EXPLORATION OF ALTERNATIVE APPROACH – CLASS-BASED DISTRIBUTIVE JUSTICE AND THE WHOLE-OF-SOCIETY APPROACH (SDG MODEL)

Just as there are many proponents of affirmative action, there are also numerous opponents. A number of people have criticised affirmative action, such as Madona Mbatha who argued that “affirmative action was ‘racism in reverse’ and suggested that competence was not determined by colour but by individual skills and thus there should be encouragement of a level playing field.” (Ratuva, 2013). Another opponent of race-based distributive justice is Jeremy Seekings, who in his paper, *The Colour of Desert: Race, Class and Distributive Justice in Post-apartheid South Africa*, referenced a survey conducted by the Kaiser Family Foundation. *The Washington Post* found that as many as 68% of South Africans believed that race relations were

better than they had been under apartheid, and just as many expected that race relations would continue to improve over the next five years (Hamel, Mollyann and Richard).

On the other hand, “proponents of affirmative action have pointed to its original "remedial" justification. Race and gender disparities and discrimination still exist, they claim that without affirmative action doors will remain closed for racial minorities and women. The goal is distributive justice: the "visible presence and success of minority professionals can help secure compensatory or distributive justice for other members of their racial and ethnic.” (Woo 1997, 516).

The system of distributive justice is based on race, in direct response to the apartheid oppression that was also based on race. As we know, during apartheid, the white minority were able to maintain their advantages through access to education, political and social networks, while the disadvantaged citizens suffered exclusion and lack of opportunities. However, there was a segment of disadvantaged citizens who did not let apartheid dictate their future. They opted to educate themselves and uplift their lives, while there were also white citizens who did not capitalise on the opportunities that apartheid offered them to secure their future. This created a mixed society comprising some rich, affluent blacks, coloureds and Indians, as well as some poor whites. For equitable upliftment and just distribution in the country, it would be important to consider the economic situation of all citizens and align benefits and burdens to their needs.

South Africa has five economic classes, the chronically poor, the transient poor, the vulnerable middle class, the stable middle class and the elite. The establishment of these social classes preceded apartheid but are still relevant today. This begs the

question, was the decision to adopt race-based distributive justice in the best interest of the previously disadvantaged race groups and to the country at large? According to Seekings (2008, 2), in a multi-cultural society, poor people might misdiagnose the sources of their disadvantage, identifying them in cultural rather than class terms. In South Africa, the disadvantage was clearly based on the grounds of race, but impactful restitution did not have to follow the same trend. To achieve equitable distributive justice, it is important for the varied needs of the citizens to be considered in the allocation of benefits and burdens.

In what follows, I discuss the idea of class-based distributive justice in relation to the following benefits and burdens: education and housing. To demonstrate my suggestion of class-based distributive justice, I would like to go back to the early 1990s when the concepts of just distribution were being suggested and explored. At that point, it would have been beneficial to pause and determine the economic status and needs of the people by means of a survey or an alternative channel. The economic status of the citizens would have given the government an indication of which resources were required by which citizens and contextualise the government's responsibility.

Benefits and burdens: Education. Education is the cornerstone of good societies. Consequently, one of the factors that would have been advisable for the government to prioritise, would be education of all classes of citizens. When India gained independence from Britain, one of the critical reforms was the prioritisation of the education system. The Constitution (86th Amendment) Act, 2002, inserted Article 21-A in the Constitution of India, has to provide free and compulsory education of all children in the age group of six to 14 years. South Africa intended to implement 10 years of free education for all as an RDP goal, but this could not be done. My

suggestion would be that South Africa ought to adopt a similar stance of prioritising education but implementing it in various tiers according to the needs and economic classes of citizens. This would mean that the chronically poor and the transient poor will receive free educational support at primary, secondary and tertiary level education; the vulnerable middle class will receive free primary and secondary education support and a partial subsidy for tertiary education; the stable middle class will receive free primary and secondary educational support but would be responsible to fund their own tertiary education; and the elite will be responsible for funding their own educational needs across all levels.

This model will increase literacy levels and education levels and consequently afford citizens the opportunity to be self-sufficient, contributing members of society. This would have a direct and positive impact on the value of their lives, self-worth and dignity. Ultimately, the benefit that well-educated citizens bring, transcends race or class and would be for the general benefit and upliftment of all citizens and the country at large.

Benefits and burdens: Housing. The initial determination of the economic position of the citizens, would have afforded the government an opportunity to contextualise their burden for the provision of housing for citizens because all classes would not need the same level of assistance. I would suggest that in addition to class, the government should also consider the age of the disadvantaged citizens in determining their burdens. Citizens in the chronically poor, transient poor and vulnerable middle-class categories who are of the age where they do not have the opportunity to acquire their own homes, such as retirees, pensioners and others would be provided with proper, good quality houses that suit their needs. Citizens in the stable middle class who are retirees or pensioners will be given a one-off payment that will allow them to improve

on the houses that they already occupy. Citizens in the vulnerable middle class and stable middle class, who are of an age where they are still able to capitalise on the educational opportunities discussed above and contribute to their own upliftment would be offered semi-subsidised housing packages that would afford them the opportunity to construct houses that are suitable for their needs and satisfy their own preferences or improve on the houses they already have. The elite would not be included in the burdens of the state.

When citizens have an opportunity to capitalise on and benefit from an education system that is designed to benefit them, the ripple effect will be experienced in other elements of their lives. They will be better equipped to contribute to their own housing and be less reliant on public health or transport facilities.

Peter H. Schuck, in his paper *Affirmative Action: Past, Present, and Future* also concedes that affirmative action does not have the same appeal it did in its inception. He argues that "the ethno-racial categories on which affirmative action relies are losing whatever coherence and normative appeal they may once have had" (Schuck, 2002 3). He suggests that alternatives that could be considered are "Better targeting with favoured groups" (Schuck, 2002 78), which requires that designated groups should be specifically targeted to determine their applicability. In the South African context, better targeting would require determining the extent to which particular race groups were disadvantaged during apartheid, as suggested above.

As another alternative to race-based distributive justice, the official opposition of the ANC government, the Democratic Alliance (DA) proposes the Economic Justice: A Sustainable Development Goal (SDG) model that is based on the premise of equal opportunities for all citizens. The SDG concentrates on areas that focus deliberately

on upliftment on a societal level. These include targeted interventions that address poverty and inequality, unemployment, psychosocial impact of a breakdown in the family component, healthcare and impact of geographical location, malnutrition and discrimination.

The affirmative action policy principles and the implementation thereof were determined primarily by the government without widespread consultation, while the SDG model, on the other hand, and promotes collaborative consultation and decision-making by government and the private sector on aspects that affect the society as a whole. “In 2016, the EU Chamber of Commerce in South Africa indicated BEE legislation as its top legislative impediment, and top three challenges overall to doing business in South Africa” (SDG, Democratic Alliance, 2020).

In the SDG model, sustainability will be incorporated into business practices across the spectrum of the organisation, diverting the focus from chasing employment equity and procurement targets, and concentrating on all aspects of the business that could have an impact on economic and societal upliftment. The SDG model proposes that all contributors should be utilised to fulfil the need they are best equipped to fulfil. There needs to be a deliberate effort to determine the need and who is best suited to benefit.

The focus of the SDG is not purely economic, but also has a societal outlook. By focusing on poverty and inequality, it is firstly recognised that these two concepts are not the same. The interventions implemented will have a long-term, more sustainable impact. In addition, acknowledging and addressing the impact that apartheid had in breaking down the family unit and, to a greater extent, the subsequent societal issues

that arose, provide an opportunity to address the array of problems that disadvantaged groups faced that do not fall into the domain of economic upliftment.

Similarly, implementing the SDG to address unemployment, healthcare, the impact of geographical location, malnutrition and discrimination as separate components creates a greater focus on each one forcing the distributive justice efforts to be more deliberate and more effective. The SDG model recognises that opportunities to accumulate wealth are separate from addressing unemployment and that employment prospects do not automatically translate into the accumulation of wealth.

The achievement of an equal or an economically just society should be the primary purpose of restitution efforts. For a long time, South Africa has been an unequal society, which was further exacerbated by apartheid. During March 2022, A World Bank report determined South Africa as the most unequal country in the world, where 10% of the population owns more than 80% of the wealth. Despite the abolishment of apartheid, disadvantaged race groups have had little opportunity to acquire or accumulate wealth.

Nozick's principle of justice in acquisition highlights that the historical inequalities created by the forced and unjust removal of black, coloured and Indian population groups in favour of the minority white population still plague them, as can be seen by the continued high unemployment rates, poor quality of education, inequalities in accessibility to healthcare and difficulty to accumulate intergenerational wealth. The economic and humanitarian deprivation that disadvantaged groups are subject to for the benefit of the white minority who did not justly earn the right to the resource is in direct contravention of the principle of justice in acquisition. Consequently, the legacy of generational wealth does not uphold the principle of justice in transfer, because the

original acquisition was unjust. An accurate account of the principles of justice of Nozick's theory would support an alternative approach to the acquisition and distribution of benefits and burdens. It would not only compensate for the lack of opportunity and recognise that a whole-of-society approach would be more appropriate in recognising that apartheid was consistent in depriving the black, Indian and coloured race groups, but it was not consistent in benefitting all white citizens.

SECTION 7: OBJECTIONS AND RESPONSES

As stated above, affirmative action is equally opposed and supported by many. It would stand to reason that the supporters would refute my arguments above, and I explore and respond to a few of these arguments.

Impact on education

In my assessment of the effectiveness of race-based distributive justice in South Africa, I noted that the implementation of affirmative action on the education of previously disadvantaged youth has not been beneficial due to the poor quality of education that is accessible to them and, consequently, the poor opportunities they are offered. The focus of my argument is that of quality and the impact that quality education would have, as opposed to the type of education that is presently being delivered. Proponents of affirmative action would argue that the implementation of the affirmative action policy in education is the only way to ensure that (1) the previously disadvantaged youth have access to education and some education is better than no education, (2) a greater number of disadvantaged students are granted accessibility to education and (3) the quota system at tertiary level introduced as a result of the affirmative action policy is appropriate and necessary to address the disadvantages of the past.

I do not think that this objection affects my position. An education system that has over time reduced the pass requirements to a mere 30% cannot be credited for making any tangible contribution to society. Affirmative action has been purported to make life better, but at the tertiary education level, it creates a system of competitiveness and resentment because the universities apply quota systems to grant admission, which inadvertently leaves deserving students of other race groups outside the system. Therefore, my suggestion of a class-based approach is a more equitable solution. The education system is the first and most important point at which formidable change in a society can be influenced. It should be equipped to support and produce worthy students who go on to become meaningful contributors to society, whose contribution translates to upliftment and a better society.

Entitlement mentality

The tone in the country post-apartheid was set by the ruling ANC, who were not hesitant to adopt a “we have arrived” and “it’s our turn” stance. This encouraged the most previously disadvantaged communities to do the same. They developed an expectation and adopted a “wait to receive” attitude. Supporters of affirmative action would argue that, especially, previously disadvantaged black citizens were subjected to harsh, inhumane living conditions and they should take advantage of the opportunity to be compensated for their great sacrifice. I would respond that citizens should be careful not to assume that the government coffers are abundant to perpetually provide for their needs. This approach creates a cycle of dependency and diminishes a person’s dignity. Taking responsibility for oneself and playing an active part in one’s own upliftment allows one to steer his or her path to a more sustainable one.

Unjust enrichment

The implementation of race-based distributive justice provided the politically connected with the means to manipulate the implementation of affirmative action policies to their benefit and to the detriment of the greater society. Some would argue that the politicians and those connected to them were part of the liberation struggle and have made many huge sacrifices for the country. Many had to leave their families behind to go into exile to further the liberation cause and are now entitled to be compensated for the sacrifice because they would not have had the opportunity to accumulate wealth. I would argue that if you commit to the service for the greater good of the country, the commitment should be made because one has a passion for the cause that one is supporting and should not be made with the intention of potentially receiving a reward at the end of the sacrifice. The majority of the individuals who were part of the liberation struggle were afforded opportunities to be members of Parliament, hold positions within the ruling party, were tasked with heading state-owned entities and so forth. They were rewarded for the sacrifices that they made. They erred in not taking initiative to learn how to perform these jobs properly. Consequently, many of these thriving enterprises were subjected to looting and corruption and many are now in various states of ruin, trying to recoup their reputations and economic viability.

SECTION 8: CONCLUSION

In this research, I explored the justification of race-based distributive justice in South Africa with the aim of demonstrating that it has been ineffective in its implementation. In particular, the focus is how such implementation plays out in terms of the wellbeing of previously disadvantaged groups and, consequently, the country at large, and if the requirements of Nozick's account of distributive justice are to be satisfied. I have

demonstrated some of the common place ills in society such as the entitlement mentality and unjust enrichment that have negatively affected citizens.

What I have suggested is that determining the effectiveness of race-based distributive justice in South Africa is essential because it allows for the reflection on the impact of such policies on the lives of citizens and the country at large. This opportunity is important because it provides for the correction of decisions that would more positively affect the lives of previously disadvantaged citizens. It also affords citizens the opportunity to have a voice and determine that which best serves them.

Despite there being a level of success in some countries, as I have indicated, implementation in South Africa has been poor. The main reason is that in South Africa, affirmative action is associated with black empowerment, which incorporates both economic transformation and transfer of political power. Having two critical agendas that this legislation needs to accomplish complicates the process and causes distraction to the main business at hand. Furthermore, the desire for political power by the affluent and well connected within the ruling party has caused much internal discord and competition, with members constantly attempting to gain favour, yield more influence, gain financially and become more powerful. It seems to be a constant battle to be reminded that “Affirmative action in South Africa seeks to overhaul the nefarious legacy of apartheid and bridge the socio-economic divide between the historically disadvantaged groups and the advantaged group” (Matambo and Ani 2015, 278) and not to further political agendas.

The whole of society’s sustainable development goal model creates the setting to consider the needs of all citizens for the holistic upliftment of citizens and, consequently, the country at large. The determination of just benefits and burdens

based on the needs of citizens will benefit all to a greater extent and create a more sustainable economic future for the country.

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